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Court Review

Volume 41, Issue 2
Summer 2004

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 41, Issue 2

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EDITOR'S NOTE

This issue is focused on judicial independence. On the next page, Mike McAdam, the president of the American Judges Association, explains how it developed that a National Forum on Judicial Independence would be a part of this year's AJA annual conference. We're pleased to present this special issue of *Court Review*, which is intended to stimulate discussion at the conference and to bring the members who couldn't attend into the process.

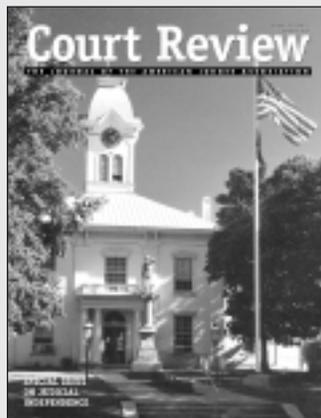
Minneapolis judge Kevin Burke leads off the issue with an overview of judicial independence concepts in today's courts. He has worked in his own court to make sure that accountability to the public is provided; his lead discussion emphasizes the connection between accountability and independence. Kevin has my great gratitude for also agreeing to write an additional article considering the challenges to judicial independence that may arise in a problem-solving court.

John Russonello, a partner in a public opinion research firm, presents suggestions for bolstering public appreciation of the judicial system, based on years of survey research, focus groups, and other work. Michael Buenger, the state court administrator in Missouri, reviews the challenges of getting appropriate funds for the courts.

The nitty-gritty challenges to judicial independence often arise in two forums: judicial elections and municipal courts. Miami judge Jeff Rosinek provides an overview of the most recent judicial elections in Florida. Larry Myers, the court administrator in Joplin, Missouri, reports on a statewide survey he did this August of municipal court clerks in Missouri. The survey respondents answered honestly about concerns in their court over the need to raise revenue for their cities—and the problems that arise when court staff are supervised by nonjudicial personnel.

Professor Roy Schotland has compiled a useful set of resource materials on judicial independence. Through it and the articles found in this issue, we hope to stimulate your thinking about this important topic. And we have a Resource Page focus section on judicial independence on page 63, with additional resources you might find of interest.

I'm pleased that our authors include leaders of the American Judges Association as well as academics. Jeff Rosinek is a past president of the AJA; Kevin Burke is on the AJA Board of Governors. In addition, Mike Buenger is past president of the Conference of State Court Administrators (COSCA); Larry Myers is past president of the National Association for Court Management (NACM). The discussion in San Francisco promises to provide an excellent interchange between judges and others who work daily in the courts and academics who take time to think seriously about the problems—and opportunities—we have in front of us. We will share the highlights of the conference in a future issue.—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 47 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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President's Column

Michael R. McAdam

This special edition of *Court Review* will be devoted to the critical issue of judicial independence. The articles contained here were solicited as part of the National Forum on Judicial Independence, which will take place at the AJA's 44th annual educational conference in San Francisco. For those attending the conference, these papers will be an integral element of the Forum and will be discussed and debated in San Francisco by the authors and conference attendees. For those who can't attend the Forum, these articles present excellent analyses by respected judicial professionals about various aspects of the concept of judicial independence.

A bit of background about the Forum is worth reviewing. This program really had its origins at the AJA's Executive Committee meeting in January 2003. I wanted a program about judicial independence for a future AJA conference, preferably the one I would preside over in 2004. Judges Fran Halligan, Terry Elliott, Steve Leben, Gayle Nachtigal, Mike Cicconetti, Bonnie Sudderth, and Jerry Fielding answered my call for assistance. The advice received from that esteemed group led me to search for a funding source that could make this program possible. By searching "judicial independence" in Google, I found the Joyce Foundation of Chicago. I called them without any prior knowledge, except that they had a keen interest in preserving the independence of the judiciary, according to their web page. I spoke to a very thoughtful person by the name of Larry Hansen, who is the foundation's vice president. He seemed interested in the project and even more interested in the AJA. His interest was demonstrated by his shep-

herding of this project over the next year. The result was a \$100,000 grant from the Joyce Foundation to put on the National Forum.

The AJA could not have obtained this grant without the professional guidance and assistance of the National Center for State Courts, specifically David Rottman, Ph.D., of the National Center's Research Division. He prepared the grant application and has guided the project's execution since then. Special thanks should go to the California Chief Justice Ron George



and the California Administrative Office of the Courts, led by Director William C. Vickrey and Chief Deputy Director Ronald G. Overholt. They and their staff have been extremely helpful and generous in assisting the AJA in this important project.

Finally, this Forum is a major achievement for the AJA and its members. An organization of 2,200 judges from every state and level of court jurisdiction *should* host a wide-ranging discussion of this important issue. Our members face questions from the public, the media, and the two other branches of government about budgets, judicial elections, and problem-solving courts, all of which impact judicial independence. These questions deserve to be answered thoughtfully and in a positive fashion. Judicial independence should not be a cover for an arrogant judiciary or an unaccountable one. The public we serve should be informed about the history and the necessity of judicial independence, both as the overarching, institutional foundation for the third branch of government and the specific basis for a neutral judge, on the individual case level.

A Judiciary That Is as Good as Its Promise:

The Best Strategy for Preserving Judicial Independence

Kevin S. Burke

Barbara Jordan once said: “What the people want is simple. They want an America as good as its promise.” The same can be said of what this nation wants of its courts. They want a court—they want a judiciary—as good as its promise. I have developed this theme before.¹ I expand on that discussion here as an introduction to this special *Court Review* issue on judicial independence because the key to the preservation of the independence of the judiciary is to give to the public courts that are responsive, efficient, and caring.

Nearly 100 years ago, Roscoe Pound gave his famous speech entitled “The Causes of Popular Dissatisfaction with the Administration of Justice.”² Pound spoke of three things that contributed to the dissatisfaction he perceived during his time: first, a belief by the people that the administration of justice is easy; second, the historical tension between the branches of government; and, finally, what he described as the sporting theory of justice. While Pound’s focus was on why the public was dissatisfied, it is axiomatic that the causes of the popular dissatisfaction with the administration of justice are the fuel for present threats to judicial independence. Simply put, we have not effectively met the fundamental challenge of reducing the causes of popular dissatisfaction with justice and, until we are more effective in meeting this challenge, the independence of the judiciary will remain at risk.

Today the dissatisfaction with the administration of justice is at a level that none of us should tolerate or accept because it threatens our democracy as much as any terrorist. Thus, the nation’s dissatisfaction with the administration of justice is a central issue of homeland security.

We are not alone: the American people have had their confidence shaken in their most important institutions. Churches plagued with sex abuse scandals and the failure of major corporate institutions like Enron and Arthur Anderson illustrate the challenge the judiciary faces. Given the shaken public faith in many critical institutions, simply saying the judiciary is a separate, equal, and historically important branch of government will not resonate with the American people. Judicial independence is not an end in itself, but a means to preserve the values of our democracy.

Judicial independence has two forms: decisional independence and institutional independence. The freedom to self-govern and to think and act free from external bias also has a duty that comes part and parcel with it. The duty courts owe is to be accountable to the people. To be accountable is an easy and straightforward covenant between the judiciary and the people.

Roscoe Pound’s second factor that he said contributed to the dissatisfaction with the administration of justice was political jealousy by the other branches of government with the judiciary due to judicial review—the doctrine that courts have the final say as to what the constitution means. At about the same time as Pound’s speech, ABA President Jacob M. Dickinson observed that “[j]udicial judgments are not accorded the same respect as formerly.”³ He continued: “Political parties of all creeds have bowed their heads in recognition of a discontent.”⁴ The consequence, Dickinson warned, was “to destroy confidence in the courts and to make a subservient judiciary.”⁵

Today it is fair to say that too many of our colleagues in the executive and legislative branches have the same jealousies as their predecessors 100 years ago. Unfortunately, some political leaders not only are too easily prone to cry about judicial tyranny when there is disagreement with the outcome of a case, but also have made careers out of fostering public misunderstanding of the role of courts.

All of us—in the courts and the community at large—pay the price for public misconceptions about the courts. While there is far more trust and satisfaction with the court system than judicial critics might lead one to believe, it is easy to feel a bit under siege at times. To maintain perspective about where the issue of judicial independence is today, though, we must realize that judicial independence has been challenged by the other two branches of the government from the very beginning of our nation’s history.

In 1795, the Senate rejected the permanent appointment of John Rutledge as a Supreme Court justice due to a speech given by Rutledge during his temporary commission on the Supreme Court as a recess appointee. In 1805, Justice Samuel Chase was impeached by the House of Representatives. (Fortunately, the Senate failed to convict when it became

Footnotes

1. Kevin S. Burke, *A Court and a Judiciary That Is as Good as Its Promise*, Summer 2003 *COURT REVIEW* at 4.
2. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 *A.B.A. REP.* 395 (1906), reprinted in 35 *F.R.D.* 241, 273-91 (1964).
3. American Bar Association, Address of the President, 33 *REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASS’N* 341

(1908), quoted in *AMER. BAR ASS’N, AN INDEPENDENT JUDICIARY: REPORT OF ABA SPECIAL COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE* § 7 (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html> (last visited October 6, 2004).

4. *Id.*
5. *Id.*

apparent that Chase's opponents were after him not because he had committed any wrongdoing, but merely because the House disagreed with his decisions.) Chief Justice John Marshall, who today is revered, was nearly impeached in an effort fostered by Thomas Jefferson. Marshall, not having the benefit of a bar association fair response committee nor even a court public information officer, was forced to respond to his critics by writing a series of letters to the editor, using a pseudonym. Nearly a century later, President Theodore Roosevelt, upset with a ruling from the Supreme Court, said of Justice Oliver Wendell Holmes that he could carve a judge out of a banana with more backbone than the backbone of Holmes. Senator Robert LaFollette characterized all federal judges as "petty tyrants and arrogant despots." President Franklin D. Roosevelt, who referred to the Supreme Court Justices as "nine old men" with a "horse and buggy mentality," tried unsuccessfully to pack the Supreme Court. Billboards populated parts of the nation demanding the impeachment of Chief Justice Earl Warren. And former President Gerald Ford at one time wanted to impeach Justice William Douglas.

Every era of American history presents unique challenges for those committed to preserving judicial independence. The way we conduct public debate on the issues of our present era contributes to undermining the public's confidence in government and the courts in particular. Regrettably, too often the current method of policy disagreement is to take the other person's idea, mischaracterize it, and then announce one's profound outrage and disagreement. While that style of debate might be entertaining for talk radio commentators, it contributes to our nation's bewilderment as to whether all issues are so susceptible to reduction to all black and all white.

Not only is our political rhetoric poisonously divisive at times, our nation is divided as well. That division contributes to the difficulty we have in responding effectively to the popular dissatisfaction with the administration of justice. The social historian Gertrude Himmelfarb described us as "one nation, two cultures," one more religious, traditional, and patriotic; the other more secular, tolerant, and multicultural.⁶ It should be no surprise that a polarized nation is also conflicted when it comes to a vision what the justice system should look like.

Throughout our nation's history, the public's confidence and trust in government has ebbed and flowed. Today we live in an era where there is significant erosion of confidence in government. The erosion of confidence is exemplified by one of former President Ronald Reagan's most memorable phrases in his 1981 inaugural address: "[G]overnment is not the solution to

our problem. Government is the problem"⁷ For courts to maintain the public's confidence, we need to be far more cognizant about the times in which we live. As the ABA Commission on Separation of Powers and Judicial Independence stated, "A public that does not trust its judges to exercise sound, evenhanded, independent judgment is a problem to be eradicated, rather than a virtue to be proud."⁸

The polls consistently show a decline in the public's perception of how responsive the government is to the public's concerns. Courts cannot derive their policies from watching polls, but to maintain judicial independence, courts need to be responsive and need to listen. Not many judicial leaders quote Jimi Hendrix, but it might be worthwhile: "Knowledge speaks, but wisdom listens."⁹

The judiciary has always faced issues that were politically contentious. In *Brown v. Board of Education*,¹⁰ the judiciary spoke with a single voice and contributed to making the liberty that our founders wrote of a reality for all Americans. To be sure, there was a short-term price and threats of retaliation. For example, on March 13, 1957, the state of Georgia, by joint resolution of the Georgia General Assembly, requested the initiation of impeachment proceedings against six Supreme Court Justices (Warren, Black, Reed, Frankfurter, Douglas, and Clark) for their decision in *Brown*. With the present debates about gay marriage, tort reform, and crime, there is a danger that judicial independence could suffer a serious blow, in part because of the public belief that courts and judges are political branches of government not in the tradition of which Hamilton wrote. A study conducted by the National Center for State Courts found that nearly 80% of the public believe that judges' decisions are influenced by political considerations.¹¹

Today's assault on "activist judges" by conservatives may focus on decisions like *Goodridge v. Dept. of Public Health*,¹² a decision which the highest court in Massachusetts held unconstitutional that state's ban on gay marriage. But the history of the judiciary is littered with cases that offend liberals as well. In the early part of the 20th century, the United States Supreme Court found worker protections unconstitutional.¹³ The *Dred Scott* decision,¹⁴ which struck down a ban on slavery in the ter-

The polls consistently show a decline in the public's perception of how responsive the government is to the public's concerns.

6. See GERTRUDE HIMMELFARB, *ONE NATION, TWO CULTURES: A SEARCHING EXAMINATION OF AMERICAN SOCIETY IN THE AFTERMATH OF OUR CULTURAL REVOLUTION* (2001).

7. ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF HISTORY* 219 (1986). The official text of the speech only included the sentence, "In this present crisis, government is not the solution to our problem." First Inaugural Address of Ronald Reagan, available at <http://www.yale.edu/lawweb/avalon/presiden/inaug/reagan1.htm> (last visited October 6, 2004).

8. See ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 3, at § 4.

9. Quote DB, available at <http://www.quotedb.com/quotes/984> (last

visited October 6, 2004).

10. 384 U.S. 886 (1954).

11. See David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, *COURT REVIEW* at 16.

12. 798 N.E.2d 941 (Mass. 2003).

13. *Lochner v. New York*, 198 U.S. 45 (1905); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); and *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

14. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

Although there are nearly 28,000 state and local judges who can champion a renewed public confidence . . . , there are even more court employees.

ritories, illustrates that a judiciary that has the power to do good also has the power to do evil. When these types of decisions are issued, the wisdom of the courts is certainly fair game for public criticism. As long as courts continue to serve as the forum to resolve society's most contentious issues, judges can expect to be criticized and criticized harshly. While it might sting, principled criticism of particular decisions of the judiciary

is no threat to judicial independence.

No one should be so naïve as to expect universal agreement on the issues that face the courts. While the judiciary is virtually united when the attack on judicial independence comes from external political forces, the fact is that those of us in the judicial branch will and should have our own disagreements on the vision of justice we each seek. But we must express our disagreement in a manner that fosters public confidence. Unfortunately, the judiciary and the leaders of the bar at times contribute to the popular dissatisfaction with the administration of justice. Too often judicial leaders who should know better forget Justice Learned Hand's admonition that the spirit of liberty is the spirit that is not too sure that it is right.

Pound's speech identified a third cause of dissatisfaction with the administration of justice, which he labeled as the sporting theory of justice. The sporting theory of justice is the view that the legal process is essentially two modern gladiators in a pitted war, with the role of the judge to be simply a referee for the combat. Even today, the sporting theory of justice is so rooted in the legal profession in America that many of us take it for a fundamental legal tenet. Pound argued that the sporting theory of justice disfigures our judicial administration at every point. It leads the most conscientious judge to believe that he or she is merely to decide the contest, as attorneys present it, according to the rules of the game, and not to search independently for truth and justice. It leads attorneys to forget that they are officers of the court and instead leads them to deal with the rules of law and procedure exactly as the professional football coach deals with the rules of the sport. In the final analysis, the sporting theory of justice leads critics of the legal profession like former Vice President Daniel Quayle to say, "All lawyers are worthless."

In order for the judiciary to maintain its rightful place in our democracy, we must move away from the sporting theory of justice. To do so does not by implication destroy or threaten the adversary system: it strengthens it. Judges and lawyers must move from recycling problems to resolving them with the best thinking of the courts and communities. Courts need to exercise leadership and connect the resources within our communities with the issues facing us in drug court, mental health court, family court, or in how we respond to issues of race and diversity. The current catchwords are "problem-solving courts" and "therapeutic justice." Regardless of the label, if

courts want to insure their relevance to the people, the courts of the future require partnerships with the other helping professions and the public at large. That is how we can truly preserve the judicial branch's independence. Constructive interdependence will protect judicial independence.

The popular dissatisfaction with the administration of justice is not fueled just by rhetoric, but by performance. The best strategy for preserving and enhancing the independence of the judiciary is to enhance the judiciary's performance. For some understandable reasons, courts have differentiated themselves from the private sector and its business practices. We say that courts neither control the influx of cases nor the laws that create them, that due process is intrinsically inefficient, and that the administration of justice is complex and, therefore, not amenable to modern management practices. The unfortunate consequence of these and other such arguments is that most courts can articulate what does not work, but have not designed quality initiatives that do work in what is asserted to be the unique culture of the court.

Although there are nearly 28,000 state and local judges who can champion a renewed public confidence in our courts, there are even more court employees. Those employees must also be enlisted in the campaign to preserve the judicial branch's independence. To create a judiciary as good as its promise, court leaders need to communicate to court employees the vision of what we expect the judiciary to be. Community outreach begins in the courthouse. Yet not all courts understand the importance their own employees play in being responsive, efficient, and caring. A strong partnership between judges and employees is essential. Court employees need to feel a part of the team and to be able to offer constructive criticism to foster change. Viewing the judge as a deity is not healthy for anyone involved in court administration. In the relationship judges have with court administrators and employees, judges must remember we were appointed, perhaps elected, but never anointed.

The challenge to maintaining judicial independence is made more difficult with the fiscal crisis that confronts too many courts. But this is not a new challenge, either. Shortly after the lower federal courts were established in 1789, the Federalist lame duck, President John Adams, and the Federalist lame-duck Congress passed the Judiciary Act of 1801, which established 16 new circuit judgeships. The following year, the new Republican President, Thomas Jefferson, and the Republican Senate passed legislation eliminating the new judgeships. The political branches used their constitutionally given regulatory authority over the courts to make the ultimate budget cut—the elimination of judgeships. If John Adams and Thomas Jefferson could have great constitutional quarrels over the fate of the judiciary's budget, then we need to accept that such battles will occasionally occur between the political mortals of our day, too.

The ability of legislatures to determine the judicial branch's budget is seen by some as "one of the greatest threats to judicial independence." One need not belabor the point by rehashing what has happened to many courts. Oregon's recent four-day work week, the Federal District Court in Washington D.C.'s threat to do the same, or canceling civil jury trials as

many states have done speak volumes of the critical position many courts are in. However, a lack of money is not an excuse for a lack of ideas. Courts must be willing to innovate if we are to effectively address the popular dissatisfaction with the administration of justice.

Part of the challenge that budget issues present to courts is our image. Well-run public institutions are well-funded. Others are told to do more with less. Because courts have not been able to succinctly articulate the key performance measures that will make them effective, we have contributed to our own crisis. As professor Doris Marie Provine said, in a somewhat different context:

A tradition of concern for preservation of the sovereignty of judges circumscribes policy initiatives at each level. In our country judicial independence means not just freedom from control by the other branches of government, but freedom from control by other judges. This ideal of autonomous judges, with roots deep in American legal culture, powerfully influences contemporary debates about efficiency and accountability within the judicial branch.¹⁵

Judicial leaders need to confront the issue—efficiency and accountability are the foundations of adequate and stable funding and the willingness of the other branches.

Courts need to acknowledge that, in part due to our own failures, we are no longer a monopoly as the sole provider of justice services. Because our “service” did not always quickly and affordably meet the consumer needs, other providers of justice were formed. Administrative law processes, rent-a-judge, and private arbitration, to mention a few, take some of the work away from an already overburdened system, and as such there is no reason to feel threatened. But there is a lesson to be learned. The truth is that rarely do courts deal with the great social issues that are fodder for radio talk show commentary. The nearly 100 million cases in state courts will almost never be heard about outside of the courthouse. They are cases involving contract disputes, small claims, personal injury, juvenile law and family law, and not particularly sensational criminal cases. All of those cases have a common thread—they are important to the litigants, and those litigants deserve individual attention. An independent judiciary provides to these litigants a court system that is responsive, efficient, and caring.

Courts depend on public cooperation for their effectiveness. Social scientists have long known that people’s reactions to the legal authorities are based in large part on their assessment of the fairness of the process by which legal authorities make decisions and treat members of the public.¹⁶ The willingness to accept and obey the orders of the judiciary is strongly linked to people’s evaluations of the procedural justice of the courts. Cooperation, consent, and buy-in are words tossed about in other walks of life, but they are critical when it comes to hav-

ing a healthy system of justice. Respect is also critical for courts. No matter what nation they live in, people accept the directives of judges only when they believe such authorities are entitled to respect. One only need look at the fragility of court respect in other nations to see just how fortunate we in this nation are.

For the judiciary to be truly responsive, independent, and fair, the public must be willing to accept the use of discretion by judges. In democratic societies such as the United States, the line between an abridgment of personal freedom and a legitimate policing activity is often controversial and contested. Hence, one important issue is the degree to which the public is willing to empower the judiciary to make tough decisions in close cases.

When the public is unwilling to give courts the discretion to make judgments, the actions of judges are constrained and are often not fair for anyone. Concern about bias in sentencing by judges is a reasonable concern, but the concern has, at times, led to the use of sentencing guidelines that unduly constrain judges’ behavior. Concern about leniency in sentencing is reasonable, but has, at times, led to mandatory sentencing laws that can be very unfair to particular defendants.

Social science studies have found that there are two types of factors that shape people’s deference to legal authorities during personal encounters. The first is obviously linked to outcomes. People’s willingness to accept judicial decisions is based in part on the degree to which they regard the outcome as being fair or favorable. However, outcomes do not paint a total picture of satisfaction. Procedural fairness counts even more.

A court that is as good as its promise is known not just for speed and efficiency, but also for other, less quantifiable aspects of justice—things like fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding our orders. Courts cannot be satisfied with being quick. Nor can we be satisfied with being clever. To preserve the judiciary’s independence, we must strive to be fully just to every person who leaves the courthouse.

The volume of work makes individual attention to justice seem at times to be an unattainable goal and so we rest on measuring our speed. There is a saying that what you measure is what you care about. To more effectively address the popular dissatisfaction with the administration of justice, courts must measure and be accountable for the fairness of our process.

Courts that are committed to accountability and to the proposition that you can have articulable performance measures will, in the final analysis, have the people’s trust. Too

[E]fficiency and accountability are the foundations of adequate and stable funding and the willingness of the other branches.

15. Doris Marie Provine, *Governing the Ungovernable: The Theory and Practice of Governance in the Ninth Circuit*, in ARTHUR D. HELLMAN, *RESTRUCTURING JUSTICE* (1990).

16. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

often, judges have accepted the notion that 50% of the time we rule against the people and, therefore, the maximum level of satisfaction is 50%. Actually, 100% of the people can be dissatisfied with the process. Most judges and virtually all of the continuing judicial education focuses on getting it right. Getting it right is critical, but it does not significantly explain satisfaction with judges or the court system. Courts cannot expect to maintain public confidence if both the winner and loser leave the courthouse dissatisfied with the process and treatment to which they were subjected.

In this most difficult of times for the judiciary, we need to speak with a single voice and ask these key questions:

- How just and impartial were the procedures?
- Did the judge appear to have sufficient information to support the decision?
- Did the judge take all of the evidence into account?
- Did the judge listen to each side of the story?
- Did the judge take enough time to consider the case carefully?
- Was the judge apparently unbiased?

Most importantly, judges need to directly confront the notion that although judges at every level must be neutral, neutrality does not dictate that we mask that we care about the people and issues that come before us.

The questions posed seem simple, and perhaps that is why, although Roscoe Pound, as profound as his observations were, got the first point wrong in his speech. Contrary to his argument, the administration of justice is, in fact, pretty easy.

It is not trite to say that the courts play an indispensable role in preserving democracy. They most definitely do. Any

particular case we hear may not have great historical effect, but each case is a crucial human event. Taken together, the decisions we make day in and day out have the potential to affirm the public's faith in the strength of democracy—or to shake that faith. If courts give the people what they want, then and only then will courts gain the public trust and respect—and preserve their proper constitutional independence. What the people want is simple. They want a court—they want a judiciary—as good as its promise.



Kevin S. Burke is chief judge of the Hennepin County District Court in Minneapolis. Appointed to the municipal court bench in 1984, he became a general-jurisdiction trial judge by court merger in 1986. He received the 2003 William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts, having previously received the National Center's Distinguished Service Award in 2002.

The Rehnquist Award is presented annually to a single trial judge who exemplifies the highest levels of judicial excellence, integrity, fairness, and professional ethics. Burke established the drug court in Minneapolis and has engaged in detailed studies of court fairness, including ones exploring what factors determine whether criminal defendants and victims believe a proceeding was fair. He is a 1975 graduate of the University of Minnesota School of Law, where he is an adjunct member of the faculty.

Speak to Values:

How to Promote the Courts and Blunt Attacks on Judiciary

John Russonello

Americans think about their judicial system the way they think about the water departments in their towns: the local water department is absolutely essential, but only comes to people's minds when something appears to malfunction: a water main explodes, water restrictions go into effect because of shortages, or reports of contamination set off alarms. For the courts, it is usually a controversial decision that results in rising criticisms of judges.

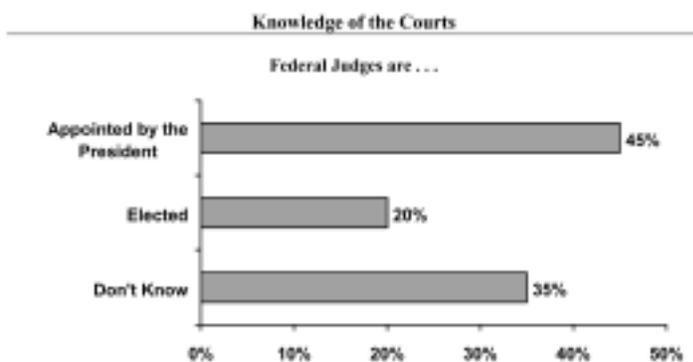
There is not much the courts can do to avoid rulings that will create hurt feelings and heated debate. Controversial decisions will always be with us. There are steps that court advocates can take, however, to minimize the impact that controversies have on long-term attitudes toward the courts.

This article will outline a number of ideas for communications that could help to promote stronger public support for the courts when they do come under attack. The ideas take into consideration the desires, motivations, and values of the American public that have been learned from years of conducting national and statewide public opinion research on the judicial system for clients such as the ACLU, Justice at Stake Project, the Youth Law Center, and the Open Society Institute, among others. Here are some of the observations on American public opinion that lead to suggestions for court advocates.

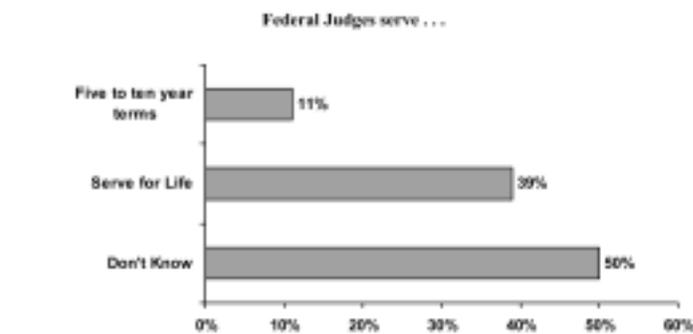
Most Americans do not follow the day-to-day workings of the courts, but they have a firm grasp on the purpose of our judicial branch. We hear it in the voices raised for the rights of women and minorities in cases of discrimination. We also hear it in the criticisms of provisions of the Patriot Act that water down judicial review of law enforcement actions. Americans cannot recite the Constitution, but in our ongoing research group discussions in every region of America, conducted for the ACLU, they demand a strong system of "checks and balances," even as the country is focused on fighting terrorism.

We have found that protecting constitutional rights is a place where conservatives and liberals meet on common ground. The secret searches of a person's home authorized by the Patriot Act evoke as strong a reaction among businessmen in Salt Lake City as with liberal women with whom we spoke in Chicago—and their reactions stem from lack of sufficient court review.

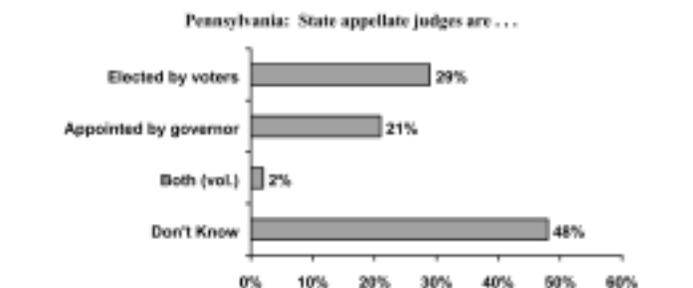
The generally positive attitudes toward the courts are built on a foundation of affirmative expectations and competing values, mixed with some ignorance and distrust. Americans hold generally favorable but soft opinions about both the state and the federal courts. In a national survey we conducted, we found that a healthy two-thirds majority of adults in the United States felt the federal courts are fair and impartial, but fewer than one in seven said these qualities describe the courts "very well." On the state level, we find similar attitudes. When we asked Pennsylvanians how much confidence they have in their state courts, three quarters expressed confidence, but only one in five said "a great deal" of confidence.



Q. Do you know if federal judges are appointed by the President, are they elected, or are you not sure? Source: BRS national survey; n=1,200 adults; February 1998; Attitudes Toward the Federal Courts; for the ACLU.



Q. Do you know if federal judges serve five year terms, ten year terms, do they serve for life, or are you not sure? Source: BRS national survey; n=1,200 adults; February 1998; Attitudes Toward the Federal Courts; for the ACLU.



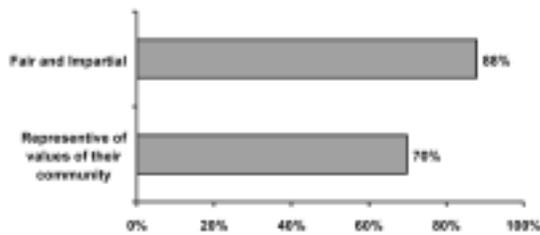
Q. The state courts are divided into courts that hear trials, and courts that hear appeals, called appellate courts. From what you know, are state appellate court judges mostly appointed by the governor, or elected by the voters, or are you not sure? Source: BRS statewide Pennsylvania survey; n=1,091 adults; March 2002; for Justice at Stake and Pennsylvanians for Modern Courts.

Attitudes about the courts are grounded in the values of fairness, independence, accountability, and the sense that the courts should reflect the nation's beliefs. Sometimes these values compete. For example, one of our national polls showed that a sizeable majority (68%) believed that federal judges

Important Qualities of Courts and Judges

Pennsylvania: Important Characteristics of State Judges

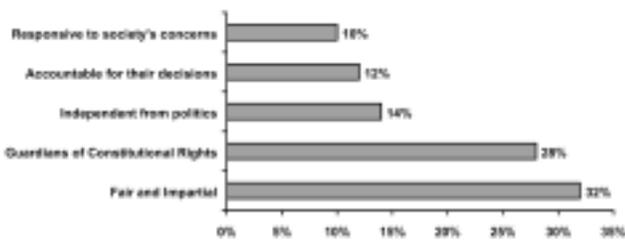
(Percent saying very important)



Q. How important is it to you that state court judges have the following characteristics: Is it very important, somewhat important, not very important, or not at all important for state judges to be: [answers in chart above] Source: HRS statewide Pennsylvania survey; n=1,001 adults; March 2002; for Justice at Stake and Pennsylvanians for Modern Courts.

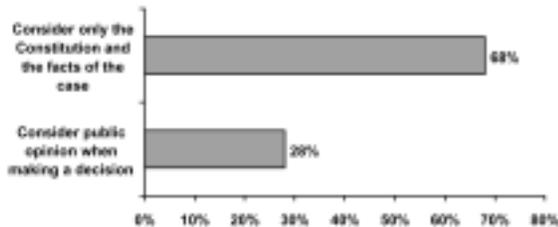
Most Important Quality of the Federal Courts

(Choose one)



Consider the Constitution

Federal Judges should . . .



Q. With whom do you agree more: those who say federal judges should consider ONLY the Constitution and the facts of the case, or those who say federal judges should also consider public opinion when making a decision? Source: HRS national survey; n=1,200 adults; February 1998; Attitudes Toward the Federal Courts; for the ACLU.

should only consider the Constitution and the facts when deciding a case, without any attention to public opinion.

In our statewide survey for Pennsylvanians for Modern Courts, 88% of the state said it was “very important” for state judges to be fair and impartial, while a lesser 70% described as very important that judges be representative of the values of their community.

This 70% score makes the point that we cannot ignore the public’s desire for courts not to stray too far from community norms, and the desire for some form of judicial accountability. These values will dominate the public debate unless people have heard another message on the need for fair and impartial courts that follow the law and the facts.

The sense that there should be some accountability in our

courts leads many Americans to oppose lifetime appointment of federal judges, and in our experience in Pennsylvania, to favor electing state judges over appointing them.

Lifetime judicial appointments are problematic to the public for several reasons. In our national survey on judicial independence in 1998, we found majorities of Americans believed lifetime judicial appointments too often lead “to incompetent judges who are difficult to remove from the bench” (76% agree), or to judges who are “out of touch with the will of the people” (64% agree). The public’s concern over accountability was also reflected in the widespread belief that there are “not enough remedies for correcting bad decisions by federal judges” (70% agree). In focus groups in Pennsylvania, we heard voters say that appointing state judges would be “more political” than electing them.

These doubts are fed somewhat by the public’s limited knowledge about the courts. While Americans generally understand the constitutional role of the federal courts and the opportunity for appealing court rulings, we found a majority (51%) unaware that judges are bound by precedent in their decisions. Majorities also did not know that federal judges are appointed (55% did not know), or that they serve for life terms (61% did not know). In Pennsylvania, nearly seven in ten adults (69%) did not know that they elect state appellate court judges.

Critics of the judiciary, particularly those seeking to restrict access to the courts, have played on these public sentiments and lack of information. They portray judges as not being fair or reflective of national norms, and they criticize so-called liberal activist judges who they claim make rulings that follow their own views rather than the law.

Our research suggests that attacks on activist judges sometimes ring true to the public unless countered with another point of view. That alternative point of view to bolster public appreciation for the judicial system should have at least four elements.

First, the public must hear a constant drumbeat of messages from court advocates about how the courts defend the rights of all Americans. Pretend the courts are a candidate for office and you need to tell your constituents why your candidate is qualified. For the courts, it would be stories of individuals who have been wronged by big institutions—government, industry, business—and who used the courts as a last resort for justice. An elderly woman gaining the right to stay in her apartment, a veteran using the court to obtain health care that was denied by government bureaucrats, communities like Woburn, Massachusetts, and Anniston, Alabama, which held W.R. Grace and Monsanto accountable for the poisons dumped in their ground, to prevent the same thing from happening to other communities. These are the types of affirmative stories that make the case for fair and independent courts.

Second, make your stories contemporary. Americans remember historical allusions, but we are a society that values change, rarely looks back, and believes that yesterday’s solutions should not be expected to fit today’s problems.

Third, always remember that your cause is not to defend judges, but to strengthen faith in the courts. The judiciary’s point of salience with the public is the courts’ role to defend individual rights. Protecting the institution that is the

defender of rights is more important than focusing on individual judges. The reason for Americans to care about the courts is that the courts work for them.

Fourth, building long-term public support for a strong judiciary will require a better informed public. Our research indicates that those Americans with the most knowledge of the ways the federal courts function are among the most likely to reject attempts to reduce the courts' powers. Having an understanding of the role of precedence, appeals, constitutional review, and other aspects of the federal courts reinforces an appreciation for the courts and their role as constitutional guardian and protector of individual rights.

The unifying theme across these points is that the courts are special places where the powerless in society can challenge the powerful on a more equal footing than anywhere else. Making the case for the courts can be woven into programs carried out by state judges associations, state bar associations, and civic and civil rights organizations from the League of Women Voters and AARP to the ACLU and the NAACP.

These programs may be run by lawyers and judges, but they do not need to be about judges and lawyers. Instead, they should let ordinary people tell their stories of hope.

By extending these programs to schools to give students in junior high and high schools a picture of how the courts are relevant to our lives, we will begin to build a stronger base of

public—and ultimately political—support for an independent judiciary.

Even if we tell the flesh and blood stories of the courts as champions of fairness, it will not prevent individuals or interest groups from protesting specific decisions or vilifying specific judges. There will always be cries of a water main break at some point or other. But a program of positive communication can enable the public to see with ever more clear vision that the system works.



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The Challenge of Funding State Courts in Tough Fiscal Times

Michael L. Buenger

*The complete independence of the courts of justice is peculiarly essential in a limited Constitution. * * * * Without this, all the reservations of particular rights or privileges would amount to nothing.*¹

*We are looking at the dismantling of our court system; it is a very painful process.*²

It has been described as the worst state fiscal crisis since the end of World War II, with officials from across the country likening it to a “perfect storm,” “the Incredible Hulk of budget deficits,” and a “problem of historic proportions.”³ Beginning in 2001, almost every state experienced a deep fiscal crisis that placed funding of critical services in jeopardy and rendered many previously hallowed programs subject to draconian cuts, if not outright elimination. The fiscal crisis was particularly traumatic for court systems receiving all or a significant portion of their funding directly from state governments.

In response to the fiscal crisis, courts curtailed operating hours, laid off employees, closed courthouses, eliminated funding for education programs, curtailed technology development, and abolished what were once thought to be inviolate, even sacrosanct programs.⁴ In some cases, state courts turned to local governments—who were facing their own budgetary problems⁵—in an effort to “backfill” the reduction in state funds. In recent years, as state governments have replaced traditional local funding with state funding, the fate of the courts has become closely tied to the fiscal and political well-being of the state. Courts are being forced to compete for funding against more politically popular state services, such as education and public safety, or against seemingly out of control mandatory expenses, such as health care—often without much success.

It would be easy to chalk the current fiscal crisis in the courts purely to state financing problems. Yet the financial crisis facing many state judiciaries is not simply a problem of cash flow or reduced revenues, and to paint it as such puts a far too simplistic spin on the matter. To be sure, a significant part of the crisis is rooted in economic factors. But to understand the true breadth of the problem, one must take account of the political factors affecting state court budgets.

The crisis is defined by considerations that reflect not only money, but also the expanding influence of state judiciaries, offsetting concerns in some circles with “judicial activism,” and a seemingly growing and fundamental misunderstanding regarding the status and role of the courts in governing the nation.

Donald L. Horowitz aptly described the current environment, which contrasts sharply with practices in England:

The difference in the scope of judicial power in England and the United States should not be exaggerated. It is primarily a difference of emphasis. There have been periods of great passivity in America. But still the difference remains. What it has meant, in the main, is that American courts have been more open to new challenges, more willing to take on new tasks. This has encouraged others to push problems their way—so much so that no courts anywhere have

Footnotes

1. THE FEDERALIST No. 78 (Alexander Hamilton).
2. Kateri Walsh, Oregon State Bar Ass’n, *quoted in, Courts’ Cash Crunch*, April 2003 ABA JOURNAL at 17 (April 2003).
3. Jason White, *Govs Scramble for Soundbites to Decry Budget Crisis—Red-Ink Blues*, Montana Associated Technology Roundtables, available at <http://www.matr.net/article-6290.html> (last visited October 4, 2004).
4. The Oregon judiciary was arguably the most seriously affected and was required to furlough employees and implement a delay and no action plan for several case types. The Missouri judiciary lost upward of 60% of its judicial education budget and 54% of its general revenue funding for court technologies.
5. In *Pennington County v. South Dakota Unified Judicial System*, 641

N.W.2d 127 (S.D., 2002), the county sued the state arguing that a state law mandating that counties provide free space to the “court” did not extend to related programs such as the court’s probation office. The county sought to relocate that office and charge the state rent in an effort to recoup some of the costs associated with providing state courts space in county courthouses. The county lost on appeal with the state supreme court determining that where the state commands a county to provide space for a court and its operations, the county, as a political subdivision of the state, cannot contest that command in a suit against the state. Although this case did not arise in the context of cost shifting in reaction to the fiscal crisis, it does portray the ever-present tension that now exists between local and state funding obligations for the courts.

greater responsibility for making public policy than the courts of the United States.⁶

Today, perhaps more so than at another time in the nation's history, the courts are involved in policy making on such a broad range of matters that conflict with the other branches of government is inevitable and can involve budgetary considerations.

A. THE STATE FUNDING DILEMMA

A state budget is, in the truest sense, a statement of public policy more than a simple allocation of money for programs. The creation of a state budget is a continuing exercise of balancing competing public demands filtered not through logical legal principles, but through the eyes of national, regional, state, and local politics. It reflects shifting program priorities, regional concerns, economic considerations, local desires, and competing political philosophies. As such, a state budget can shift wildly from year to year, producing a "fits-and-starts" approach to public policy development as evidenced by the complete elimination of a program one year and its complete resurrection the following year. To mimic the historian Barbara Tuchman, who once observed that history is formed by personality, for good or ill a state budget is formed by those in power to form it. Thus, it reflects not only overarching policy considerations but also the personal priorities of each legislator and the governor. It is important, therefore, to appreciate that unlike a court case ensconced with procedures and restraints that seek to objectify the decisional process, no such restraints exist in the legislative process. The construction of a state budget is very much an exercise in personality, politics, and policy.

Economically, the late 1990s saw an explosion in state revenues with a corresponding explosion in state spending. According to the National Conference of State Legislators, state spending from 1991 to 2001 grew 88%, or an average of 6.57% annually, largely in response to increased revenues.⁷ During this time, Medicaid expenditures increased 149%, education 90%, corrections 99%, and other health and welfare costs 39%.⁸ There appeared to be little appreciation that the bubble would eventually bust because the "new economy" had put an end to inflation, deflation, and all other aspects of the economic cycle.

Of course, that belief ended with shocking swiftness beginning in late 2000. State governments were faced with the

results of overextending state budgets in the late 1990s and shifting federal spending mandates. Health care and education costs, largely formula driven, were growing at a rate far in excess of the ability of states to generate the revenue to cover them. Tough sentencing policies led to ever increasing corrections costs in response to the expanding inmate population. As result, today the five largest functional areas of most state budgets are generally education, Medicaid, corrections, health and mental health, and social support programs, in some cases consuming as much as 85% of a state budget.⁹

Much of the spending was mandated by the federal government or the result of policy decisions given little long-term fiscal consideration when adopted. Consequently, states were left with relatively little money to actually "run" the remainder of state government, including the courts. As the mandated expenses continued to outpace revenue growth, budget writers looked to the remainder of state government—generally viewed as discretionary obligations—to fill the gaps, causing further reductions in funding for "needed" but not "necessary" programs.

In Missouri, for example, the amount of money spent on the judiciary as a percentage of overall state spending has decreased over the last 20 years, notwithstanding an increase in real dollars spent.¹⁰ The increase in real dollars generally reflects a shift to state funding for programs and personnel historically paid by the counties. Little money has been made available to underwrite new programs or expand existing programs. From an economics perspective, this is important history because while some states faced declining revenues in the 2001-2003 period, the greater culprit was out-of-control mandatory spending that far outpaced the ability (or willingness) of state legislatures to generate needed money.

The impact on the courts was noticeable. In Oregon, one of the most seriously hit of the states, the courts closed one day per week, furloughed employees, and implemented a "delay and no action" policy on processing certain types of cases.¹¹

Today, . . . the courts are involved in policy making on such a broad range of matters that conflict with the other branches of government is inevitable

6. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 3 (1977).

7. Ronald K. Snell, Corina Eckl, & Graham Williams, *State Spending in the 1990s*, National Conference of State Legislators (July 14, 2003), available at <http://www.ncsl.org/programs/fiscal/stspend90s.htm> (last visited October 4, 2004).

8. *Id.* For example, overall Medicaid expenditures for Utah increased from approximately \$600 million in FY 1996 to almost \$1.5 billion in FY 2005. See State of Utah Budget Summary, FY 2005, available at <http://www.governor.state.ut.us/gopb/fy2005budgetsummary.pdf> (last visited October 4, 2004).

9. Under Ohio's biennium FY2004 – FY2005 budget, education (elementary, secondary and higher), Medicaid, other health and human services, public safety (not including judiciary), and tax relief consume 96.7% of the general revenue fund.

10. For example, in FY 1983 Missouri spent 1.8% of the state general

revenue fund on court operations. In FY 2004, the state will spend 1.65% of the general revenue fund on the judiciary, notwithstanding an almost \$120 million increase in the judiciary's budget over 20 years.

11. See generally American Bar Ass'n, State Court Funding Crisis, Selected State and Local Resources: Oregon, available at http://www.abanet.org/jd/court/funding/resources_statelocal3.htm l#38 (last visited October 4, 2004). The Oregon Supreme Court in response to drastic budget cuts closed all appellate, tax, and circuit courts on Fridays from March 1 to June 30, 2003, and cut staff hours by 10%. In addition, in some areas of the state the courts stopped hearing a wide range of cases including small claims, nonperson misdemeanors, violations, probate, many civil cases and non-person felony cases.

In an effort to create revenue without raising taxes, state legislatures turned to court cases as fee-generation tools.

California faced cutting almost \$200 million from its judiciary budget, forcing early retirements, reducing full-time jobs to three-quarter time, limiting night court, and closing courtrooms.¹² Missouri faced a possible 15% across-the-board reduction that would have closed courthouses and eliminated as many as one in every four non-statutory employees.¹³ And Florida's chief

justice spoke of drastic cuts in court personnel and operations, and called upon the state bar to lobby the legislature on behalf of adequate funding for the judiciary.¹⁴

The problem with managing judicial budgets during this period was exacerbated by the fact that so much of a state's courts budget is heavily laden with personnel costs. With a few exceptions, most states split court funding obligations between state and county governments, with the former covering the bulk of personnel costs and the latter covering the bulk of operational costs. What this has meant in the main is that cuts to state judicial budgets frequently result in staff reductions, particularly at the trial court level, which tends to be the bulk of the budget.¹⁵ Adding to the difficulty is that a significant dollar portion of the personnel costs in a state's courts budget are judicial and other statutory salaries not subject to reduction. Thus, where a 5% across-the-board reduction in an executive department's budget may be absorbed through operational restructuring or pro-rata staff reductions, a like cut to the judiciary's budget can result in significant staff reductions.

In an effort to create revenue without raising taxes, state legislatures turned to court cases as fee-generation tools. Groups impacted by the budget crisis likewise lobbied state legislatures to impose new fees on court cases to fund particular and special programs—many of which have nothing to do with the administration of justice much less underwriting the costs of the courts. During the 2004 legislative session, for

example, the Missouri General Assembly introduced bills that would have increased court fees to fund a law enforcement officers' annuity, promote child advocacy centers, institute gang resistance education, underwrite sheriffs' prisoner costs, and expand DNA laboratories. Although not all of these fees passed, the aggregate increase could have added as much as \$50 to certain court cases.

The confluence of these economic factors forces a singularly important question: How does the state judiciary (at all levels) maintain access to the courts and its decisional independence when its evolving institutional independence is now so tied to resources that are in competition with the politics and spending priorities of the legislative and executive branches of government? The spending cuts and fee increases for justice services leave one wondering whether the judiciary and justice system are no longer viewed as a general obligation of government, but rather as just another fee-based operation, open primarily to those who can afford the service.

B. A CHANGING PARADIGM?

Even before the current fiscal crisis, courts around the nation struggled to obtain the resources needed to maintain operations and underwrite the costs of ever-expanding programs. Thus, funding problems for courts are not new. As far back as 1838, one court was forced to exercise inherent power to compel the expenditure of funds for judicial operations related to the case determination.¹⁶ The present crisis, therefore, simply underscores what many court officials have known for years: funding of the judiciary has always been a tenuous adventure. In recent years, however, the number and intensity of court funding disputes has seemingly increased, forced by the dramatic increase in the judiciary's responsibilities, its exploding caseloads, the reach of its decisions, and the costs associated with running large state judicial systems. Unlike early funding disputes, today's disputes center more on the institutional needs of the judiciary rather than the resources needed to resolve a particular case.

For much of the nation's history courts—be they federal or state—enjoyed only limited institutional status or influence as

12. See generally American Bar Ass'n, State Court Funding Crisis, Selected State and Local Resources: California, available at http://www.abanet.org/jd/court/funding/resources_statelocal3.htm#38 (last visited October 4, 2004). See also *State Budget Woes Hit Courts Hard*, April 2003 CALIF. B. J. at 1.

13. *Budget Cuts Could Delay Court Cases*, COLUMBIA (MO.) DAILY TRIBUNE, April 22, 2003.

14. *Florida Not Alone in Funding Woes*, TALLAHASSEE (FLA.) DEMOCRAT, April 30, 2003. See also New Hampshire Bar Ass'n, State Budget Plan to Further Cut Court Services (May 2, 2003). In Alabama, jury trials were temporarily suspended in 2002 due to lack of funds, although emergency funds were made available to resume trials. In Massachusetts, the judicial branch experienced a \$40 million deficit in 2002, with additional cuts anticipated in 2003. The courts have lost over 1,000 employees through attrition and layoffs. In Kansas, budget cuts forced the Supreme Court to take the unusual step under its inherent authority of imposing a \$5 emergency surcharge on all case filings. See American Bar Ass'n, Summary of Issues and ABA Policies, State Court Funding Crisis

at <http://www.abanet.org/jd/court/funding/issues.html> (last visited October 4, 2004).

15. For example, over 70% of Missouri's state judicial budget is for funding personnel in the circuit courts. Less than 10% of the overall budget is dedicated to operations.

16. For example, in *Commissioners v. Hall*, 7 Watts 290, 291 (Pa. 1838), a Pennsylvania court held, "When a deficiency of public accommodation induces an expenditure, it must be at the public charge, for it is as much a part of the contingent expenses of the court, as is the price of the fire wood and candles consumed in the court room." See also *County Comm'rs of Allegany Co. v. County Comm'rs of Howard Co.*, 57 Md. 393 (1882) (county from which prisoner came is required to pay costs related to the jury); *Stowell v. Jackson Co. Sup'rs.*, 57 Mich. 31, 34 (1885) (in criminal cases the power of the court to keep prisoner in custody binds the county to pay for the maintenance); *Carpenter v. County of Dane*, 9 Wis. 274 (1859) (in meritorious cases court has obligation to appoint counsel and county has obligation to pay).

a separate branch of government. The modern concept of the judiciary's institutional independence, which now embraces broad, self-governing authority, is a relatively new development resulting from a long, evolutionary process.¹⁷ This fact is exhibited by the lack of any institutional structure provided by early state constitutions or even the federal constitution. In many states, like the federal government, the institutional structure and status of the courts was a function of the legislature, not a direct product of a constitution. This was particularly true with regards to the internal management and governance of the courts.

This began changing in the latter half of the twentieth century as state judiciaries emerged with a more robust institutional identity. At the state level, the evolving institutional independence of the courts is evidenced in the language of many "modern" judicial articles. Unlike the federal Constitution and many early state constitutions, which anchored much of the judiciary's institutional structure in the legislature, modern state constitutions now generally place this responsibility directly in the judiciary or in extra-legislative bodies. The revision of judicial articles over the last 50 years illustrates the shift from relying on the legislature for the institutional structure and authority of courts toward anchoring such matters directly in the constitution and the judiciary itself. For example, in many states, the legislature no longer controls such critical matters as creating trial courts, establishing jurisdiction and venue, controlling the selection and removal of judges, or even setting salaries. Arguably, over the last half-century, the power of the legislature to control the fundamental structure of courts has greatly diminished while the "institutional" influence of the judiciary has grown, both constitutionally and socially. The development of modern judicial institutions and the evolving role of the judiciary in governing American society provide ample opportunity for conflicts with those holding more traditionally focused beliefs concerning the role of courts.

As a result of structural changes—not only in governance but also in the growing influence of courts and the explosion of programs directly under the judiciary's control—state courts have attained an institutional standing not previously enjoyed or recognized by the coordinate branches of government. This growing "institutionalizing" of the courts, combined with the complexity and costs of running large judicial systems, have arguably altered traditional relationships within the judiciary and between the courts and the coordinate branches.

The role of state courts is no longer limited to adjudication. Essential to the modern judiciary is providing a wide range of

services that result from the act of judgment, but also sit apart from that act at an operational and budgetary level. Beginning in the 1950s and accelerating through the 1960s, courts have been confronted with a wide range of new legal remedies for which little if any "judge made" law has existed.¹⁸ Taken singularly, the actions of courts in these areas represent no great departure from the traditional notion of judges and courts deciding cases. However, taken in their totality, these emerging areas of specialty law have radically reshaped the exercise of judicial power, the breadth of its application beyond the confines of a single case, and have, arguably, compelled a departure from more traditional judicial functions. This has created a climate ripe for conflicts over the breadth and limits of the judiciary's institutional independence and its funding needs. The centralization of authority and superintending power in state supreme courts has complicated the matter, in that a single controversial decision can impact the entire judiciary's state-funded budget, not just that of the court issuing the decision.

Thus, the current debate on judicial independence and court funding has little to do with historical considerations from the 18th century and more to do with the expanding role of courts in governing American society today. In short, it has never been entirely clear where the divide lies between the exercise of judicial power by independent courts and the authority of the coordinate branches to both define and contain that independence, through substantive law and budgetary manipulation. Rather, the divide has been a function of ebb and flow, depending in large measure on the cultural and political environment of the particular age in which the exercise of such power took place. The current age is no different, though arguably more complicated given today's pressing public policy issues. One cannot underestimate the significance of fundamental differences on the emerging role of the courts as a factor impacting the funding debate.

Additionally, while courts may see themselves as the weakest of the branches of government, others may tend to view modern courts as possessing extraordinary power due in large measure to the zero-sum nature of the judicial process. Where

[T]he current debate on judicial independence and court funding has little to do with historical considerations . . . and more to do with the expanding role of courts

17. During the Constitution Convention, for example, James Madison appealed for the creation of a separate federal judiciary arguing, "[I]n Rhode Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislatures who would be willing instruments of the wicked and arbitrary plans of their masters." RECORDS OF THE FEDERAL CONVENTION OF 1787. See also Notes of Rufus King in the Federal Convention of 1787 (June 4, 1787) available at <http://www.yale.edu/lawweb/avalon/const/king.htm#june4> (last visited October 4, 2004). Thomas Jefferson complained that the

legislature's assumption of executive and judicial powers rendered no opposition to "173 despots" who "would surely be as oppressive as one." Thomas Jefferson, Notes on the State of Virginia, Query XIII at 4 (1782), available at <http://www.yale.edu/lawweb/avalon/jeffvir.htm> (last visited October 4, 2004).

18. For example, there is no long jurisprudential history for housing law, welfare law, environmental law, natural resource management, school desegregation, or medical ethics.

First and foremost, courts are public institutions and should, therefore, see themselves as accountable to the public for the use of its resources.

the political branches must negotiate solutions through a consensus building exercise largely defined by democratic principles, the judicial process forces courts to render “final judgments” in disputed cases; in effect, to declare winners and losers ostensibly without the nuance of politics.

The judicial process inevitably leads to perceived winners and losers. The typical

question before a judge is whether one party has a right and the other party a duty, with the court generally rendering a decision supported by predefined legal principles on disputed issues of fact or law. While one may contest this proposition, arguing that court decisions are decidedly an exercise in balancing interests, the judicial process encourages—indeed demands—that courts resolve disputes, including those implicating public policy, on the narrowest of grounds and with a much higher degree of finality than the legislative process allows. By contrast, the typical questions confronting a legislature or executive bureaucracy are what is the better public policy and what are the full breadth of alternatives available to resolve a problem. Narrow principles of legal analysis have little value in this context. Thus, where Americans generally look to the legislative process to protect broad public interests (a function of negotiation and compromise), they generally look to the judicial process to protect private interests (a function of declaration and finality). These starkly different ways of defining and resolving public policy problems necessarily impact the internal workings and cultures of three branches of government. Individual court decisions with broad public impact, consequently, can be seen as providing policy direction that is out of touch with the political world and its underlying democratic values, not to mention overarching budgetary considerations.

C. IS THERE AN APPROPRIATE RESPONSE?

In difficult budget times, courts may be tempted to rest on a belief that the legislature has an unbounded obligation to provide the resources reasonably necessary for the efficient administration of justice through the separate, coequal judicial branch of government. While it is true that the legislature has an obligation to fund the courts at an appropriate level,¹⁹ practically achieving this goal is an entirely different matter. Courts have no formal role in the budget process. The idea of courts “ordering” the expenditure of public funds for their own operations—as if rendering a final judgment—is at odds with the give and take of the legislative process, whose primary actors

balance, sometimes inequitably, competing and amorphous interests in shaping public policy through the budget.²⁰

Therefore, while courts may be tempted to exercise inherent powers to compel needed funding, the long-term consequences to such an action can be significant. As the Washington Supreme Court observed, “By its nature, litigation based on inherent judicial power to finance its own functions ignores the political allocation of available monetary resources by representatives of the people elected in a carefully monitored process.”²¹ The unreasoned assertion of inherent power by the judiciary to demand funding can be a threat to the image of and public support for the courts. Such actions may threaten, rather than strengthen, judicial independence, by conveying an image of courts that comports more with political power plays and not the exercise of reasoned judgment. The legislature and other groups whose interests are adversely affected by such court action can legitimately respond with political sanctions, including threats of impeachment, tighter control over judicial selection, and opposition to the individuals who initiate budgetary intervention. The exercise of inherent power in the context of a budget fight should always be viewed as a weapon of last resort. Alternative, less drastic, and more permanent solutions to problems of court finance must be pursued.

First and foremost, courts are public institutions and should, therefore, see themselves as accountable to the public for the use of its resources. There has been a tendency in some quarters to wrap judicial administration and funding in a mantle of independence that is more appropriately directed to insulating individual judges and insulating individual judgment. Without a doubt, the hallmark of the American justice system has been the individual and impartial act of judgment—judgment generally free from the influence of unwarranted political coercion and intervention from the other branches of government. Yet the individual independence that judges enjoy cannot be a mechanism for holding the institution of the judiciary unaccountable for its use of resources. To the extent that the institution strives to set itself apart from considerations for accountability, it invites higher scrutiny and great intrusion. “Credibility grows when judicial budget priorities are consistent from year to year, when courts take steps to measure and report on their management performance, when courts demonstrate sound fiscal management over time, and when the judiciary routinely demonstrates how individual courts and programs have used resources wisely and in accordance with sound fiscal practices.”²² In short, courts must see themselves as institutionally accountable to the public if they reasonably expect to compete for scarce public dollars in an increasingly competitive environment.

Second, there certainly has been serious erosion in the public’s understanding of the role of courts, a lack of understanding that spills into the appropriations process. Legislators who

19. The current standard in many states for the exercise of “inherent power” to compel funding is “reasonably necessary.” See, e.g., *State ex rel. Wilke, Judge v. Hamilton County Bd. of Comm’rs*, 734 N.E.2d 811 (Ohio 2000).

20. As observed in *In re Salary of Juvenile Director*, 552 P.2d 163, 173 (Wash. 1976), “The judiciary is isolated from the opinion gather-

ing techniques of public hearings as well as removed from politically sensitive, proportionately elected representatives.”

21. *Id.* at 172.

22. Conference of State Court Administrators, *State Judicial Branch Budgets in Times of Fiscal Crisis*, 19 COURT MANAGER 27, 28 (2004).

describe courts as mere “agencies” of government or who perpetuate disrespect for the judiciary only exacerbate difficult funding decisions. There is a need for the judiciary to become more engaged in the education of the legislature and the citizenry. People fear what they do not understand and few people understand the courts. Courts play an active role in governing the nation, not simply resolving its disputes. The public needs to understand this role, and courts have an affirmative obligation through appropriate outreach to increase this understanding.

Finally, much as been made of finding alternative funding mechanisms for the judiciary to wean its dependence on state general revenues and provide greater insulation from potential budgetary blackmail. Such mechanisms should be discussed and explored, whether they involve a dedicated tax base, percentage set-asides, or mandated spending levels. In exploring alternative funding mechanisms, however, courts must be careful not to contribute to a “theme park” mentality whereby both access to and funding of the courts becomes overly dependent on fees. James Madison once observed, “Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”²³ As the “end of government,” the justice system and the courts must be viewed as a general obligation of government, indeed one of its most fundamental obligations. When legislatures and the courts themselves turn to fee-based structures to replace general funding obligations, the image of courts as a cornerstone of democratic government is substantially eroded.

Funding of the state judiciary has always been a tenuous activity and is even more so today. There are many and varied reasons for the funding challenges state judiciaries face, some of which are beyond the control of courts and some of which are clearly the results of judicial action or inaction. In today’s world, courts must balance the interests of individual judgment with institutional standing; in effect, to preserve a long and fruitful heritage of individual and impartial judgment at a time when institutional concerns are of growing importance. It is important to appreciate that political complaints today about the judiciary are not wrapped in the language of an individual judge, but rather in language of “the courts.” Only by preserving the individual act of judgment within the emerging institutional status of the judiciary can courts can preserve their important role in governance.



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23. THE FEDERALIST No. 51 (James Madison).

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Some Thoughts on the Problems of Judicial Elections

Jeffrey Rosinek

Election season is within sight again, and with it come the obligatory attacks on the judiciary. Some call it simply campaigning or electioneering, while others believe it is more serious and a form of “judge bashing.” Whatever name the problems are given, the entire election process may have a marked effect on the independence of our judiciary, as well as the ethics of judges and judicial candidates. And in the end, because these problems affect the public’s faith in the judicial system, they must be addressed.

Most of the literature concerning an independent judiciary centers on the several federal judges of the United States, with little discussion about state court judges. Yet the American public is much more affected in its daily life by the results of state court judicial decisions than opinions from the federal judiciary. The majority of jury trials in Florida take place in its twenty circuit courts, which have 527 judgeships and also hear appeals from county court cases.¹ In total, 97% of all litigation in the United States is handled by state courts.²

Similar to problems plaguing the federal judicial system, much of the harshest recent criticism of judges has been directed at state jurists for issuing opinions at odds with the majority will in a variety of contexts. A California trial judge reported on the prevalence of criticism of California judges, and discussed a protocol initiated by the California Judges Association: when such inaccurate and unfair criticism occurs, selected judges stand ready to assist in offering a rapid response for publication or broadcast.³ There is some understandable concern as to the propriety and desirability of judges defending decisions of their brethren in the media. Effective response mechanisms must be developed that involve not only the bench, but also the bar and public, in a coordinated effort.

In state courts, judges are either appointed or elected for a specific initial term, and then up for retention or reelection by the voters, or reappointment by the governor or state legislature, for additional terms in office. As shown in the accompanying chart, most state court judges stand for some form of contestable election—and almost 90% of general jurisdiction trial judges go through a contestable election to gain a second term in office.

Florida has a three-tier judicial system: a trial level, consisting of the County Court, which is a court of limited jurisdiction (one county court in each of the 67 counties in Florida) and the Circuit Court, a general jurisdiction court (there are 20 geographic circuit courts in Florida); an appellate level, the District Court of Appeals (there are 5 geographic district courts of appeals in Florida); and one Florida Supreme Court. Florida is among the states in which judges of the trial courts are initially appointed by governor (when there is a vacancy or a new judicial seat created by the legislature), after recommendations from the governor-appointed judicial nominating committees, and then judges must stand for election, and may face opposition in a nonpartisan vote. The judges and justices of the appellate and supreme courts, respectively, are initially appointed by governor after recommendations from the appointed judicial nominating committees, and then the judges and justices must run for “merit” retention, without an opposing candidate.⁴

In total, state judges are subject to election, reelection, or retention election in 38 states.⁵ In 2001, the Florida Legislature revised the statute relating to the appointment of members of the state’s judicial nominating commissions. Prior to the change, the Florida Bar appointed three lawyer members, the governor appointed three members who could be either lawyers or nonlawyers, and those six commission members selected three nonlawyer members. Under the revision, the governor now appoints all nine members of each commission. Four of the lawyer members must be appointed from lists of nominees submitted by the Florida Bar. The law also requires the governor to consider racial, ethnic, and gender diversity, as well as geographic distribution, when making appointments to the commission.

This reform of the Florida judicial nominating commissions by the legislature further politicized the judicial election process. In addition to the appointment, election, and impeachment processes, states have their own judicial standards and monitoring bodies, such as Florida’s Judicial Qualifications Committee (JQC), an administrative agency that investigates judicial misconduct and recommends to the

Footnotes

1. Mike Schneider, *The Campaign Finance Coffers of Elected Florida State Court Judges Keeps [sic] Increasing*, ASSOCIATED PRESS, July 26, 2003, available at <http://www.judicialaccountability.org/articles/judicialectionsfl.htm>.
2. AMER. BAR ASS’N, AN INDEPENDENT JUDICIARY: REPORT OF ABA SPECIAL COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE § 5 (1997) [hereinafter ABA JUDICIAL INDEPENDENCE REPORT], available at <http://www.abanet.org/govaffairs/judiciary/report.html> (last

visited Sept. 27, 2004).

3. Testimony of Albert Dover, Feb. 21, 1997, quoted in ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 5, n. 144.
4. An overview of the methods of judicial selection in Florida, including changes that have been made over time and attempted reform efforts, can be found on the website of the American Judicature Society. See History of Judicial Selection Reform, Florida, available at http://www.ajs.org/js/FL_history.htm.
5. ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 5.

Florida Supreme Court the level of punishment believed warranted for each infraction. The Supreme Court then determines the degree of discipline, which may range from private reprimand to removal from the bench.

In a recent decision, *In re Angel*,⁶ the Florida Supreme Court noted “conduct related to partisan political functions [that] violated both the spirit and the letter of ... the Florida Statutes and Canon 7 of the Code of Judicial Conduct.”⁷ In *Angel*, the judge and his family had actively campaigned at a number of partisan political gatherings, holding the judge out as a member of a political party in a nonpartisan election; his opponent was not invited to these political events.⁸ Canon 7, as adopted in Florida, specifically forbids a judge from attending partisan political events outside of the campaign season; even then, the judge may not appear unless other candidates are invited and may address only matters relating to the law, improvement of the legal system, and the administration of justice.⁹ The court issued a public reprimand of Judge Angel, but warned that more severe sanctions may be levied for partisan activity by judges: “Certainly, in very egregious cases, where a judge’s misconduct included implications that he or she would make partisan decisions on the bench, the JQC has recommended a substantial fine in addition to public reprimand and even removal.”¹⁰

The balance of powers, delicately established over two centuries ago, is destroyed when our political leaders attack judges and judicial decisions, without just cause, in order to play politics. As I have written previously, “a vicious assault on the independence of the judiciary is a direct attack on the viability of our government It is the public’s faith in the system of an impartial, independent judicial branch of government that embodies a constitutional law-abiding citizenry. Uncalled-for and unjustified political attacks on the independence of the judiciary defeat that concept so long enjoyed and cherished.”¹¹

In Ancient Roman times, Juvenal wrote, “*Sed quis custodiet ipsos custodiet*”—“Who watches the watchmen?” This question is equally relevant and appropriate in modern times, when allegations of undue influence by political and financial benefactors may arise, often due to the very election process. The

SELECTION AND RETENTION SYSTEMS FOR STATE COURT JUDGES	
APPELLATE COURTS	
Total appellate judges: 1,243	
Total that stand for some form of election: 1,084 (87%)	
Total that stand for contestable election: 659 (53%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 582 (47%)	Appointment: 133 (11%)
Partisan Election: 495 (40%)	Partisan Election: 400 (32%)
Nonpartisan Election: 166 (13%)	Nonpartisan Election: 166 (13%)
	Retention Election: 518 (43%)
GENERAL JURISDICTION TRIAL COURTS	
Total trial judges: 8,489	
Total that stand for some form of election: 7,378 (87%)	
Total that stand for contestable election: 6,650 (77%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 2,061 (24%)	Appointment: 1,013 (12%)
Partisan Election: 3,669 (43%)	Partisan Election: 2,360 (28%)
Nonpartisan Election: 2,759 (33%)	Nonpartisan Election: 2,891 (35%)
	Retention Election: 2,127 (25%)

Source: Report and Recommendations of the [ABA] Task Force on Lawyers’ Political Contributions, Part Two, July 1998, at 69, 73.

American Bar Association’s Commission on Separation of Powers and Judicial Independence circulated a list of questions to 245 state and local bar leaders and got 93 responses, listing the top factors that threatened judicial independence in their states: (1) judicial independence is being eroded by excessive criticism of judges for issuing opinions at odds with the majority will in a variety of contexts; (2) judicial reelection is too politicized; (3) judicial selection is too politicized; and (4) judges are too dependent on campaign contributions.¹²

It is the need to raise funds for costly campaigns that initially brings the notion of judicial independence into question to begin with, for a number of reasons. Organizing a judicial campaign has become very expensive. Judges must raise funds from a variety of outside sources in amounts that, only a few years ago, were unthinkable. The use of advertising on radio and television and in print media has skyrocketed. In a growing number of states, television advertising—by candidates and supportive special interests—is becoming the key to getting elected to America’s state supreme courts. Ads ran in 64% of the states with contested races in 2002, compared to less than a quarter of such states in 2000.¹³ An increasing per-

6. 867 So.2d 379 (2004).

7. *Id.* at 383.

8. *Id.* at 381-82.

9. *Id.* at 382.

10. *Id.* at 383.

11. Jeffrey Rosinek, *Political Pressure on an Independent Judiciary*, WASHINGTON TIMES, Sept. 2, 1997.

12. ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 5.

However, the ABA Commission warned that “opinions [of bar leaders] may not be shared by rank-and-file members of the bar, let alone by judges,” and that the small sample size just of bar leaders may not be representative of all bar leaders’ views.

13. DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002 at 9 (2004), available at <http://www.followthemoney.org/press/Reports/200405061.pdf>.

Thirty percent of the state judges in Florida believed that campaign contributions made to judges had at least some influence on their decisions

centage of candidates in contested races are buying ads, and the number of special interests buying airtime has doubled in just two years. Altogether, in America's 100 largest media markets, candidates and interest groups spent almost \$8.3 million on television airtime in 2002.¹⁴ Judicial campaigns are pressured into hiring public relations firms to handle all the advertising needs. In some cases, these public relations firms and political consultants notify judges that though they have other potential

judicial candidates, these candidates will not run against any judge who hires their firm—arguably analogous to extortion, yet carried out like business as usual. And business costs money, so the need for candidates to raise funds for successful campaigns is greater than ever. Typically, incumbent judges in Miami-Dade County do not draw opposition because of the perception that they have status, name recognition, and money, but judges are kept in suspense up to the very last minute as to whether they will run unopposed or be faced with new challengers in an expensive election campaign.¹⁵

Unfortunately, this creates a perception that candidates are beholden to their financial benefactors, be they wealthy individuals, attorneys who try cases before them, special interest groups, or entire community demographic groups. No matter how ethical judges may be, that perception definitely affects the public's view of judges, particularly shaping how it will vote. In a national survey of state judges in late 2001, 60% of Florida state judges said that the conduct and tone of judicial campaigns had gotten worse over the past five years.¹⁶ Thirty percent of the state judges in Florida believed that campaign contributions made to judges had at least some influence on

their decisions, and 68% were concerned that “there are few restrictions on special interest groups who buy advertising to influence the outcomes of judicial elections and decisions.”¹⁷ (Nationally, the percentage was similar: 62%.)¹⁸

Interest group television campaigns are rapidly spreading. Just a few years ago, special interest ads were unheard of in judicial elections. But in 2002, special interests and political parties ran ads in more than twice as many states as in 2000.¹⁹

Judges and judicial candidates are always pressured to speak on current issues, such as the death penalty and abortion, which the Code of Judicial Conduct generally bars them from commenting on publicly.²⁰ There is always pressure to comment on current issues, which causes judges great concern. Ninety-six percent of Florida state judges favor a proposal that ensures “judicial candidates should never make promises during elections about how they will rule in future cases that may come before them.”²¹ That proposal is already the rule under the present Code of Judicial Conduct as adopted in Florida.²² Canon 7A(3)(d)(i) in Florida provides that judges or judicial candidates shall not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” Subsection (d)(ii) in Florida provides that judges or judicial candidates shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” Although the United States Supreme Court in *Republican Party of Minnesota v. White*²³ found Minnesota's Code of Judicial Conduct provision forbidding judges from “announc[ing] his or her views on disputed legal or political issues” too broad to withstand constitutional challenge, the Florida Supreme Court has upheld the constitutionality of these Florida provisions after *White*.²⁴ It found that these canons, as adopted in Florida, were more narrowly tailored than the broad “announce” clause at issue in *White* and that the Florida provisions satisfied a compelling state interest in maintaining public confidence in an impartial judiciary; thus, the Florida provisions withstood a First Amendment challenge.²⁵

14. *Id.*

15. Jay Weaver & Marc Caputo, *Many Incumbent Judges Retain Seats, But Six Spots Are up for Grabs*, MIAMI HERALD, May 7, 2004, available at http://www.judicialaccountability.org/articles/judicial_electionsfl.htm (last visited Oct. 2, 2004).

16. Survey taken November 5, 2001 through January 2, 2002 by Greenberg Quinlan Rosner Research and American Viewpoint for the Justice at Stake Campaign, available at <http://www.justiceatstake.org/files/SurveyPullOutFlorida.pdf> (last visited Oct. 2, 2004). In the Florida survey, 105 judges participated out of a total sample size of 701 judges; the reported margin of error for the survey of Florida judges was $\pm 10\%$.

17. *Id.*

18. *Id.* The national survey of judges had a reported margin of error of $\pm 2\%$.

19. GOLDBERG & SANCHEZ, *supra* note 13, at 9.

20. For a discussion of the limits of judicial speech during election campaigns following the United States Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), see Roy A. Schotland, *Should Judges Be More Like Politicians?*, Spring 2002 COURT REVIEW at 8; and Jan Witold Baran, *Judicial*

Candidate Speech After Republican Party of Minnesota v. White, Spring 2002 COURT REVIEW at 12. For a review of public opinion, as well as that of judges, regarding judicial selection, see David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, Spring 2002 COURT REVIEW at 16. Past *Court Review* articles from 1998 forward can be found on the web at <http://aja.ncsc.dni.us/courtrv/review.html>.

21. Survey, *supra* note 16.

22. Except when specifically noted otherwise, citations in this article are to the Code of Judicial Conduct as adopted in Florida. It is available on the web at <http://www.flcourts.org/sct/sctdocs/ethics/> (last visited October 2, 2004). Although most states have based their Codes on the ABA Model Code of Judicial Conduct, they generally make some modifications and, thus, the Code varies from state to state. The ABA Model Code of Judicial Conduct is available on the web at <http://www.abanet.org/cpr/mcjc/toc.html> (last visited October 2, 2004).

23. 536 U.S. 765 (2002).

24. *In re Kinsey*, 842 So. 2d 77 (Fla. 2003), *rev. denied*, 2003 Fla. LEXIS 513 (March 26, 2003), *cert. denied*, 124 S. Ct. 180 (2003).

25. *Id.* at 86-87.

If the Florida interpretation of *White* is eventually confirmed by the United States Supreme Court, this should dissuade candidates from making statements that commit or appear to commit them with respect to issues, cases, and controversies likely to come before the court. Even so, as a practical matter, judges may be attacked not only by candidates, who are subject to these restrictions, but also by third parties, who are not. Once attacked, judges are fearful about defending themselves against attacks, lest they disqualify themselves from handling the very issues in question later, should those issues come before the bench.

Sixty-eight percent of Florida judges are very concerned that “because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications.”²⁶ As one reporter recently summarized the situation, “Experts who study judicial elections say voters know little about the people who preside over the legal system and considerably less about whether they are doing a good job.”²⁷

The 2004 circuit judge election in Miami-Dade County, Florida (the 11th Circuit), the largest of Florida’s judicial circuits, illustrates some of these concerns perfectly. Data on candidate contributions is available through the Florida Secretary of State’s campaign financing database.²⁸ As of October 2, 2004, online data showed candidates in contested races had raised a maximum of \$360,556 (John Schlesinger, running against Teresa M. Pooler, who raised \$111,837) and as little as \$27,400 (William L. Thomas, running for an open seat against three other candidates, one of whom, Catherine B. Parks, had raised \$115,863). Sixteen candidates for the 11th Circuit (out of a total of 26 candidates) raised over \$100,000, and only two candidates were incumbents defending against challengers: D. Bruce Levy, who raised \$184,484 (running against Barbara Areces, who raised \$223,209), and Henry H. Harnage, who raised \$251,278 (running against Peter Adrien, who raised \$59,594). John Schlesinger holds the 2004 record for campaign contributions raised for all candidates in all of Florida’s circuits, followed by Henry Harnage, also of the 11th Circuit, with the second-highest amount in the state.

In 2002, the estimated population of the 11th Judicial Circuit was 2,332,559. In recent years, the cost to reach the voters has skyrocketed. To run a competitive campaign in Miami-Dade County, scores of thousands of dollars must be raised, with much of it coming from the practicing bar. These figures suggest that true judicial independence may be a thing of the past, or called into question at the very least, with such

large amounts of funds raised for campaigning.

The judicial election took place on August 31, 2004. There were only three judicial incumbents, two circuit judges and one county court judge, who were challenged. All three were defeated. The man who raised the most money, John Schlesinger, won handily.²⁹ But the overall victors were the public relations people, who walked away from the election financial victors, no matter which judicial candidate was elected.

Daniel Foley . . . put it this way, “There’s no good way to elect judges. What we need to do is to find the least bad way to elect them.”

A different situation exists in smaller counties, such as Polk, a county in west central Florida. There, as a local newspaper reporter put it, “lawyers may be hesitant to challenge incumbent judges for fear of reprisals. Hence, most judges are unopposed. In bigger cities—especially in states where judicial races are partisan contests—judicial elections can turn into highly charged, bare-knuckled brawls.”³⁰ Daniel Foley, an associate professor of journalism at the University of Tennessee who studies courts and criminal justice put it this way: “There’s no good way to elect judges. What we need to do is find the least bad way to elect them.”³¹

In the end, how can the tensions between judicial independence and elections be resolved? One idea to create a greater degree of judicial independence is to lengthen the terms judges serve. This would make the positions more attractive to draw and keep the best judges, and it would reduce the number of campaigns and the need for fundraising. Of course, many contend that the best solution is for all states to appoint their judges on a merit-based system, to alleviate even more problems associated with fundraising for costly campaigns. Most states that appoint their judges, including Florida’s appellate and supreme court judges, still subject them to run in retention elections (in which judges run unopposed), making fundraising not as big an issue. While this process could create a new set of issues, such as when governors appoint judges and politics and party affiliations get involved, the system seems preferable to hard-fought and expensive judicial elections.

The ABA Standing Committee on Ethics and Professional Responsibility recently proposed amendments to the Code of Judicial Conduct, which would state the ABA’s preference for

26. Survey, *supra* note 16.

27. Jeff Scullin, *Why Judicial Contests Go Unnoticed*, (LAKELAND, FLA.) LEDGER, April 10, 2004, available at http://www.prisonpotpourri.com/COURTSandCASES/Why%20Judicial%20Contests%20Go%20Unnoticed%20theledger_com.html (last visited October 2, 2004).

28. Campaign contributions for circuit judges can be reviewed at <http://election.dos.state.fl.us/campfin/contrib.asp> (last visited Oct. 2, 2004).

29. Election results can also be found on the Florida Secretary of State website at <http://election.dos.state.fl.us/elections/results/archive/index.asp>. Schlesinger defeated Pooler, 57% to 43%. Adrien defeated Harnage by the same margin, 57% to 43%.

Areces defeated Levy, 58% to 42%. In the four-way race involving Thomas and Parks, those candidates qualified for a run-off with 30% of the vote apiece; the run-off will be held along with the November general election. Two other candidates, Josie Velis and Don Cohn, received 23% and 17% respectively. Velis raised \$60,705 and Cohn raised \$81,154.

30. Jeff Scullin, *Why Judicial Contests Go Unnoticed*, THE LEDGER (Lakeland, Fla.), April 10, 2004, available at http://www.prisonpotpourri.com/COURTSandCASES/Why%20Judicial%20Contests%20Go%20Unnoticed%20theledger_com.html (last visited Sept. 27, 2004).

31. *Id.*

merit-based selection.³² A relatively new provision of the ABA's Model Code of Judicial Conduct, Canon 3E(1)(c),³³ suggests that campaign contributions made by attorneys or others who appear before the judge may raise questions about the judge's impartiality, depending on the source and size of such contributions.³⁴ Such contributions could be cause for disqualifying the recipients, perhaps a necessary deterrent to halt the appearance of judicial impropriety.

In the meantime, Florida residents voted in 2000 to keep electing their circuit and county judges rather than having them retained on a merit basis, so there is still strong public support, at least in Florida, for some election procedures.³⁵ It is ironic that the appointment process is credited with making the judiciary more diverse, yet several groups representing a variety of minority attorneys wanted to keep elections. The National Bar Association, the Hispanic Bar Association, the Cuban-American Bar Association, and the Florida Association for Women Lawyers all supported the current system of elections, while the Florida Bar and the American Bar Association spent about \$70,000 lobbying for the change to a merit-based system of retention.³⁶

The Florida proposal for merit selection and retention was

overwhelmingly rejected in every county. The average affirmative vote (in favor of merit-based retention) was only 32%; two-thirds of Floridians preferred electing their judiciary. Despite public debates and support for retention procedures from a variety of interest groups (including the Florida Bar), it looks like the election process will not be ending any time soon. What judges and judicial candidates do to campaign for these positions will continue to have a great impact on the public's trust in its judiciary.



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32. ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 6. The Commission admitted to focusing its efforts on the area of federal judicial independence since no two state systems are alike, but they encouraged state bars to conduct their own individual studies.
33. This provision of the ABA Model Code provides that one of the situations in which a judge's impartiality might reasonably be questioned, and thus in which he or she is disqualified, occurs when "the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than" a certain amount. The Model Code provision suggests two versions for states to consider in

determining the threshold contribution that would trigger disqualification: either a set amount [(\$) for an individual or (\$) for an entity] or a "reasonable" amount that [is reasonable and appropriate for an individual or an entity]. See ABA Model Code of Judicial Conduct, Canon 3E(1)(e), available at http://www.abanet.org/cpr/mcjc/canon_3.html (last visited October 2, 2004).

34. *Id.*
35. See History of Judicial Selection Reform, Florida, *supra* note 4.
36. Anita Kumar, *Floridians Keep Right to Elect Judges*, ST. PETERSBURG (FLA.) TIMES, November 8, 2000, available at http://www.sptimes.com/News/110800/Election2000/Floridians_keep_right.shtml (last visited October 2, 2004).

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Those who want the judges to be social activists. Those who find it easier to change the law via the court system than through legislative channels. Judges themselves who believe that they understand what social change is needed better than the makers of the law.

Some judges will discover social changes in the Constitution that never existed before. Some judges simply believe they are not controlled by the Constitution and law made pursuant to it if they determine that a socially desirable result is necessary and is justified. If this be the case, why have a constitution?

Why go to the trouble of having the Constitution amended? Why have a legislature make the law? No one will know the law until it is pronounced by some court. How are people to behave and how are they to conduct business in such an uncertain climate? Obviously, it becomes impossible.

Judges must judge cases by applying and interpreting the law. This is their proper function as set forth in the Constitution. There is room for different interpretation of the law, but there must be an effort by every judge to uphold the law, as the oath he takes upon taking the

bench requires. He must be impartial and lay aside any preconceived notions as to what the law ought to be. The court must consider the cases before it in a fair and thorough manner, and decide it in as expeditious a manner as possible. To do otherwise is to demean the judiciary and the litigants before it.

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Judicial Independence in the Municipal Court: Preliminary Observations from Missouri

Lawrence G. Myers

Studies of judicial independence abound. Yet most of them focus on the federal courts, even though the overwhelming bulk of the contacts between the public and the courts take place in state and municipal courts.¹ And there are real questions about judicial independence at the state and local level.

Preliminary results from a recent survey of the municipal courts in Missouri show significant structural and attitudinal barriers to judicial independence. The results are preliminary in light of the deadline for this issue: only a relatively short time was available to analyze the responses before submitting this article. Even the early returns suggest real problems, however.

A 15-question survey was sent August 6, 2004 to all of the 473 reported municipal courts in Missouri. The questionnaire was designed to assess the administrative structure of each court, problems that might be associated with that structure, and attitudes about the role and purpose of the court. Responses were requested within two weeks. By the end of August, 198 survey responses had been received. That represents a return rate of 43% once the 11 cities that reported they no longer have a municipal court are eliminated. While a slightly higher response rate would have been preferable,² since we cannot determine the extent to which the views of non-responders differ from those who returned the surveys, the responses appear to provide a great deal of useful information.

Before turning to the substantive results, we should consider the characteristics of those who responded. Almost half of the respondents worked in courts that had fewer than 1,000 case filings during all of 2003 (Figure 1). Thus, a significant portion

of these courts will necessarily be part-time in nature. Another 16% worked in courts with 5,000 or more case filings per year and a total of 34% worked in courts with 2,000 or more case filings per year. Thus, the sample included significant numbers for all sizes of municipal courts found in Missouri.

In total, for those who responded and answered the question on number of filings for 2003, more than 847,000 case filings were represented. That is a lot of people, and yet many courts are very small and located in rural Missouri. A few have dockets every workday of the week; many have court once a month; and some have court only once every three months.

Most of the respondents were court clerks, although two were judges (Figure 2). About three-fourths of the respondents were court clerks; about one-fourth worked both as a court clerk and also had a separate, executive branch job title.

This article does not address the constitutional and statutory provisions governing the courts of Missouri. To do so would exceed the scope of this article and the space available in this issue of *Court Review*. Suffice it to say, for purposes of this article, that there are both constitutional and statutory provisions that appear to provide for separation of powers of the judiciary in Missouri—and that the office of the Missouri State Court Administrator has taken the position that the doctrine of separation of powers does apply to the municipal courts of Missouri.³

PRELIMINARY OBSERVATIONS

The respondents were very open in their replies to this survey. For example, although providing the name of their court

Footnotes

1. The excellent 1997 report of the American Bar Association's Special Commission on Separation of Powers and Judicial Independence is a case in point. Focused on the federal courts, the commission report included a brief segment on judicial independence in the state courts. That section began: "The focus of this study is on judicial independence in the federal courts; limited time and resources have not allowed a detailed examination of the intrusions, both real and apparent, on the independence of the state courts. Nevertheless, since 97% of all litigation occurs in the state courts, the Commission felt it was essential to survey the major issues affecting state judicial independence, if only briefly." AMER. BAR ASS'N, AN INDEPENDENT JUDICIARY: REPORT OF ABA SPECIAL COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE § 5 (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html> (last visited October 9, 2004).
2. The "standard" for an adequate response rate in a mail survey has long been considered to be 50%. E.g., EARL R. BABBIE, SURVEY RESEARCH METHODS 165 (1973); EARL R. BABBIE, THE PRACTICE OF

- SOCIAL RESEARCH 242 (5th ed. 1989). Professor Shari Seidman Diamond has suggested that when the response rate is below 50%, "the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn." Shari Seidman Diamond, *Reference Guide on Survey Research*, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 245-46 (2d ed. 2000). Here, of course, we are not trying to make "precise quantitative statements" about the exact percentages of Missouri municipal court officials who have a specific opinion. Rather, we are trying to gauge what problems may exist to at least some degree given the administrative structures now in place. Thus, we consider the response rate sufficient for our purpose and would note that it likely exceeds that of most mail surveys. See PAMELA L. ALRECK & ROBERT B. SETTLE, THE SURVEY RESEARCH HANDBOOK 45 (1985) (finding that response rates above 30% are rare in mail surveys).
3. See Letter from Ronald L. Larkin, Missouri State Court Administrator, to Margaret Kelly, Missouri State Auditor, Aug. 20, 1997 (on file with the author).

FIGURE 1: SURVEY RESPONDENTS BY SIZE OF COURT

Size of Court by No. of Filings in 2003	
Less than 500	33%
500-999	16%
1,000-1,999	17%
2,000-4,999	18%
5,000-9,999	7%
10,000-19,999	5%
Greater than 20,000	4%
	100%

FIGURE 2: JOB TITLES OF SURVEY RESPONDENTS

Job of Survey Respondent		
Court administrator or court clerk	143	72%
Court clerk plus executive branch job	53	27%
Judge	2	1%
Total	198	100%

was optional, more than 75% did so—and close to 60% made additional comments. Many shared horror stories. Some of those will be included along the way as we review the data and some preliminary observations from that data.

Many of the municipal courts in Missouri do not have staff who work only for the municipal court. Seventy-two percent of respondents reported a title that could be classified either as court administrator or court clerk, while 27% reported that their title of court clerk was in conjunction with another position—one that would be characterized as part of the executive branch of government. For example, 29 respondents (15%) listed titles either as city clerk, city clerk/court administrator, or court clerk. Others had additional titles such as police dispatcher, records clerk, city collector, communications supervisor, police municipal clerk, or even “city clerk/prosecutor/police/maintenance.”

Most of Missouri’s municipal court staff work only part-time for the court. Seventy-six percent of the judges and 88% of the city prosecutors were reported to work only part-time in those jobs. In addition, 36% of the respondents who serve as court clerks or administrators themselves worked only part-time. Many of the others, while full-time city employees, are not full-time within the courts. Rather, they also work in city departments within the executive branch of government. Nearly half (48%) of the respondents listed at least one other city department in which they work. At least one court clerk is a contract employee who is paid for hours worked and works only as needed.

The part-time status of many of the judges undoubtedly affects the way in which business is handled. One clerk said, “Actually, I am pretty well on my own. The judge isn’t here, but if there is something I just can’t handle I *try* to get the judge.” Another noted the difference in availability between the city clerk and the judge: “The city clerk is here all the time. The judge is only here while court is in session one evening a month.”

Of major concern, only about half of the municipal court administrators and clerks report to the judge. Even among those who do report to the judge, many also report to another official of city government or even to the local police department. A minority of the respondents (44%) report only to the judge, which would seem to be the ideal (Figure 3). Another 21% report both to the judge and to another city official. Those “other” city officials include prosecutors, chiefs of police, and city finance directors. Thirty-four percent report only to city officials. For 9%, their sole supervisor is the city prosecutor; for another 9%, the sole supervisor is the city police chief (or, in one case, a police sergeant). The city finance director, collector, or another city employee in the finance department either was the sole supervisor, or supervised along with the judge, for 5% of the court clerks. Perhaps the two who are not confused over separation between the branches of government are the lucky two who answered that they did not report to anyone!

FIGURE 3: REPORTING STRUCTURE FOR COURT CLERK

Court administrator/clerk reports to:		
Judge	86	44%
Judge and city prosecutor	14	7%
Judge and city manager/administrator	11	6%
Judge and director of finance	5	3%
Judge and other city officials	10	5%
Circuit court clerk	1	1%
City clerk	20	10%
City manager/administrator	11	6%
Chief of police or other police officer	9	5%
City prosecutor	9	5%
Director of (or other person in) finance dept.	4	2%
Various other city officials	12	6%
No one	2	1%
	194	100%

As is true in most human endeavors, not one of the administrative structures was without problem. For those who reported to a judge, the greatest problems appear to arise from the part-time status of three-fourths of the judges. One court administrator said, “I have a part-time (one day a week) judge

who is not here enough to make a 'good judgment' in evaluating my work." Another put it this way: "Part-time judge means that most of the responsibilities fall on the clerk/administrator. Further workload can become easily backlogged due to lack of hours dedicated to the court by a part-time judge. Part-time judges really don't know what all goes on in court and therefore do not realize the importance of staying on top of the work. I am pleased with our structure; however, I would like to see the part-time judge take a role (however slight) in the municipal court (*i.e.*, annual review, etc.)."

These court administrators and clerks look to the judge for leadership, even when the judge is part-time. As one court administrator who reports to a part-time judge and a person in the executive branch of city government said, "I think the judge should be the department head for the court. We have to answer to someone who knows nothing about the court. Problem is the judge doesn't really care. He shows up for court—does his thing and out the door he goes. He is not involved with the budget or personnel. Judge makes \$30,000 a year." That clerk added, "I have a problem with getting the judge to agree with me. I have asked that we have more court dates and even a morning court (once a month). He says no. We have a lot of attorneys certifying cases to the county court. They do this because they don't like night court. It would help a lot to have a day court."

The greatest share of reported problems occurred for those who report either to city clerks or city finance personnel. Three major problems seem to surface here: (1) the belief on the part of the court administrator that the city clerk or director of finance does not understand their job and could not do it if the court administrator or clerk is absent; (2) conflicts of power seem to develop between these positions; and (3) conflicts develop over non-court staff having access to closed court records that are not open to the public. One court administrator put it this way: "Unable to protect the integrity of the court. City clerk trying to make court like any other city office. Does not or refuses to recognize that we are a part of the state courts and presiding judge and municipal judge are actually the chain of command. With that, the mayor, city manager, and city attorney ignore [state court rules]." With regard to records, one administrator said: "Area not secure. Anyone can and does have access to court records. Court files are not to be open to the general public and must not be available to non-court staff. The department head likes to remind you she is the department head and you have no right to an opinion or say-so in what will be done in your office. She has no training in the court. The city administrator believes the city clerk is right and knows what she is doing in regards to the court."

Positive comments were obtained from some of the court administrators and clerks who report at least in part to city prosecutors and city managers. With respect to prosecutors (who, like the judges, are often part-time), we suspect this is related strongly to the prosecutor's knowledge of the legal system. Court administrators feel comfortable with their knowledge of the purposes and responsibilities of the courts; good prosecutors know how the court is supposed to function. Several comments noted that reporting at least in part to a city manager is a good way to make sure that city officials are informed about the activities and accomplishments of the

court, as well as its needs and problems. This was seen as advantageous to both the court and to the city.

A particularly problematic reporting relationship has the court administrator or clerk reporting to a city finance director or finance official. Administrators who had this reporting relationship generally reported significant problems. As one administrator put it, "My city uses the court for one of their main sources of income with no regards to my training. The judge is appointed and part-time; therefore, he won't overstep his boundaries. I don't feel I get his back-up when really needed." Another said, "In two previous cities where I was a clerk, the finance director and assistant city manager did not allow the court to properly follow state statutes. Did not understand closed/open cases. Undermined the authority of the court clerk. Did not feel the judge should be in charge of the court—both thought they should be in charge of the court, yet neither had any understanding of the court, its rules, or its role."

Also problematic are those courts in which the court clerk or administrator reports to the police department. Most respondents, though, found this structure to their liking (apparently because of good personal relationships with the police chief involved).

One administrator provided this overall assessment of the tension that can arise when the court is supervised by non-judicial personnel: "As a court administrator, I have always tried to maintain a certain degree of independence from the other offices of city government and I am finding this harder and harder and more frustrating all the time. I have lost several judges that I have worked for, because they stood up for what they believed the Constitution stands for, and because they were appointed and not elected, they were 'let go' by a majority of the board of aldermen or mayor. This does not give us, as court administrators or court clerks, much security in our positions."

Most court administrators and clerks want a separation from the executive branch of government. The vast majority of respondents wanted to report to the judge: 76% wanted to report only to the judge, while another 19% wanted to report to the judge and another city official (Figure 4). Many of those who suggested dual reporting both to the judge and to a city official suggested that this was important for the city officials to understand the court's operations and any problems faced there. A handful of respondents wanted to report to the city prosecutor or police chief; in each case, these respondents were suggesting the arrangement already in place in their city. Most, though, believed that it was especially important to make sure that judges not allow someone in the executive branch of city government to influence the judging of cases, and that the court structure should be separate from the executive branch of city government (Figure 8).

Respondents identified a number of areas of concern. Concerns appear to be higher among those who report at least in part to city officials, rather than solely to a judge. Respondents were asked to say whether "your current administrative structure (who you report to) [has] caused you to" do or experience a variety of things. The number one response, at 26%, was that it had caused them to experience stress

FIGURE 4: RECOMMENDED REPORTING ARRANGEMENT

Who should the court administrator/clerk report to:	
Judge	76%
Judge and city manager/administrator	13%
Judge and city prosecutor	6%
City manager/administrator	2%
City prosecutor	2%
Chief of police	1%

(Figure 5). A significant 11% said they had experienced “hopelessness” as a result of this reporting arrangement. More than 10% said it had undermined the authority of the court and caused a loss in control over how the court handles its budget. More than 5% said it had affected the way in which training money for court staff could be used or had changed how cases are decided. Smaller numbers indicated improper handling of confidential information, failure to file required reports, and even directives to violate judicial conduct rules.

Preliminary review of the types of reporting arrangements in place for those who noted these concerns or problems suggests that some of the supervisory arrangements are especially troublesome. While it is a small part of the overall sample, *all* of those who reported solely to a city finance director reported significant problems in response to this question. Similarly, 61% of those who reported to a city clerk and 73% of those who reported to the judge and a city manager reported one or more of these problems, while only 22% of those who reported solely to a judge reported one of them. The incidence of these problems was in the middle ground for those who report both to a judge and a prosecutor: 42% of those respondents reported at least one of these listed problems as a result of the reporting structure.

One person said that “stress comes with the job” and that may well be. It would seem, though, that some of the reporting arrangements cause increased levels of stress, as well as other problems.

A substantial number of respondents viewed one of the court’s important roles as generation of revenue. Surely it is not the goal of a justice system to produce revenue. Yet substantial numbers of the respondents said it was. Almost even numbers agreed and disagreed with the statement that “It is the responsibility of the courts to raise revenue for cities through fines and fees” (Figure 6). Thirty-one percent agreed and 34% disagreed, while the rest neither agreed nor disagreed. Similarly, 31% agreed that one of the purposes of municipal courts is to “generate revenue,” while 36% disagreed and the rest neither agreed nor disagreed (Figure 7). It would not be surprising that *municipalities* themselves viewed the genera-

FIGURE 5: PROBLEMS CAUSED BY CURRENT ADMINISTRATIVE STRUCTURE

Has your current administrative structure caused you to:	
Experience stress	26%
Experience conflict with a person in the executive branch of government	13%
Undermine the authority of the court	12%
Minimize your position of court administrator/court clerk	12%
Experience hopelessness	11%
Lose control over how the court either prepares or spends its budget	11%
Be threatened for your job/position	9%
Be unable to use the court’s training money in the manner you thought it should be	7%
Change how a case should be decided	5%
Change how a case was decided	5%
Be unable to supervise or discipline court staff	5%
Not to file a case that should have been filed	3%
Hire someone you did not think was the best candidate	2%
File a case that should not have been filed	2%
Not send a disposition to the Dept. of Revenue	2%
Be directed to violate the judicial code of conduct	2%
Release information to the public that was closed information	1%
Not release information to the public that could have been released	1%

tion of revenue from the issuance of traffic citations and court fines to be of some importance. It is perhaps more of a surprise to find that a substantial percentage of municipal *court officials* view it that way.

Education of those working in the courts appears to be needed, as the respondents did not uniformly show a clear understanding of the court’s role. Several questions in the survey were designed to determine the extent to which court administrators and clerks correctly perceived the court’s role and function. Questions were developed based on the Core Competency Curriculum Guidelines developed by the National Association for Court Management⁴ and the Trial Court Performance Standards,⁵ each of which summarizes the basic purposes and roles of the trial courts.

4. See *Core Competency Curriculum Guidelines: What Court Leaders Need to Know and Be Able to Do*, 18 CT. MANAGER No. 2 (2003).

5. See Pamela Casey, *Defining Optimal Trial Court Performance: The*

Trial Court Performance Standards, Winter 1998 COURT REVIEW, at 24, available at <http://aja.ncsc.dni.us/courtrv/cr35-4/CR35-4Casey.pdf> (last visited October 9, 2004).

In the list of questions used (Figures 7 and 8), all but one of the responsibilities or purposes listed *are* generally considered valid. Only the generation of revenue is not a purpose of the courts at all. While there was general understanding of many of these court responsibilities, one would not have expected such high numbers in the “neither agree nor disagree” column for several of the items. Significantly, judicial independence was one of those. While 49% said it was the responsibility of the court to “be an independent check on other branches of government,” 20% disagreed and 33% neither agreed nor disagreed. If we can’t convince those who work in our courts that this is an important aspect of courts in our system of government, we should not expect to do better with the public at large. Education of those who work in the courts, as well as the public and those who work in other branches of government, is needed.

Missouri’s municipal courts have dedicated, hard-working,

and service-oriented court administrators and clerks who are doing the best they can under the circumstances. I do not mean for this article to imply, directly or indirectly, anything else. These are good people trying to do the best they can to do their jobs and to accomplish the goals of their courts.

Some of the comments received reflect this quite well:

- “My judges and prosecutors all have a good working relationship.”
- “My court is in super order. We all respect each other and trust each other.”
- Structure is wonderful! No problems with my individual court.”
- “My court is so small, there is no one else to answer to but the city clerk.”
- “Equal treatment for all is our goal. Administration does not influence the judicial process.”
- “As a small municipal court, we try to carry out justice in a

FIGURE 6: VIEWS OF MUNICIPAL COURT OFFICIALS ON COURT’S PURPOSES

The purposes of municipal courts are to:	Strongly Agree	Agree	Neither Agree Nor Disagree	Disagree	Strongly Disagree
Do justice	63%	33%	3%	0%	1%
Guarantee liberty	38%	38%	19%	3%	2%
Enhance social order	27%	34%	27%	9%	4%
Maintain rule of law	60%	34%	4%	0%	1%
Generate revenue	10%	21%	33%	23%	13%
Resolve disputes	26%	47%	12%	12%	2%
Provide equal protection	46%	42%	10%	3%	1%
Ensure due process	56%	38%	4%	2%	0%
Rehabilitate persons convicted of crimes	8%	25%	39%	20%	9%
Deter criminal behavior	24%	46%	18%	11%	2%
Separate some convicted people from society	14%	28%	31%	18%	8%

FIGURE 7: VIEWS OF MUNICIPAL COURT OFFICIALS ON COURT’S RESPONSIBILITIES

It is the responsibility of the courts to:	Strongly Agree	Agree	Neither Agree Nor Disagree	Disagree	Strongly Disagree
Make impartial decisions	68%	26%	3%	2%	1%
Ensure fairness under the law	61%	37%	2%	0%	1%
Defend constitutional rights and freedoms	58%	33%	7%	2%	1%
Provide equal justice for rich and poor	62%	34%	3%	0%	1%
Be an independent check on other branches of government	23%	26%	33%	15%	4%
Raise revenue for cities through fines and fees	10%	21%	35%	20%	14%
Protect civil rights	41%	41%	12%	4%	1%
Protect individual rights	46%	46%	5%	3%	0%
Dispense punishment for crimes	46%	43%	10%	4%	1%
Resist political pressure	53%	32%	10%	4%	1%
Advance social and economic justice	22%	31%	38%	9%	1%

FIGURE 8: VIEWS OF MUNICIPAL COURT OFFICIALS ON OTHER QUESTIONS

The purposes of municipal courts are to:	Strongly Agree	Agree	Neither Agree Nor Disagree	Disagree	Strongly Disagree	Total
Because judges and court administrators/clerks are appointed/elected to make independent decisions, it is necessary for courts to maintain an administrative structure that is separate from the executive and legislative branches of government.	87 52%	63 38%	14 8%	2 1%	1 1%	167 100%
Judges should not interfere with agreements reached between prosecution and defense attorneys about charges that will be dismissed or modified when a defendant enters a guilty plea	11 6%	39 22%	40 22%	71 40%	18 10%	179 100%
Judges must be vigilant in protecting the administration boundaries of the court. For example, judges of the court should not allow someone in the Executive Branch of government to influence the court's impartial judging of cases.	109 59%	61 33%	9 5%	4 2%	1 1%	184 100%
The Code of Judicial Conduct applies to the judge and to the municipal court staff.	114 61%	59 31%	7 4%	0 0%	8 4%	188 100%

fair process to all parties in our court. I feel very strongly about that.”

- “I work for an excellent judge. He is honest, fair, and follows the letter of the law. Therefore, I have no concerns.”

The views expressed here are necessarily tentative and preliminary. More work needs to be done to analyze the data from this survey, to consider its meaning, and to review options for improvement. Nonetheless, despite the best efforts and work by the judges and staff of the Missouri municipal courts, problems do exist. At least in part, they appear to result in many places from the structural issues involved in setting up a part-time court. No doubt they also result from a failure to think through the ramifications of structure and the need for courts at all levels of an effective justice system truly to be independent. In addition, better training and education of court staff—with clear direction from higher-ups within the court system itself—certainly would help.



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FUTURE AJA CONFERENCES

2005 Midyear Meeting
Sanibel Island, Florida
May 12-14

Sundial Beach Resort
\$125 single/double

2005 Annual Conference
Anchorage, Alaska
September 18-23

Hotel Captain Cook
\$135 single/double

2006 Midyear Meeting
Coeur d'Alene, Idaho
May 18-20

Coeur d'Alene Resort
\$130 deluxe room;
\$160 premier room

2006 Annual Meeting
New Orleans, Louisiana

Hotel Monteleone
\$169 single/double

2007 Midyear Meeting
Newport, Rhode Island

2007 Annual Conference
Vancouver, British Columbia

The Tyranny of the “Or” Is the Threat to Judicial Independence, Not Problem-Solving Courts

Kevin S. Burke

If one values freedom, tolerance, and civil liberties, we live at a time when our planet is a dangerous place. Even if one accepts the notion that mankind is composed of decent and good human beings, not all societies place a premium on the values of freedom, tolerance, and civil liberties for all. While there are many factors that promote justice, judicial independence is the cornerstone to freedom and liberty. Now more than at other times in history, a strong, effective, and independent judiciary is imperative. Now more than ever, judges need to realize that maintaining an impartial independent judiciary is their responsibility.

In the eighteenth century, Montesquieu noted that a resolute judiciary is the only check on the executive branch, because it is the only protection a citizen has of their civil rights. Montesquieu thought judicial independence was the most important safeguard in our system of government to protect individual rights, including life, liberty, and property. Similarly, Alexander Hamilton argued that “the complete independence of the courts is peculiarly essential in a limited constitution,” noting “that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”¹ He concluded that an independent judiciary was “an essential safeguard against the effects of occasional ill humors in the society” that lead to the enactment of “unjust and partial laws.”²

Historians agree that judicial independence, newly established in the United States, was firmly secured in 1803 when Chief Justice Marshall wrote, in *Marbury v. Madison*,³ “It is emphatically the province and duty of the judicial department to say what the law is.” He continued by quoting the oath of office for a judge:

I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States.⁴

Although his leadership and opinion in *Marbury* was at the time controversial, Marshall provides today’s judicial leaders a model as to how courts should do what is right and just, even

if it is unpopular and not politically advisable.

Most of today’s discussions about judicial independence center on the degree to which a court may freely adjudicate cases without outside pressures impacting the decisions. For the judges of many state courts, the most obvious source of pressure is the electorate. However, while there are gross abuses in the electoral process that infringe on judicial independence for most of the nearly 28,000 state and municipal judges, there is less of a threat from the electorate than many would like to concede. Judicial independence is not absolute independence. Judicial independence is a means to an end, not an end in itself. Judges should function to promote democracy and civil rights, but cannot easily maintain their role as independent and impartial arbitrators if they are isolated from answering to anyone. Communities have a right to expect that courts will not just be independent, but fair, impartial, and effective in dealing with the problems that confront them as well.

Problem-solving courts are part of the way to be more effective. Problem-solving courts need not be a threat to fairness and impartiality, but they can be. Some have argued that problem-solving courts place judges in untenable positions that undermine judicial independence. They argue that due process requires that judges must refrain from any role other than that of neutral arbiter, listening to two (or more) sides presenting an issue and then deciding between them. They argue that it is impossible for judges to do more—that you can have due process *or* you can have a problem-solving judge, but that you cannot have both. False choices like this represent a tyranny of limited thought and an unnecessary limit on the ability of judges to perform the work today’s society and its problems require.

Judicial independence is easily understood and accepted when a judge acts in the traditional role of judge as a neutral, impartial decision maker. However, when problem-solving courts were created a century ago, innovative judges and court personnel redefined the role of the court and the judge. Today it is worth asking, what if the threat to judicial independence and impartiality is not external? What if the threat is from well-meaning and well-intentioned members of the judiciary or traditional allies of judicial independence?

The original problem-solving court, a juvenile court, was created a century ago in Chicago, and within 25 years the con-

Footnotes

1. THE FEDERALIST No. 78 (Alexander Hamilton).

2. *Id.*

3. 5 U.S. 137, 177 (1803).

4. *Id.* at 180.

cept had spread nationwide. When these juvenile courts originated, a primary goal was rehabilitation. Children are our future and the impetus for the creation of the juvenile court was the promise that courts could surely do better with our future than the courts were doing at the time. The original juvenile court was to determine and cure the juvenile's problem. To reach its goal, the court had to determine "what [the juvenile] is, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."⁵ Ideally, each disposition was to be customized to fit the child, such that the child would grow into a productive, useful adult citizen and put the errors of his youth behind him.

To distinguish this original problem-solving court from the other courts of the time, the founders used different terminology from that used in criminal court in an effort to clearly distinguish the two courts. Accordingly, a juvenile was a delinquent, not a criminal, and was adjudicated, not found guilty. A juvenile was held in detention, not jail, and if it was long-term, it was a "school," "camp," or "program" where the juvenile stayed, but not a prison. A juvenile was not sentenced, but committed.

As Shakespeare wrote, "What's in a name? That which we call a rose by any other word would smell as sweet."⁶ While the juvenile court founders intended the vocabulary to distinguish juvenile court, words are not what distinguish the court. The founders' theory only works if the "schools" and "camps" actually treat the child and are not just words masking punishment or prison.

In the original juvenile courts, the role of the judge was different from a traditional judge. Ideally, it was thought that the juvenile judge would not focus solely on guilt or innocence but on what forces and events in the child's life combined to bring the child to appear before the judge. An early description of the ideal juvenile court judge was a concerned parent, psychiatrist, and social worker wrapped up in a black robe who could guide a youth away from a negative life.

The early juvenile courts disregarded some of the established rules of law and the constitution by "rethinking" concepts of due process and creating new rules of evidence peculiar to the juvenile court. The court's founders believed that due process and some rules of evidence made it more difficult, if not impossible, to focus solely on what the child's best interests were. The original juvenile courts even discouraged the presence of lawyers as they would only add a burden to the court by introducing technicalities.

In making the decision to turn away from the fundamental constitutional principles to which every adult defendant had a right, juvenile courts felt that these rights were not in the child's best interest, since it was thought that the rights limited the judge's ability to do what was best for the child. No doubt the founders of the original juvenile courts had good intentions, but the concept removed an important check of the executive and legislative branches by removing the judicial safe-

guard that by design was to protect individual rights. This erosion of judicial impartiality and independence came from within the judicial branch, not from external forces as Montesquieu and Hamilton had feared might happen, but the effect was just as destructive.

Juvenile courts have helped millions of children. They were a good idea when they were founded and remain so today. Over time, juvenile courts recognized that juveniles were entitled to their constitutional rights and that ignoring one's constitutional rights is not in anyone's best interest. In holding that juveniles are entitled to the same constitutional rights as adults, Justice Fortas said in *In re Gault*:

The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. . . . Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of your juvenile courts. . . ." The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.⁷

As with any innovative idea, there is a period of struggle to figure out what works best. Post-*Gault*, the rules of evidence and due process were introduced back into juvenile court, and throughout the nation, lawyers, albeit frequently overworked, are present to represent the juveniles. The judge as a compassionate and caring parental substitute is still a model. However, judges who work in juvenile court must work to also maintain judicial fairness, impartiality, and effectiveness.

For decades, juvenile court was the only specialized problem-solving court, but today many people realize that problem-solving courts are beneficial in that they allow judges to focus on similar types of cases and defendants. As a result, more problem-solving courts, including drug, domestic abuse, community, and mental-health courts, have been created.

Drug court developed in response to the increase in drug crimes and the judiciary recognizing that the addictions of many of the defendants controlled their actions. The first recognized drug court opened in Miami in 1989. In the 15 years since it opened 1,470 additional drug courts have been created across the United States. While there are wide differences in the program details of these courts, the goal of drug courts is

As with any innovative idea, there is a period of struggle to figure out what works best.

5. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

6. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2.

7. *In re Gault*, 387 U.S. 1, 17-19 (1967). See also *Kent v. U.S.*, 383 U.S. 541 (1966).

simple—to strengthen supervision of defendants participating in drug treatment programs, to reduce recidivism, to build productive citizens, and to save prison space for violent offenders. Just as with the invention of the juvenile court, however, many of the proponents of drug courts designed these courts by “redefining” concepts of evidence, the role of lawyers, and due process. Many of the early proponents of drug courts thought that the adversary process itself threatened the effectiveness of their courts.

It is very conservatively estimated that 16% of the nation’s prison population have serious mental illnesses. Many believe that a more accurate estimate is nearly 35%. Any judge who sits on an arraignment calendar in a major city knows the problem—the laudable goal of deinstitutionalization of the mentally ill swept too many into the criminal justice system. With the success generated by many drug courts, problem-solving courts have begun to deal with mentally ill offenders through mental-health courts. In mental-health court, the objective is to help the defendant receive proper treatment rather than simply a jail or prison sentence. Just as with the drug and juvenile problem-solving courts, one of the judge’s roles is to balance the needs of the defendant against the needs of his or her family, while always remembering to consider public safety.

Like the founders of juvenile court, frequently the founders of new drug, mental-health, or other problem-solving courts believe that the defendants in these courts should not be “confined by the concept of justice alone.” Regrettably, it is argued that there is a conflict between the goals of the problem-solving courts and constitutional rights of due process.

The challenge for all problem-solving courts is balancing the role of the judiciary. An important lesson learned from the early juvenile courts is that a judge cannot abandon his or her neutral role in the justice process, no matter how noble the cause. The judge can become a partner with the key players in the problem-solving courts, but there is a tyranny of the “or” that presents a severe threat to problem-solving courts. The tyranny of the “or” poses the choice as treatment for addiction or surrendering a defendant’s right to due process. Treatment or surrendering your right to due process are not choices that are necessary, but rather represent the evil created by the tyranny

of the “or.” The tyranny of the “or” is a viral poison that limits the possibility of problem-solving courts as an accepted approach to more universally dealing with the problems confronting the nation’s courts. More importantly, the tyranny is a viral poison that can undermine judicial independence, fairness, and impartiality.

Every judge, regardless of assignment, struggles to find the balance between neutrality and caring, but this is especially important in problem-solving courts. In the context of the problem-solving court, the judge’s role is not the typical role of referee between two adversaries, but rather a judge is a ship’s captain, directing the course of the ship or the court. Steering a ship during the storms that becloud the justice system is not an easy task.

The answers to the balance between appropriate interdependence and abandoning neutrality are never clear cut. Minnesota Chief Justice Kathleen Blatz has championed the Children’s Justice Initiative (CJI). CJI is a project to shift the focus of the child-protection system to better serve the child. It focuses on a safe, stable, and permanent place for the child in a nurturing family. To achieve this, CJI revolves around child-centered decision making, while protecting the due process of all parties, recognizing cultural and social differences, and holding the system accountable. A century after the creation of juvenile court and a quarter century after the growth of problem-solving courts, CJI is setting goals and beginning to measure performance in juvenile court. For example, CJI has a goal that “proceedings are conducted in a fair manner with strong judicial oversight.” The table found in Figure 1 illustrates how this goal is measured by CJI.

It is possible to measure the effectiveness of problem-solving courts in part by measuring tangible outcomes, such as the response time of the court, the timeliness of the proceedings, and the sufficiency of representation. These are important and easily ascertainable data that do in part explain a court’s performance. However, the performance measures need to go a step further. Problem-solving courts need to ask such questions as: Is the court perceived as being fair to litigants and other constituents? Do litigants perceive they are being listened to? Do litigants understand the orders given by the

FIGURE 1: MINNESOTA CHILDREN’S JUSTICE INITIATIVE

STANDARD	MEASURE	2002	2003
Guardian ad litem (GAL) is assigned on all cases	Percent of children appointed or assigned a GAL	88%	91.6%
Adjudication or dismissal occurs within 60 days of the first hearing	Average number of days between first hearing and adjudication	94.8	96.2
	Percent of children for whom adjudication occurred within 60 days of first hearing	56.1%	52.8%
In-court review hearings are held at least every 90 days	Average number of days between disposition and first in-court review hearing	128.1	84.5
	Percent of children for whom first in-court review hearing occurred within 90 days of disposition	56.7%	68.4%

court? All courts, regardless of whether they view themselves as problem solving or not, enhance their independence if they are held accountable for their answers to these questions. The best strategy for problem-solving courts to minimize the risk that the tyranny of the “or” presents is to adopt these types of performance measures.

One of the unfortunate side effects of urbanization is the disconnect that can occur between government and the governed. Courts in an urban setting, like other parts of government, can lose their connection to the problems facing the community. The result is not just a lack of effectiveness but the erosion of public trust and confidence that courts need in order to thrive. Problem-solving courts need not be specialized dockets, but can also be a court’s global response to a beleaguered community’s problems. Community court is a problem-solving court, but one that presents yet another challenge for judicial independence. The issue for community court is not just to maintain the commitment to individual litigants’ right to an independent, fair, and due-process-oriented court. The issue for the community court is the community connection itself.

Perhaps the most notable example of a successful community court is the Red Hook Community Justice Center in Brooklyn.⁸ About a decade ago, a multi-jurisdictional court was created that combined criminal, civil, and family matters that arose from the police precincts in the neighborhoods. Benefits of this court include community service directly in the community for small-time offenders, and the public is much more aware of what the penalties are for the worst offenders. Since this problem-solving court opened, crime in the Red Hook District has decreased 60%. The presence of the problem-solving court in the community in which the problems arise increases the community feeling safe in their own homes, as well as feeling that there is meaningful access to justice in an urban setting for non-criminal matters. Community confidence may be a less tangible measurement of the effectiveness of problem-solving courts than the specialized version of case-type courts, but the results are just as important.

There is no reason to fear community court. In fact, judicial independence, fairness, and effectiveness can be strengthened through appropriate interdependence with the community and other branches of government. The success of a problem-solving court like the community court in the Red Hook District of Brooklyn demonstrates that the judges are far more effective when they are aware of the problems and of the successes in the community and resources that can be assembled to assist the court. The community court in Red Hook is successful in large part because of an open, visible working relationship between the community and the justice system. There is benefit that flows from restorative justice initiatives that involve the community beyond the positive impact on any particular defendant. Public trust and confidence in the judicial branch is

enhanced if the community sees that judges care. Judges who are familiar with the community are better able to customize the punishment to the crime and the offender. This in turn allows the community to see justice in action and government being responsive.

Traditions of judicial neutrality and detachment are bedrock; however, if judges wear blinders that shield them from seeing the resources and outcomes of courts, they cannot be effective in modern society. Unfortunately, that is exactly what some judicial ethicists and traditional allies of judicial independence want from their judges—neutrality to the point of isolation from becoming familiar or working with the resources of the problem-solving court.

States have different traditions about the appropriate collaboration of the judiciary with the community or the executive and legislative branches. Programs such as Minnesota’s Children Justice Institute and the Red Hook Community Court encourage judges to work with organizations that may have an interest in a case outcome. Collaboration to effect systemwide improvement is the mantra of those involved in problem-solving courts. Sometimes the mantra can be misunderstood. Some attempts to limit a judge’s activities outside the courtroom simply undermine the potential of courts to appropriately work with the community.

In Texas recently, a family-court judge was criticized and alleged to have committed misconduct when his impartiality was called into question because he was a board member for a local child-protection organization. The family-court judge must rule on whether a child should be removed from his or her parents and placed in state custody. Therefore, in the minds of some Texas commentators, the alleged misconduct occurred because the family-court judge’s position on boards could impact his ultimate rulings on custody cases.

The role of a judge is changing. While there are always reasons for judicial leaders to be cautious about change, particularly when it comes to ethical rules, it is proper and necessary for a judge to be active in policy formation in virtually every problem-solving court. Judicial codes are perfectly understandable when they prevent judges from creating personal conflicts of interest by serving on boards that may appear before them in court. The line of demarcation is more difficult to ascertain when the court itself is designed to foster a new relationship between the judiciary and the community. The approach advocated by some in Texas and, to be fair to Texas, in other jurisdictions, is yet another variation on the tyranny of the “or.” It’s just as viral and just as destructive. Collaboration

**All courts . . .
enhance their
independence if
they are held
accountable for
their answers to
these questions.**

8. For an overview of the Red Hook Community Court, see GREG BERMAN, RED HOOK DIARY: PLANNING A COMMUNITY COURT (1998), available at http://www.courtinnovation.org/pdf/redhook_diary.pdf (last visited October 5, 2004). For general information about Red Hook Community Court, see the website of the Center for Court Innovation at http://www.courtinnovation.org/demo_

[09rhjc.html](http://www.courtinnovation.org/demo_09rhjc.html) (last visited October 5, 2004). For an overview of community courts generally, see David Rottman, Community Courts: Prospects and Limits (2002), available at http://www.ncsconline.org/wc/publications/Res_CtComm_Prospects&LimitsPub.pdf (last visited October 5, 2004).

and interdependence with others *or* impartiality and fairness are not mutually exclusive.

Judges are in a unique position to serve as a mechanism for reform outside of the courtroom. Judicial canons support and even encourage this role. In 2002, in *Republican Party of Minnesota v. White*,⁹ the U.S. Supreme Court held that a judicial canon preventing judicial candidates from speaking regarding disputed legal and political issues was a violation of the First Amendment. *White* is viewed by many in the judicial community as undermining judicial independence. Viewed in another light, the case stands for a broader point that enables problem-solving judges to make the administration of justice more effective. In delivering the Court's opinion, Justice Scalia noted that judges are not only permitted, but are encouraged to state their opinions outside the context of adjudication on disputed issues in forums such as classrooms, books, and speeches.¹⁰ Being appointed or elected to the bench does not create a cone of silence that may only be lifted when issuing orders in the courtroom.

In New York's 2004 state of the judiciary speech,¹¹ Chief Justice Judith Kaye quoted a line from an editorial, which stated, "Being a judge should be a source of pride, not patronage."¹² She continued:

It is indeed a privilege—the greatest privilege imaginable—to sit in judgment on fellow human beings, to review challenged acts of government, to declare justice. Judges, above all, feel it. With privilege, of course, comes the heavy responsibility to make good decisions in individual cases, to treat people with dignity and sensitivity, and to safeguard the efficacy and integrity of the process.¹³

Judges speaking out should come not only when they see a way to improve things, but when changes have worked. Such as the judge from upstate New York, who wrote to Chief Justice Kaye:

"I for one single-handedly attest to the revolution in the criminal justice system with the advent of the drug treatment court and domestic violence court. Today, we do it a lot better than it was done yesterday. . . . I am a local judge positively affecting the lives of many people in my community. A great blessing I cherish."¹⁴

Not every judge is comfortable advocating for change. Not every judge necessarily has the skills to be good at that type of advocacy and system change. Some other judges believe it is not their role to speak out about problems with how the mentally ill or drug addicted are treated in court. These judges are sincere and care about the problems. Those attitudes present the final tyranny of the "or" that problem-solving courts face. Either you are an advocate for problem solving *or* an out-of-touch mechanical jurist.

Problem-solving courts and the judges who preside in them must be able to be innovative and outspoken about how to deal with the litigants in these courts. To advance their cause, they need to make converts of many of their judicial colleagues. What made nearly all of the early problem-solving courts effective was not just the bells and whistles of the courts, but an attitude in everyone in the courtroom that the judiciary cared and the judiciary listened. All judges will enhance this discussion if they resist the tyranny of the "or." The tyranny of the "or" is the true threat to judicial independence, not problem-solving courts.



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9. 536 U.S. 764 (2002).

10. *Id.* at 779.

11. Judith Kaye, *The State of the Judiciary: 2004* (February 9, 2004), available at <http://www.courts.state.ny.us/ctapps/soj.htm> (last visited October 5, 2004).

12. *Id.* at 23.

13. *Id.*

14. *Id.* at 10.

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION



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

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Resource Materials on Judicial Independence

Compiled and Edited by Roy Schotland

In addition to the articles found in this issue of *Court Review*, which present the considered views of the authors on various subjects, we also seek to stimulate the thinking of the reader regarding judicial independence. For those attending the annual conference of the American Judges Association this year, this will involve review of the materials in this issue and interchange with authors of the articles and a number of others who have given substantial thought to the topic—as well as interchange with other judges in attendance.

For those whose involvement with the National Forum on Judicial Independence will come only through the pages of *Court Review*, in this issue and the next, we provide in the next few pages some materials that we hope will give you pause and stimulate your thinking. There are two distinct types of materials included. We are indebted to Professor Peter M. Shane of Ohio State University, who has given permission to include several of the hypothetical problems on judicial independence that he presented to the U.S. Conference of Chief Justices at its 2001 midyear meeting. In addition, from a variety of sources, I have culled the views on judicial independence of a number of thinkers. Interspersed within the views of others I have included some of my own comments.

HYPOTHETICAL PROBLEMS ON JUDICIAL INDEPENDENCE

Let us begin, then, with the hypothetical problems presented by Professor Shane. We note, also, that the sixth hypothetical was contributed to Professor Shane by Stewart Jay, professor of law at the University of Washington School of Law.

On decisional independence:

1. An East Carolina District (*i.e.*, trial) Court judge has issued an injunction against the state's current system of financing its public schools through property taxes. While the case is on appeal to the Court of Appeals, the House majority leader declares on the floor of the House: "The judiciary has requested \$50 million to upgrade court facilities and technology and to improve judicial pay. If the Supreme Court ultimately affirms the challenge to property tax-based public school financing, they will not see a dime of the budget they have requested." Is this appropriate? Would it be any more or less appropriate for the House majority leader to convey the same message privately to the Chief Justice?
2. East Carolina's District Court has issued an injunction requiring a series of administrative and facilities improvements in the state system of publicly funded mental hospitals. While the case is pending on appeal, the House of Representatives schedules a committee hearing on the mental hospital system and requests that both the District Court judge and the Chief Justice of the East Carolina Supreme Court testify. Should they?
3. The Constitution of the state of East Carolina provides that Supreme Court Justices "shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office." During the past year, the court has decided two highly controversial cases. In the first, the court invalidated a state law prohibiting the distribution of birth control information and supplies to minors without parental consent or notification. The court based its decision on the "right of privacy" under the East Carolina Constitution. In the second, the court upheld a custody award to the divorced husband of a woman managing partner at a major law firm on the ground that the lower court properly took account of the time demands of the mother's job. Outraged conservative legislators have demanded the impeachment of the justice who wrote the birth control opinion, while outraged liberal legislators have demanded the impeachment of the justice who wrote the custody opinion. Is either demand proper?
4. East Carolina Supreme Court Justice Nicole Green concurred last year without opinion in a unanimous opinion vacating a death sentence based on procedural error in the sentencing hearing. During her retention election, a conservative radio talk show host has galvanized a campaign against Justice Green on the ground that she is "leading the anti-death penalty charge" in East Carolina. The Governor, facing a tough reelection campaign next year, has publicly expressed his doubts about any justice who would "deny the people of East Carolina the benefit of the ultimate penalty for a heinous capital crime." How should Justice Green, the judiciary, or the organized bar respond?
5. Fred Bundy has been convicted and sentenced to death for an especially heinous killing of a police officer. The case against him is overwhelming on the facts. But his court-appointed lawyer was observed at trial sleeping through portions of the testimony of key witnesses. He failed to bring out on cross that one of the witnesses against Bundy had been convicted of fraud. Also, although Bundy's trial venue was probably the most conservative county in East Carolina, the defense attorney wore a "Gay Rights" button on the first day of trial. On appeal, a three-judge panel of the state's intermediate appellate court voted 2-1 to uphold his conviction. The dissenting judge, Lonnie Brown, would have ordered a retrial on the ground of ineffective assistance of counsel. (As a general matter, Judge Brown has voted to affirm criminal convictions in 90% of the cases he has heard on appeal and in 78% of the cases involving death sen-

tences.) Unlike Judge Brown, his opponent in his next reelection campaign is a multimillionaire with virtually unlimited resources for advertising. The opponent's ads show a male hand unlocking a jail door and allowing the inmate, a scruffy and malevolent looking fellow, to walk out smirking. A voice says: "Judge Lonnie Brown is soft on crime. If it had been up to Judge Brown, Fred Bundy would be a free man today." How should Judge Brown, the judiciary, or the organized bar respond?

On institutional independence:

6. Reacting to complaints from the public and the bar about the tardiness of certain trial judges in completing cases, the state enacts a law to encourage speedier dispositions. The Commission on Judicial Administration is charged with setting general timetables for disposing of various matters (e.g., motions for summary judgment/dismissal, post-trial motions, issuing findings of fact/conclusions of law, rendering final judgments). Each trial judge in the state is required to keep a record of the time spent on these matters in every case. These records are reported to the Commission on an annual basis. The Commission is required (1) to publish a "report card" (using such labels as "completes work on time" or "takes substantially longer than other judges to decide cases") to be included in a Voters' Guide whenever any sitting judge seeks reelection, and (2) to impose penalties (measured as a portion of the judge's salary) if the judge exceeds the time limits by certain percentages, i.e., the slower the disposition, the higher the penalty.

The state constitution provides, "The judges of the Supreme Court and judges of the superior courts shall severally and at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected." The constitution also states: "Each cause submitted to a judge of a superior court for his or her decision shall be decided by such judge within 90 days from the submission thereof; *Provided*, that, if within said period of 90 days, a rehearing shall have been ordered, then the period within which the judge shall decide shall commence at the time the cause is submitted upon such a hearing." Are the new statute's provisions appropriate responses to judicial tardiness?

7. East Carolina's Senate Committee on the State Judiciary sends a questionnaire to the presiding judge of each state court and to the Chief Justice of the Supreme Court. The questionnaire seeks not only case management statistics for each court as a whole, but also the following statistics for each judge:

- Number of opinions assigned
- Number of opinions written

- Average number of days between case argument and announcement of decision
- Cases still pending for decision for 30 days or less, for 30-90 days, for 90-180 days, and for more than 180 days
- Hours per week on non-court related professional activity, including a list of all such activities
- Hours per week on non-case related travel, including documentation of the expenses for all such travel; and
- For each appellate judge, the number of votes to affirm lower court judgments and the number of votes to reverse.

Are all of these inquiries appropriate? How should the courts respond?

8. The East Carolina Court of Appeals hears appeals as a matter of right from virtually all state district court cases. The nine judges have a screening system. If a screening panel of three judges agrees (a) that a case does not require oral argument before resolution, and (b) on the proper disposition of the case, then the case is resolved entirely on the briefs. Approximately 40% of the court's caseload is handled this way. The court also has a "summary affirmance" process that permits lower court opinions to be affirmed without a written statement of reasons. About a quarter of the cases screened and about 10% of the cases decided after oral argument are summarily affirmed. The East Carolina Constitution expressly authorizes the state legislature to enact procedures for all courts below the Supreme Court. The legislature is considering a bill that would require the Court of Appeals to permit oral argument in all cases and to decide each case based upon a written opinion stating the court's reasons for affirmance or reversal. The legislation does not contemplate the creation of new judgeships. How should the state judiciary respond?

Reacting to complaints from the public . . . , the state enacts a new law to encourage speedier dispositions.

VIEWS ON JUDICIAL INDEPENDENCE

The excerpts to follow from several sources are intended to advance one's thinking about the concepts raised in considering judicial independence. After one of them, I have included my own comments (marked as "Editor's Note").

John Adams' view on judicial independence, according to David McCullough's recent biography: Essential to the stability of government and to an "able and impartial administration of justice" is separation of judicial power from both the legislative and executive. There must be an independent judiciary. "Men of experience on the laws, of exemplary morals, invincible patience, unruffled calmness and indefatigable application" should be "subservient to none" and appointed for life.¹

Footnotes

1. DAVID G. McCULLOUGH, JOHN ADAMS 201 (2001).

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.

Felix Frankfurter

James Madison saw independence for judges as a protection against legislative and executive oppression, but in 1789, on the floor of the House of Representatives when he was proposing the Bill of Rights, he added this: “[I]ndependent tribunals of justice will consider themselves in a peculiar manner

the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive.”²

The States’ treatment of judicial independence varied. The “founding generation was ambivalent about the independence of the judiciary.” The nature of this ambivalence was the tension between competing values. On the one hand, an impartial, independent judiciary was viewed as a necessary protection of the rights of the people. On the other hand, a truly independent judiciary would conflict with the principle of majority rule.³

Felix Frankfurter, in the 1951 case of *Dennis v. United States*: “But how are competing interests to be assessed? [W]ho is to make the adjustment? — Who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.”⁴

Otto Kaus, who served on the California Supreme Court from 1980 through 1985, described memorably the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. “You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”⁵ He said this in 1985, the year before Chief Justice Rose Bird was denied retention, along with (and because of) two of her colleagues.

Alfred P. Carlton, Jr., a North Carolina lawyer who served as president of the American Bar Association in 2002-2003: “Judicial independence is precious to our way of life. Judicial independence is a fundamental principle upon which our country was founded and for which Americans have died, not only at Yorktown and Valley Forge, but at the Alamo, Iwo Jima, Inchon, Khe Sanh, and, now, Mazar-E-Sharif.”⁶

The majority in *Republican Party of Minnesota v. White*⁷ held that a provision of the Minnesota Code of Judicial Conduct, which said candidates for judicial office, including incumbents, could not “announce his or her views on disputed legal or political issues” violated the First Amendment. That Code provision, called the “announce clause,” was in effect in only 7 other states at the time of the *White* decision. Most other states with codes based on the American Bar Association’s Model Code of Judicial Conduct had since adopted different, more narrow restrictions.⁸ From the majority opinion:

“One meaning of ‘impartiality’ in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. . . .

“We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

“It is perhaps possible to use the term ‘impartiality’ in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is

2. Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS. J. 115, 119 (1992) (quoting June 8, 1789 speech of Madison).
3. Gerhard Casper, *Separating Power: Essays on the Founding Period* 137 (1997), as described in Paul J. DeMuniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 373 (2002).
4. 341 U.S. 494, 525-27 (concurring opinion).

5. Gerald F. Uelmen, *Otto Kaus and the Crocodile*, 30 LOYOLA L.A. L. REV. 971 (1997).
6. Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 FORDHAM URBAN L.J. 835, 837 (2002).
7. 535 U.S. 765 (2002).
8. See generally Roy A. Schotland, *Should Judges Be More Like Politicians?*, Spring 2002 COURT REVIEW at 8.

virtually impossible to find a judge who does not have preconceptions about the law. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. ‘Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.’

“A third possible meaning of ‘impartiality’ (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose. . . .

“The short of the matter is this: In Minnesota, a candidate for judicial office may not say ‘I think it is constitutional for the legislature to prohibit same-sex marriages.’ He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of openmindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”⁹

Editor’s Note: The discussion of bias and impartiality in the Court’s decision in *White* would have benefited from remembering the thoughts of Justice Cardozo, and Kenneth Culp Davis who, like Scalia, taught administrative law. Cardozo wrote that judges are shaped in part by “the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”¹⁰ Davis, meanwhile, explained the meaning of bias:

“The concept of ‘bias’ has at least five meanings. Although the five kinds of bias shade into each other, the main ideas about bias in adjudication may be stated in five sentences, each of which deals with one kind of bias: (1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is *not, without more, a disqualification*. [As the great Ad Law professor Louis Jaffe wrote: “Our tradition rightly understood is that a judge shall be neutral toward the question of whether a specific defendant is guilty. It is a

perversion of the tradition to demand that the judge be neutral to the purposes of the law.”] (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is *not, without more, a disqualification*.

(3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be. (4)

A personal bias or personal prejudice, that is an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source; such partiality may be either animosity or favoritism. (5) One who stands to gain or lose by a decision either way has an interest that may disqualify if the gain or loss to the decisionmaker flows fairly directly from her decision.”¹¹

* * * *

The remaining excerpts (except for the last two at end) are from a book that followed a 2001 conference on judicial independence at University of Pennsylvania Law School, sponsored by the American Judicature Society and the Brennan Center for Justice at New York University. The book opened with these comments from **Stephen B. Burbank, Barry Friedman, and Deborah Goldberg:**

“Believing that the debate about judicial independence has produced more heat than light and that scholars in different disciplines have been talking past one another, we convened a conference of some 30 prominent academics with backgrounds spanning four disciplines to discuss what we know, and ought to know, about judicial independence. . . .

“At the core of the conference sat the puzzle of exactly what we mean—or could possibly mean—by the phrase ‘judicial independence.’ ‘Independent from what?’ was a typical reaction, and every bit of common wisdom on the subject was challenged. For example, . . . the common intuition of the participants was that wholly unaccountable judges are as likely to deviate from what the law might demand as follow it. Thus, *some* amount of accountability seems essential to ensure judicial adherence to popularly specified legal norms and therein lies a dilemma. . . .

“An important insight emerged from the conference repeatedly: Policy debates and academic research about

9. 535 U.S. at 775-780.

10. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921).

11. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 2 *ADMIN. L. TREATISE* 648-49 (4th ed. 2002) (emphasis added).

Decision makers are independent if they are not affected by any signal from another actor.

Edward L. Rubin

the judiciary should separate high—or constitutional—courts from other courts According to the traditional view, trial and intermediate appellate courts deal with the gritty facts of ordinary cases. It is here, specifically, that we seek decisions rendered on those facts free of any outside influence. High courts and

constitutional courts, by contrast, are more likely to deal with broad questions of public policy. Although we may want those judgments rendered in a forum different from that of ordinary politics, we may not want them entirely immune from democratic accountability.”¹²

Edward L. Rubin, a law professor at the University of Pennsylvania law school, wrote:

“[Let us clarify] the distinction between independence and neutrality, a separate matter that is frequently conflated with it. Decision makers are neutral if they are indifferent about the consequences of their decisions; decision makers are independent if they are not affected by any signal from another actor. An umpire for a baseball game is neutral if he or she does not care which team wins the game; he or she is independent if no one on the field or in the stands can influence his or her calls. The two considerations can operate separately, although they often occur in conjunction. For example, the umpire has lost both neutrality and independence if one team offers a bribe to decide in its favor, but only neutrality is lost, and not independence, if he or she has bet on one team. Racist judges are perfectly independent; no signal from any other actor induces them to decide against minority group litigants. They are entirely self-motivated.

“Neutrality is not even desirable in most governmental situations because we generally want public officials to care about the results of their actions. What is undesirable, and what we attempt to prevent, are decisions based on personal gain or on factors that we deem to be irrelevant. . . .

“[W]e are not concerned if a judge’s decision will improve his or her position, financial or otherwise, as a member of the general public. As critical legal studies, feminist, and critical race theory scholars have pointed out, public decision makers often act, or can be seen as acting, to improve the status of their own social class, gender, or race, but our concept of required neutrality does not reach these effects. Similarly, prejudice against an individual or group may be considered a forbidden breach of neutrality by the decision maker if that attitude is

deemed irrelevant by law or public morals. It is currently considered improper for a public official to explicitly disfavor blacks or Jews, but this was not true with respect to blacks in early 19th century America, nor with respect to Jews in medieval Europe, and it is currently not improper for officials to express distaste for criminals. But our concept of neutrality only reaches outright and explicit prejudice; the collection of attitudes that every individual possesses is regarded as too complex and obscure to serve as the basis of a legal rule In general, neutrality, although an important concept, is a limited one, and reaches only extreme situations such as a direct financial interest in the outcome, or an explicitly and strongly stated prejudice that is deemed legally improper. . . .

“[N]eutrality is a practical standard only in the most extreme situations because attitudes and judgments are ubiquitous. Politics is similarly ubiquitous and no general prohibition of it, however defined, can constitute a coherent standard.”¹³

Stephen B. Burbank, an administration of justice professor at the University of Pennsylvania, **Barry Friedman**, a law professor at the New York University School of Law, and **Deborah Goldberg**, a scholar with the Brennan Center for Justice, wrote:

“[D]iscussions of judicial independence often proceed on the erroneous premise, stated or unstated, that judicial independence and judicial accountability are discrete concepts at war with each other, when in fact they are complementary concepts that can and should be regarded as allies. This supposed dichotomy between independence and accountability is a favorite target of legal scholars in search of a paradox The instrumental view of judicial independence urged here, on the other hand, requires no dichotomy and sees no paradox, because it proceeds from the premise that judicial independence and judicial accountability are different sides of the same coin. . . .

“No rational politician, and probably no sensible person, would want courts to enjoy complete decisional independence, by which we mean freedom to decide a case as the court sees fit without any constraint, exogenous or endogenous, actual or prospective. Courts are institutions run by human beings. Human beings are subject to selfish or venal motives, and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom. In a society that did not invest judges with divine guidance (or its equivalent), the decision would not be made to submit disputes for resolution to courts that were wholly unaccountable for their decisions. One implication of this proposition is that we need law to constrain judges rather than judges to serve the rule of law.”¹⁴

12. Stephen B. Burbank, Barry Friedman, & Deborah Goldberg, *Introduction*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 4, 7 (2002).

13. Edward L. Rubin, *Independence as a Governance Mechanism*, in

JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 65-66, 69 (2002).

14. Burbank, et al., *supra* note 12, at 10-12.

Lewis A. Kornhauser, an economist and law professor at the New York University School of Law, wrote:

“First, the judge should only be free of ‘inappropriate’ influence. Second, and related, the judge need not be free of the influence of *all* individuals. The parties may influence a judge through legal arguments that persuade judges and that are offered orally in court or in papers submitted to the court; such persuasion does not constitute ‘inappropriate’ influence. Arguments offered *ex parte* might be inappropriate though we may not characterize the exercise of this sort of influence as compromising judicial independence. Similarly, judges who take bribes are subject to inappropriate influence. Neither lower court judges who follow the decisions of superior courts nor state supreme court justices who are persuaded by the rulings of courts outside their jurisdiction are subject to inappropriate influence. Most important, judges who render judgment on the basis of commitment to some set of moral and political principles are not subject to inappropriate influence.”¹⁵

“The concept of judicial independence does not further the development of normative theories of adjudication, does not advance understanding of the functioning of extant judicial systems, and does not aid in the design (or improvement) of judicial institutions. . . .

“The concept of judicial independence is not useful. Legal debates over adjudication, debates over the design of judicial institutions, and the explanation of the emergence and performance of various judicial institutions would be clearer and progress more rapidly if we abandoned the concept.”¹⁶

Mark Twain, who needs no title, wrote:

“Man is the only animal that blushes. Or needs to.”

Stephen B. Burbank, Barry Friedman, and Deborah Goldberg again:

“Perhaps the most important and least understood aspect of judicial independence is the relationship between public opinion and judicial decision making. . . . Do judges cater to, or are they even aware of, public opinion? And does the public watch and react to what judges do? In the common wisdom of judicial independence, the answer to the first question ought to be no but the second regrettably is yes. As it turns out, this may be exactly backward. What evidence there is suggests that a remarkable number of high-profile decisions comport with public opinion. At the same time, it seems the public has very little clue what the judiciary is up to. This juxtaposition of results presents serious normative questions about whether judges are paying too much attention to public opinion and whether the public is paying too little atten-

tion to what judges are doing. It also presents a real set of questions about how the public forms its opinion of judges.”¹⁷

Edward L. Rubin again:

“[I]ndependence is not an inherent feature of the judiciary, either as a descriptive or a normative matter. Rather, it is a technique of governance that is widely deployed in a modern state and that serves a variety of functions. The question, therefore, is entirely open. Should the judiciary be independent and if so, to what extent?”¹⁸

“[I]n important cases, in which major issues of public policy are at stake, . . . signals [transmitted to the court by nonjudicial governmental units or by private parties] are deemed acceptable because these signals are understood to relate to the case’s implications, not to the fate of the particular individuals who are before the court. The extreme version of this is public interest litigation. In *Brown v. Board of Education*, few people really cared where Linda Brown went to school; the issue was American apartheid and thus people felt as free to express their views about the case as they did when the same issue came before Congress in the debate over the Civil Rights Act.”¹⁹

“The prohibition of . . . signals to the judiciary applies only to decisions in specific cases, however, and not to signals about the judiciary’s general performance. It is considered acceptable for public officials to transmit informative signals and expressive signals to the judiciary; for example, a legislator can provide information to the judiciary about the extent of medical malpractice and condemn the judiciary for being too lenient with defendant physicians, or he or she can note the number of offenders on probation who commit additional offenses, or issue a public condemnation of the frequency with which the judiciary grants probation. Similarly, it would be considered quite proper to condemn the general performance of a particular state’s judiciary as reflecting racial prejudice and to document that condemnation with statistics about the differential treatment of the races in question. Such statements are part of our accepted political discourse; the judiciary’s performance is a matter of public concern, and non-judicial officials are entitled to speak to such matters, whether or not they have a direct role in the selection of judges. . . .”²⁰

What evidence there is suggests that a remarkable number of high-profile decisions comport with public opinion.
Stephen B. Burbank,
Barry Friedman &
Deborah Goldberg

15. Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 48 (2002).

16. *Id.* at 53-54.

17. Burbank, et al., *supra* note 13, at 6-7.

18. Rubin, *supra* note, at 69.

19. *Id.* at 75.

20. *Id.* at 77-78.

The real problem is that an electoral regime inevitably exposes judges to . . . signals from the general public.

Edward L. Rubin

“Thus far, only the adjudicatory function of the judiciary has been considered. Although this certainly constitutes the bulk of the judiciary’s role, it does not constitute the entirety. Courts are assigned a variety of other tasks that vary in content from one American jurisdiction to another. . . . Consider, for example, the federal judiciary’s role in drafting the Rules of Civil Procedure. By

statutory authorization, the chief justice of the United States appoints an advisory committee to develop the initial draft. This draft, if approved by the advisory committee and two intermediate bodies, is submitted to the Court, which has authority to revise it. . . .²¹

“This point is underscored by the much more extensive independence that is granted to the Federal Reserve Board in carrying out its monetary control function. At present, the Fed controls the money supply—the amount of cash, check-able accounts, and certain other assets available in the nation—by buying and selling government securities on the open market. . . . To begin with, the governors of the Federal Reserve System, who constitute a significant portion of the Open Market Committee, are appointed to 14-year terms and can be removed only for cause; other members of the committee are civil service employees with similar levels of protection. . . .²²

“Still another example of the way that the mechanism of independence can be used for nonadjudicatory decisions that implicate efficiency, not fairness, is the Defense Base Closure and Realignment Act of 1990. The end of the Cold War, the change in defense strategy by military analysts, and the effort to balance the federal budget brought an awareness that the United States had an excessive number of military bases and that a significant number should be closed. But most bases are economic mainstays of the community where they are located, a phenomenon that has very little to do with the base’s military necessity. Legislators often win or lose elections based on their ability to secure or retain such valuable economic assets for their constituents; thus, any effort to close military bases runs into determined opposition from the affected state’s delegation, the classic pork barrel scenario that ends up sacrificing public interest to particularized benefits. Congress enacted the Base Closure Act to prevent itself from succumbing to these political pressures, the image of Ulysses lashing himself to the mast as he passes the Sirens being an inevitable metaphor. . . .

“[I]ndependence is not always linked to fairness, any more than it is linked to the judiciary. It is not a necessary aspect of our efforts to provide fairness to groups, for

example. On the other hand, independence is often a mechanism that is deployed to achieve other goals, such as efficiency. Control of the money supply is a function in which efficiency considerations have suggested that the decision maker should be granted a very high level of independence, one that is virtually as extensive as that granted to adjudicators, and perhaps greater in certain ways. The same considerations have led to the creation of other agencies with lesser, but still significant levels, of independence such as the FTC and the FCC. These uses of independence have nothing particular to do with fairness or with the judiciary. . . .²³

“Elections are a different matter. Although it is not possible for the electorate, as a body, to transmit an informative signal to a judge—how would a general mass of citizens give the judge any persuasive information about a particular case—it can certainly transmit an expressive signal. Such signals can be extremely influential, whether the judge must stand for reelection after a term of years or is subject to periodic or ad hoc recall. Consider, in our current tough-on-crime environment, a judge who feels that the case against a person who is probably guilty of a heinous crime should be dismissed because the crucial evidence was illegally obtained, or a judge who wants to sentence a whole category of youthful offenders to alternative sentences, knowing that at least one of these offenders will probably commit a serious crime at some time in the future. Or consider a judge in the pre-World War II South who feels that a black man accused of raping a white woman should receive an acquittal notwithstanding the verdict because the evidence was insufficient. To these dramatic examples may be added the more frequent case of the judge whose ordinary decisions incrementally produce a general impression that he or she is soft on Communism, soft on crime, or soft on any other issue on which the public wants him or her to be hard. Not only are these expressive signals likely to be influential, but there is probably no informal norm against transmitting them and they are impossible to prohibit. Public officials may be forbidden or discouraged from expressing opinions about judicial performance as part of the understood obligations of their government position. But there is no practical way to prohibit the general public from expressing such opinions, and it would probably violate the First Amendment even to try.

“Thus, the problem with elected judges is not the oft-stated one that it politicizes the judicial role. Any method of selection will do that and, besides, the role is inherently political by virtue of the judge’s attitudes. The real problem is that an electoral regime inevitably exposes judges to expressive signals from the general public. The strong influences that result could deny fair adjudications to individuals who are potentially subject to disadvantages. Perhaps it would go too far to assert that judicial elections violate the due process clause, given the long history of

21. *Id.* at 82.
22. *Id.* at 82.

23. *Id.* at 83-84.

this mechanism and the traditional nature of due process, at least with respect to civil trials. But these influences do indicate that judicial elections violate our general sense of fairness and should be abolished as a matter of policy.

“A second institutional question involves salary and resources protection. Here again, many states depart from the federal baseline. To begin with, salary protection is found in only a minority of states, a situation that some would rank with elected judges as a major risk to judicial independence. But microanalysis suggests that salary protection may not be as critical as is sometimes assumed. Of course, lowering a specific judge’s salary would constitute a powerful signal to that person, but the process is too cumbersome to be used with respect to an individual decision, and civil service rules would generally preclude its use with respect to the general pattern of decisions by an individual judge. By and large, salary reductions can only be imposed on the judiciary as a whole. As such, it is an extremely crude means of sending signals and it is not necessarily an effective one. It is certainly possible to construct a scenario in which the legislature or chief executive punishes a judiciary whose decisions antagonize the public, but the actualization of this scenario is a bit more difficult to envision. An elected official who interfered with the decisions of the judiciary in such an obvious fashion might be taking a greater political risk than one who tolerated the judiciary’s unpopular stance. Moreover, the judiciary’s response, when confronted in such an obvious manner, might well be recalcitrance, particularly if the salary reduction were only a modest one, which would probably be the case.

“On the other hand, a mere proposal to reduce judicial salaries might serve as an expressive signal by the legislature or the chief executive. But it is questionable whether we really intend to forbid such signals. Although there are strong norms against expressive signals from public officials regarding the outcome of a particular case, there are no such norms against expressions of general disapproval, as noted above. There are, moreover, valid reasons to grant elected officials the authority to reduce judicial salaries. Such salaries represent a higher proportion of state and local budgets than of the federal budget; if all government salaries are being reduced as part of a general economy effort, excluding judicial salaries might be burdensome.”²⁴

Terri Jennings Peretti, a political science professor at Santa Clara University in Santa Clara, California, wrote:

“Judicial independence is considered to be a norm of vital importance in our legal system. Its goal is in ‘law-based’ decision making by judges Because the people can be confident that judges made their decisions fairly and objectively, compliance with court rulings is

thereby assured. High regard for courts continues, as then does their legitimacy, power, and unique ability to protect our treasured rights and liberties.

“I am tempted to refer to this collection of claims as ‘the judicial independence myth.’ This is due to its proponents’ tendency to present judicial independence as fact rather than as

an ideal or set of normative values about courts. As this suggests, I am rather dubious about the existence of judicial independence. Unlike many scholars, however, I am not particularly troubled by this state of affairs. . . . Whether one’s goal is to protect judicial independence or to limit it, social science research regarding courts has much to offer and is ignored at the reformer’s peril.²⁵

“Research shows that, at least with regard to the U.S. Supreme Court, none of these claims is valid. In fact, compliance with the Court’s rulings is uneven, public awareness and understandings of them are minimal, and public evaluations are neither exceptionally high nor rooted in beliefs about the Court’s impartiality. . . . The modest public support that exists for the Court appears not to be dependent on a belief in its neutrality or independence. Instead, scholars agree that the dynamics of public support for the Court ‘bear a remarkable resemblance to those for Congress and the presidency.’ Research reveals that public approval of the Court, at both the individual and the aggregate level, is strongly tied to ideology, with evaluations dependent on political agreement with the substance of the Court’s decisions.”²⁶

Charles M. Cameron, a political science professor at Columbia University in New York City, wrote:

“[O]ne can meaningfully examine the relationship between [features like life tenure and protected salaries] and the operational fact of independence (or the lack thereof.) For example, [researchers Eli Salzberger and Paul Fenn] show that judges on the English Court of Appeals who consistently take antigovernment positions are less likely to be promoted to the Judicial Committee of the House of Lords, the highest judicial venue in England, than lord justices of appeal who are less antigovernment. Similarly, [Mark Ramsmeier and Eric Rasmusen] show that antigovernment judges in Japan suffer less successful and less pleasant careers than do pro government judges. The resulting incentive systems no doubt discourage antigovernment behavior by judges—which is to say, they diminish judicial independence from the government.”²⁷

I am tempted to refer to this collection of claims as “the judicial independence myth.”

Terri Jennings Peretti

24. *Id.* at 87-88.

25. Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 103 (2002).

26. *Id.* at 117, 119.

27. Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 138 (2002).

These three features . . . make all the difference in whether the judge is independent or not.
Kim Lane Scheppelle

Kim Lane Scheppelle, professor of law and sociology at the University of Pennsylvania, wrote:

“Imagine World A [where a statute, creating a clear exception to a prior law, is appropriately applied by a judge to a case within the exception’s reach.]

“Now imagine World B where (a) the general statute

enacted in the appropriate way covers a range of cases, including Case X. But (b) the head of the governing political party who is also (not coincidentally) the head of the government (perhaps as the president or the prime minister) calls the judge to say that, in Case X, an exception should be made to the usual rule to reach an outcome different from the one that the general statute would usually require. Let us further suppose that this political official is (c) generally authorized to be the lawmaker in this particular regime because the official has the power to issue binding legal decrees but (d) this particular instruction in the particular case is not given in the form of a decree but instead through a phone call that the judge and the politician both know is supposed to be kept secret. In World B, unlike World A, the outcome in the one specific case is dictated directly by the caller without reference to a legal norm. But let us suppose that the judge in World B, like the judge in World A, does as instructed; Case X, which has specific political interest to the regime, is handled as an exception to the general rule. In World B, I submit, the judge has no independence and no moral credit left because the judge has caved in to direct political pressure.

“But what exactly is the difference between World A and World B? In both worlds, the result is the same. This one particular case that came before the judge has been lifted out of the general run of cases to which a broader, more general rule applies and it has been handled as an exception. Moreover, it was the specific instructions from someone in political power that determined what happened in both cases. In World A, however, the instructions came in the form of legislation and in World B, the instructions were personally delivered without first being converted into a legal norm. In World A, the new norm was publicly announced whereas in World B, the

instructions were secret. In World A, the judge was left alone to interpret the legal norm to determine its application in the particular case; in World B, the desired application of the instructions was specifically directed without any intervening judgment by the judge.

“These three features—(1) proper procedure in making the law, (2) publicity in announcing the norms to be applied in the specific case, and (3) the discretionary space for judicial interpretation of those norms—make all the difference in whether the judge is independent or not. In fact, the loss of any one of the three would be sufficient to compromise judicial independence. . . .²⁸

* * * *

We close with two final views on judicial independence. The first is from **James Sensenbrenner**, chair of the Judiciary Committee in the United States House of Representatives. When judges and legal-reform advocates complained that the committee’s oversight of specific judges and decisions was “muddying the separation of powers between Congress and the judiciary,” Sensenbrenner responded: “The fact that judges have lifetime appointments gives them the independence they need, but Congress has the responsibility to watch the judiciary.”²⁹

The last word goes to **Florida Supreme Court Chief Justice Harry Lee Anstead**, who spoke for a unanimous court in a public, in-court reprimand of Judge Carven Angel:

“Judge Angel, would you please approach the podium and remain standing?”

“The charges filed against you arise from . . . your admitted misconduct during your [2002] campaign for re-election as a circuit court judge in Marion County. [In] a stipulation, you admitted the impropriety of your conduct. . . .³⁰

“Each of these incidents may give to the public the appearance that you were part of the partisan activities involved. This, of course, is prohibited by Canon 7 of the Code of Judicial Ethics. . . .

“Every judicial election presents both a great opportunity and a great risk. Those elections present us with a great opportunity to educate our citizens about the proper role and responsibility of the Third Branch. . . . Of course, absolute impartiality and freedom from partisan influences are the most important of these responsibilities.

“At the same time, however, judicial elections present

28. Kim Lane Scheppelle, *Declarations of Independence: Judicial Reactions to Political Pressure*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 232-33 (2002).

29. Laurie P. Cohen & Gary Fields, *Legal Quagmire: High Court Ruling Unleashes Chaos Over Sentencing* . . . “Boiling Frustration on the Bench,” WALL ST. J., July 14, 2004, at A1, A12.

30. The charges were: He attended and participated in a regular meeting of the Ocala Republican Women’s Club and of the Republican Club of Sumter County; attended and campaigned for his election at a “Salute to Labor” picnic and Democratic candi-

date rally; his wife attended, with his knowledge, and participated on his behalf in the Lake County Federated Women Republican’s “Meet the Candidate Night” (she assumed the opponent had been invited, but the opponent had not been invited and was not present); he attended a partisan political gathering to support a Republican candidate for the House of Representatives, to which the opponent was not invited. Also, when asked about his political party affiliation, he identified himself as a member of a partisan political party.

a great risk—a risk that the public will be misinformed about the proper role and responsibilities of judges and that because of that misinformation, confidence in our justice system will be undermined or shaken if the public perception is that judges may act in partisan manner—rather than strictly adhere to the Rule of Law.

“Public confidence in the impartiality and integrity of our judges is absolutely essential to the public’s confidence in our justice system. It is especially important that our citizens understand that judges must be impartial and that the independence of the judiciary is premised on the judge’s pledge of freedom from partisan influences.

“Above all, we must never forget that the Rule of Law is not a conservative or liberal value. It is certainly not a Republican or Democratic value. Rather, it is an American value—and confidence in that Rule of Law rests entirely, at any given point in time, on the character and integrity of the individual American judge and the judge’s absolute commitment to fairness and impartiality.

“We must jealously guard this Rule of Law and not allow it to be undermined or used as a pawn in the partisan rhetoric that often marks the highly partisan political campaigns involving the other two branches of government. Judicial candidates are bound to know that their fundamental obligation is to be impartial and non-partisan. They must not allow their actions during a

judicial campaign to cause the public to think otherwise.

...

“Judge Angel, you must never forget that our justice system is judged every day by what judges and judicial candidates do and say. Please accept this reprimand in the spirit it is intended and go and henceforth make us proud of your conduct on and off the bench as a representative of Florida’s fine judiciary.

“Judge Angel, your public reprimand is now concluded and you may leave.”³¹



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31. The remarks are presented here as they were reported in the *Florida Bar News*. FLA. BAR NEWS, July 1, 2004, at 31. For the

court’s written decision, see *In re Angel*, 867 So.2d 379 (Fla. 2004).

Court Review Author Submission Guidelines

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

Court Review is received by the 2,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in Word format (although WordPerfect format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 17th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or

other law reviews.

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

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

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

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

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

Recent Civil Decisions of the U.S. Supreme Court: The 2003-2004 Term

Charles H. Whitebread

The civil cases decided by the United States Supreme Court during its last term were headlined by its decisions reasserting the rule of law in the context of detainees in the war on terrorism. In addition, the Court handed down a number of decisions on civil rights, the First Amendment, federalism, presidential power, and civil statutory interpretation. We review those cases here.

CIVIL RIGHTS ACT

In *Nelson v. Campbell*,¹ a unanimous Court held that 42 U.S.C. section 1983 was the appropriate vehicle for a prisoner's claim seeking temporary stay and permanent relief from a cut-down procedure to find a vein for a lethal injection to carry out a death sentence. Petitioner was sentenced to death and informed that, because his veins were compromised from years of drug-use, prison officials would perform a "cut-down" procedure prior to the lethal injection to find a vein. He filed a section 1983 action claiming the procedure "constituted cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eighth Amendment." The question before the Court was whether petitioner's claim was the functional equivalent of a habeas petition and, therefore, whether petitioner was required to obtain approval to file a second or successive habeas petition pursuant to section 2244(b)(3). Justice O'Connor, writing for the Court, determined that it was not. A section 1983 claim must give way to "the more specific habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." However, where the challenge is merely to the "conditions of a prisoner's confinement," the claim can be made under section 1983 in the first instance. The Court recognized that the challenge to a particular method of execution did not necessarily call into question the fact or validity of a sentence, however, "imposition of the death penalty presupposes a means of carrying it out." Nonetheless, a prisoner who was not facing a death sentence could bring a section 1983 action to challenge the cut-down procedure. The fact that the state can make a connection between the cut-down procedure and execution did not change this: "[t]hat venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary." If the cut-down method was mandatory by law, or petitioner was unable or unwilling "to concede acceptable alternatives," the state's argu-

ment might have had more weight. However, such was not the case.

In a *per curiam* decision, the Court, in *Muhammad v. Close*,² held that where a prisoner's 42 U.S.C. section 1983 claim cannot be considered on habeas relief based on any recognized theory, the prisoner need not exhaust state or federal remedies before filing an action in federal court. Petitioner, a prisoner, was put into detention until his hearing for violation of a prison rule prohibiting "threatening behavior." At the hearing, he was acquitted of threatening behavior but charged with the lesser infraction of insolence, for which prehearing detention was not required. Petitioner served an additional seven days of detention and was deprived of privileges for 30 days. Petitioner filed a complaint under section 1983 for damages. The Sixth Circuit dismissed the action pursuant to *Heck v. Humphrey*,³ stating "that an action under 1983 to expunge his misconduct charge and for other relief occasioned by misconduct proceedings could be brought only after satisfying *Heck's* favorable termination requirement."

In its decision, the Court first noted that the Sixth Circuit mistakenly assumed that petitioner was seeking expungement of the misconduct from his prison charge; he was not. It then went on to discuss whether *Heck's* favorable termination requirement applied. As background, the Court stated: "Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. 2254, and a complaint under . . . § 1983." Challenges on the "validity of confinement or to the particulars affecting its duration are the province of habeas corpus," while "requests for relief turning on circumstances of confinement may be presented in a § 1983 action." Federal petitions for habeas corpus "may be granted only after other avenues of relief have been exhausted." However, "[p]risoners suing under § 1983 . . . generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first." The Court then discussed hybrid cases, where a prisoner seeks "relief unavailable in habeas" but the allegations "imply the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement." The Court's decision in *Heck* addressed these hybrid cases, holding "that where success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable state, or federal habeas,

1. 124 S. Ct. 2117 (2004).

2. 540 U.S. 749 (2004).

3. 512 U.S. 477 (1994).

opportunities to challenge the underlying conviction or sentence.” The Court, however, concluded that the Sixth Circuit erred “by following the mistaken view expressed in circuit precedent that *Heck* applie[d] categorically to all suits challenging prison disciplinary proceedings.” The Court recognized these administrative proceedings “do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of time to be served (by bearing on the award or revocation of good-time credits) that is not necessarily so.” In this case, Muhammad “raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck*’s favorable termination requirement was inapplicable.”

Justice Stevens, writing for a unanimous Court in *Jones v. R.R. Donnelley & Sons Co.*,⁴ held that claims arising under 42 U.S.C. section 1981, as amended by the 1991 Act, are governed by the four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990, 28 U.S.C. section 1658. Petitioners, former employees of respondent, brought a class action for violation of their rights under section 1981. Their claims existed solely because of Congress’s amendment to section 1981 in the 1991 Act. The employer moved to dismiss the action, arguing the applicable state statute of limitations had lapsed. Petitioners, the former employees, responded by arguing that the four-year statute of limitations under section 1658 applied. Section 1658 provides a four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990. Because the Court found the term “arising under” vague, it turned to the history of the enactment of section 1658 to determine Congress’s intent. Before its enactment, there was no uniform federal statute of limitations period and federal courts borrowed limitation periods from states. This void created a host of problems, which Congress attempted to alleviate by adopting a uniform limitations period. The Court concluded “[t]hat the history . . . [of] the enactment of 1658 strongly supports an interpretation that fills more rather than less of the void that has created so much unnecessary work for federal judges.” Therefore, it believed the more favorable interpretation was that section 1658 applied to post-1990 amendments to federal law where the amendment created a cause of action that was not previously available. The 1991 Act “enlarged the category of conduct that is subject to § 1981 liability.” Therefore, the Court concluded the 1991 Act “fully qualifie[d] as an Act of Congress enacted after [December 1, 1990] within the meaning of § 1658.”

Justice Ginsburg delivered the opinion for an 8-1 Court in *Pennsylvania State Police v. Suders*.⁵ It held that to establish constructive discharge under Title VII, a claimant alleging sexual harassment must show that the abusive work environment became so intolerable that her resignation qualified as a fitting response. If the actions that created the intolerable work environment were not sanctioned by the employer, the employer may assert as an affirmative defense that (1) the employer had in place an accessible and effective policy for reporting sexual harassment and (2) the employee failed to avail herself of it.

Respondent, who was employed by Pennsylvania State Police (PSP), quit work in response to the sexual harassment of her male supervisors and co-workers. She brought an action against PSP under Title VII, claiming constructive discharge. PSP sought dismissal based on the affirmative defense set forth in *Faragher v. Boca Raton*⁶ and *Burlington Industries, Inc. v. Ellerth*.⁷ The *Ellerth/Faragher* affirmative defense provides that

“when no tangible action is taken . . . the employer may raise an affirmative defense to liability, subject to proof by a preponderance of the evidence:” (1) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) “that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” The Court granted certiorari to resolve a circuit split regarding the application of the *Ellerth/Faragher* affirmative defense.

The Court first restated the principles of constructive discharge: “Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes.” The inquiry is objective. In *Ellerth* and *Faragher*, the Court concluded that when a supervisor takes tangible employment action against an employee, it is “beyond question” that the employer is liable under agency principles. When a supervisor’s actions, however, did not culminate in tangible employment action, the Court adopted the “aided-by-the-agency-relation” standard for these scenarios, or the *Ellerth/Faragher* affirmative defense. In this case, the Court concluded that the constructive discharge claim stemmed from, “and can be regarded as an aggravated case of, sexual harassment or hostile work environment” with the addition that “[a] plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign.” However, as in *Ellerth* and *Faragher* this environment could either result from official or unofficial supervisory conduct and also was a combination of the employee’s decision to leave and the precipitating conduct. The Court determined that because “a constructive discharge is functionally the same as an actual termination in damages-enhancing respects,” the *Ellerth/Faragher* affirmative defense should be available to an employer. To hold otherwise “would make the *graver* claim of hostile-environment constructive discharge *easier* to prove than its lesser included component.” The case was remanded because genuine issues of material fact existed with regard to whether PSP was entitled to the defense in this action.

Justice Stevens . . . held that claims arising under 42 U.S.C. section 1981 . . . are governed by the four-year statute of limitations for actions arising under federal statutes

4. 124 S. Ct. 1836 (2004).

5. 124 S. Ct. 2342 (2004).

6. 524 U.S. 775 (1998).

7. 524 U.S. 742 (1998).

Chief Justice Rehnquist . . . held that Washington's prohibition on giving scholarships to students who wished to pursue a degree in devotional theology is not inherently constitutionally suspect.

In *General Dynamics Land Systems, Inc. v. Cline*,⁸ a 6-3 Court, in a decision written by Justice Souter, held that the “text, structure, purpose, and history of the [Age Discrimination in Employment Act (ADEA)], along with its relationship to other federal statutes . . . show[] that the statute [did] not mean to stop an employer from favoring an older employee over a younger one.” In 1997, petitioner entered into a collective bargaining

agreement with the United Auto Workers that eliminated petitioner’s “obligation to provide health benefits to subsequently retired employees, except as the then-current workers at least 50 years old.” Numerous employees filed an action claiming the agreement violated the ADEA because it discriminated against younger employees in favor of older. In rejecting respondent’s claim, the Court turned to the history of the ADEA, the specific language of the statute, and case law. Congress decided not to include age discrimination in Title VII of the Civil Rights Act of 1964, “being aware that there were legitimate reasons as well as invidious ones for making employment decisions on age.” Congressional hearings held prior to the ADEA’s enactment “dwelled on unjustified assumptions about the effect of age on ability to work,” reflecting “the common facts that an individual’s chances to find and keep a job get worse over time.” There was nothing to suggest that “any workers were registering complaints about discrimination in favor of their seniors.” The specific language of used in the ADEA supported this conclusion. The Court noted that there is no suggestion in the introductory provisions that the ADEA meant to protect discrimination in favor of senior employees. Among other things, the introductory provisions “stress the impediments suffered by ‘older workers . . . in their efforts to retain . . . and especially to regain employment.’” Case law also supported the Court’s conclusion. In *Hazen Paper Co. v. Biggins*,⁹ the Court held “there is no violation of the ADEA in firing an employee because his pension is about to vest, as a basis for action that we took to be analytically distinct from age, even though it would never occur without advanced years.” In its reasoning the Court stated that “‘the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age,’ . . . whereas discrimination on the basis of pension status ‘would not constitute discriminatory treatment on the basis of age [because] the prohibited stereotype [of the faltering worker] would not have figured in this decision, and the attendant stigma would not ensue.’” The Court stated that it

had used the reasoning in this case as a background for other age discrimination cases and the “Courts of Appeals and the District Courts ha[d] read the law the same way.”

FIRST AMENDMENT

In *Locke v. Davey*,¹⁰ Chief Justice Rehnquist, writing for a 7-2 Court, held that Washington’s prohibition on giving scholarships to students who wished to pursue a degree in devotional theology is not inherently constitutionally suspect; therefore, because the state’s interest in not funding religious studies was substantial, and the burden it placed on the recipients of the scholarship minimal, the program did not violate the Free Exercise Clause of the First Amendment. Washington implemented a Promise Scholarship Program that awarded scholarships to students pursuing postsecondary education. However, a student was not eligible for scholarship funds if he or she pursued a degree in theology. Respondent, who received a scholarship but refused to sign a waiver stating he would not pursue a degree in devotional theology, was denied his scholarship funds. He challenged the statute, arguing “the denial of his scholarship based on his decision to pursue a theology degree violated, *inter alia*, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment.” The Court did not agree. First, it concluded that “the link between government funds and religious training is broken by the independent and private choice of the recipients.” Therefore, even if a program recipient could and chose to pursue a degree in devotional theology, the program did not violate the Establishment Clause. Second, as to the Free Exercise Clause, the Court determined that Washington’s decision not to fund a certain category of instruction was constitutional. Unlike in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,¹¹ “the State’s disfavor (if it can be called that) is of a far milder kind” and the program “does not require students to choose between their religious beliefs and receiving a government benefit.” Furthermore, that the program funds secular training did not necessarily require that it fund religious training. The Court believed that the two are not “fungible.” The United States and the states’ constitutions have distinct views, “in favor of free exercise, but opposed to establishment.” That the state treats training for religious professions differently from training for secular professions is a product of these views and “not evidence of hostility toward religion.” Washington’s constitution may be more strict than the Federal Constitution, however, according to the Court, “the interest it seeks to further is scarcely novel.”

In *Elk Grove Unified School District v. Newdow*,¹² the Court did not reach the merits of respondent’s contention that the words “under God” in the pledge of allegiance violate the Establishment and Free Exercise Clauses of the First Amendment and instead determined that respondent lacked standing to maintain the action on behalf of his daughter. Justice Stevens, writing for a five-person majority, determined that a parent, who does not have the final decision-making

8. 540 U.S. 581 (2004).

9. 507 U.S. 604 (1993).

10. 540 U.S. 712 (2004).

11. 508 U.S. 520 (1993).

12. 124 S. Ct. 2301 (2004).

authority over decisions regarding their child's psychological and educational well-being, does not have prudential standing to challenge a school district's policy regarding the pledge of allegiance.

The Court had two strands of jurisprudence regarding standing: (1) Article III standing, "which enforces the Constitution's case or controversy requirement;" and (2) "prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" The latter "encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rules barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" The Court has continuously declined to interfere with domestic relations, believing "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States." The daughter's mother had the ultimate decision-making power in case of a disagreement regarding the daughter's health, education, and welfare. Nonetheless, "Newdow contend[ed] that despite [the mother's] final authority, he retain[ed] 'an unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive.'" However, the Court recognized that it was not only Newdow's interest in inculcating his child with his religious views, "but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically." The Court also recognized the importance of the daughter's rights "who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution." Newdow's standing was derived from his relationship with his daughter, "but he lack[ed] the rights to litigate as her next friend." First, in direct contrast with the Court's law on prudential standing, Newdow's interests are not parallel, "and, indeed, [were] potentially in conflict" with his daughter's interests. Second, Newdow's parental status was defined by California domestic law. The Court of Appeals, to whom the Court would normally defer to in this instance given its greater familiarity with California law, determined that "state law vests in Newdow a cognizable right to influence his daughter's religious upbringing." However, the Court did not see how either the mother or the school board had done anything that impairs this right.

Justice Breyer delivered the opinion of the Court in *City of Littleton v. Z.J. Gifts*,¹³ which held the special judicial review procedures set forth in *Freedman v. Maryland*¹⁴ were not applicable to an adult business zoning ordinance; Colorado's ordinary judicial rules of review were adequate for First Amendment protection. The City of Littleton adopted a zoning ordinance that required an adult business to obtain a license to operate. The application for the license required numerous disclosures, and a denial of the license could be appealed to the state district court, pursuant to the Colorado Rules of Civil Procedure. Instead of applying for a license,

respondent opened a store and brought an action to challenge the zoning ordinance, claiming Colorado law "[did] not assure that [the city's] license decisions will be given expedited [judicial] review," hence it did not assure "prompt final judicial decision" as required by the Constitution and the Court's decision in *Freedman*. The City of Littleton, in turn, argued (1) the Court, in *FW/PBS, Inc. v. Dallas*,¹⁵ "found that the First Amendment required such a scheme to provide an applicant with 'prompt access' to judicial review of an administrative denial of the license, but that the First Amendment did not require assurance of a 'prompt judicial determination' of the applicant's legal claim;" and (2) that Colorado law satisfies any "prompt judicial determination" requirement. The Court rejected the first argument, but accepted the second.

First, in *Freedman*, the Court set forth a number of safeguards necessary for constitutional protection in a censorship situation, including prompt judicial review and determination. Despite the City of Littleton's arguments, *FW/PBS* "does not purport to radically alter the nature of those core requirements." Of these core requirements, it was clear that the Court still mandated prompt administrative and judicial determinations. As to the second argument, the Court stated that the City of Littleton "in effect, argues that [the Court] should modify *FW/PBS*, withdrawing its implication that *Freedman*'s special judicial review rules apply in this case." The Court agreed, finding Colorado's ordinary judicial review procedures suffice, for four reasons: (1) courts may accelerate the hearing process to avoid First Amendment violations; (2) the Court has "no reason to doubt the willingness of Colorado's judges" to use their power to avoid First Amendment harm; (3) the First Amendment harm in this instance is different than that in *Freedman*, making a special procedure unnecessary (in *Freedman*, the Court considered a subjective scheme while here, the "licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display"); and (4) the Court notes "nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme."

Congress enacted the Child Online Protection Act (COPA), 47 U.S.C. section 231, "to protect minors from exposure to sexually explicit materials on the Internet." In *Ashcroft v. ACLU*,¹⁶ Justice Kennedy, delivering the opinion of a 6-3 Court, held that the district court did not abuse its discretion in granting respondent's preliminary injunction to enjoin the government from enforcing the criminal penalties set forth in the statute. The Court, in considering Congress's second attempt to make the Internet safe for minors, determined less

[I]n *Freedman*, the Court set forth a number of safeguards necessary for constitutional protection in a censorship situation

13. 124 S. Ct. 2219 (2004).
14. 380 U.S. 51 (1990).

15. 493 U.S. 215 (1990).
16. 124 S. Ct. 2783 (2004).

Both respondents were paraplegics who used wheelchairs for mobility and claimed that the state denied them access to . . . the state court system by reason of their disability.

restrictive means, *i.e.*, filtering software, existed to prevent minors from accessing harmful material on the Internet and, therefore, it was likely respondents might succeed on the merits.

In reaching its determination to uphold the preliminary injunction, the Court applied an abuse-of-discretion standard of review. In analyzing whether the district court abused its discretion, the Court considered whether

“less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” The test “[was] not to consider whether the challenged restriction [had] some effect in achieving Congress’s goal, regardless of the restriction it imposes,” it was to “ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech [was] not chilled or punished.” The primary concern of the district court was the availability of blocking and filtering software; it determined that this alternative provided a less restrictive means to prevent children from accessing the information. The Court agreed: “Filters are less restrictive than COPA. They impose selective restrictions on speech on the receiving end, not universal restrictions at the source.” Furthermore, “promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.” The Court made special note of one contrary argument: “filtering software is not an available alternative because Congress may not require it to be used.” Even though the Court made special note of the argument, it stated that the argument carries little weight “because Congress undoubtedly may act to encourage it to be used.” Furthermore, “the need for parental cooperation does not automatically disqualify a proposed less restrictive alternative.”

FEDERALISM: 11th AMENDMENT

In *Tennessee v. Lane*,¹⁷ Justice Stevens delivered the opinion of a 5-4 Court, which held that Congress had the power to abrogate a state’s Eleventh Amendment sovereign immunity under Title II of the Americans with Disabilities Act (ADA) for those classes of cases implicating the fundamental right of access to courts. Respondents filed an action alleging violation of Title II. Both respondents were paraplegics who used wheelchairs for mobility and claimed that the state denied them access to, and the services of, the state court system by reason of their disability. Specifically, many court buildings in Tennessee were inaccessible to them. Title II, at issue here, “prohibits any public entity from discriminating against ‘qualified persons’ with disabilities in the provision or operation of public services, programs, or activities.” Title II also incorpo-

rates by reference section 505 of the Rehabilitation Act of 1973, “which authorizes private citizens to bring suits for money damages.” Under the Eleventh Amendment, “Congress may abrogate the State’s sovereign immunity if (1) it unequivocally expresses its intent and (2) acts pursuant to a valid grant of constitutional authority.” Only the second element was at issue in this case.

The Court concluded that Congress’s abrogation of the state’s sovereign immunity in the Title II context was a valid exercise of its power. In *Fitzpatrick v. Bitzer*,¹⁸ it held that “Congress can abrogate a State’s sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment.” The Court has recognized that this broad power includes “the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text,” *i.e.*, prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.” However, Congress’s section 5 power is not unlimited: “it may not work a ‘substantive change’ in the governing law.” Applying this test in *Board of Trustees of Univ. of Ala. v. Garrett*,¹⁹ the Court concluded that Title I was not a valid exercise of Congress’s section 5 power because “Congress exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations.” Here, however, the Court found the opposite true: “Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.” At this point, the Court stated that the only question that remained was “whether Title II is an appropriate response to this history and pattern of unequal treatment.” First, it determined the scope of that inquiry, determining that it need not consider the application of Title II in general, but instead could ask “whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.” It concluded that because “Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.”

Under 11 U.S.C. section 523(a), student loans guaranteed by a governmental entity are not included in general discharges unless the bankruptcy court determines that excepting the debt from the order would impose an “undue hardship” on the debtor. Chief Justice Rehnquist, writing for a 7-2 Court, determined in *Tennessee Student Assistance Corp. v. Hood*²⁰ that state sovereign immunity was not implicated in a bankruptcy proceeding where a petitioner must serve a summons and complaint on the state in order to obtain an undue hardship determination for the purpose of discharging his or her student loans.

The Court explained that the “discharge of a debt by a bankruptcy court” was “similar to an *in rem* admiralty proceeding” where the Court has determined that “the Eleventh

17. 124 S. Ct. 1978 (2004).
18. 427 U.S. 445 (1976).

19. 531 U.S. 356 (2001).
20. 124 S. Ct. 1905 (2004).

Amendment does not bar federal jurisdiction . . . when the State is not in possession of the property.” Similarly, a bankruptcy court has “jurisdiction over the debtor’s property, wherever located, and over the estate.” Furthermore, under the Court’s longstanding precedent, “States, whether or not they choose to participate in the [bankruptcy] proceeding, are bound by a bankruptcy court’s discharge order no less than other creditors.” Therefore, according to the Court, the only question was whether “the particular process by which student loan’s debts are discharged unconstitutionally infringes” upon a state’s sovereignty, *i.e.*, service of a summons and a complaint. Section 528(a)(8) is self-executing: “[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.” However, even if Congress has made it more difficult for an individual to discharge their student loan debt, the proceeding is still *in rem*. The Court reiterated its prior discussions and stated, “we have previously endorsed individualized determinations of State’s interests within the federal courts *in rem* jurisdiction.” The procedures used in this case do not change the nature of the *in rem* proceeding. Furthermore, the Court saw no need to engage in a comparative analysis with the similarities to a traditional civil trial. The Court noted that “if the Bankruptcy Court had to exercise personal jurisdiction over TSAC, such an adjudication would implicate the Eleventh Amendment.” However, a bankruptcy proceeding was an *in rem* proceeding and, therefore, “even when the underlying proceedings are, for the most part identical,” meaning the procedure bears a striking resemblance to a traditional civil suit, the similarities are irrelevant. Likewise, it found “the issuance of process” does not implicate state sovereign immunity. The bankruptcy court could adjudicate without personal jurisdiction over the state: the text of section 532(a)(8) does not require a summons, “and absent Rule 7001(6) a debtor could proceed by motion.” The Court concluded, therefore, that there was “no reason why service of a summons, which in this case [was] indistinguishable in practical effect from a motion, should be given dispositive weight.”

Justice Kennedy delivered the opinion of a unanimous Court in *Frew v. Hawkins*.²¹ It held state officials were not protected by Eleventh Amendment sovereign immunity with respect to a federal court’s enforcement of a consent decree. Petitioners brought an action against the state and its officials to enforce certain provisions of Medicaid, specifically as they relate to the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. The state was dismissed on Eleventh Amendment grounds, and the petitioners and state officials entered into a consent decree, which was approved by the district court in 1996. The enforcement of the consent decree was at issue in this case. The state officials claim “the Eleventh Amendment rendered the decree unenforceable even if they were in noncompliance” because petitioners had not shown a violation of federal law. According to the Court, “this case involves the intersection of two areas of federal law: the reach of the Eleventh Amendment and the rules governing consent

decrees.” *Ex parte Young*,²² carved out a narrow exception to the Eleventh Amendment, allowing “suits for prospective relief against state officials acting in violation of federal law.” *Firefighters v. Cleveland*²³ requires that a consent decree entered in a federal court must “spring from, and serve to resolve, a dispute within the court’s subject matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objective of the law upon which the complaint was based.” The Court did not read into these requirements, as the state officials argued, that a consent decree was not enforceable unless petitioners could prove first a violation of federal law. First, the consent decree was properly entered by the district court and it stated a mandatory and enforceable obligation: “The petitioners’ motion to enforce . . . sought enforcement of a remedy consistent with *Ex parte Young* and *Firefighters*, a remedy the state officials themselves accepted when they asked the District Court to approve the decree.”

In *Engine Manufacturing Association v. South Coast Air Quality Management Dist.*²⁴ an 8-1 Court held that the reference to “standards” in Section 209 of the Clean Air Act refers merely to standards and not methods of enforcement; therefore, California’s mandates regarding the purchase of vehicles, rather than the manufacture or sale, did not escape preemption. Respondent, a political subdivision of California, adopted six “fleet rules,” which applied to various operators of fleets and “contain[ed] detailed prescriptions regarding the types of vehicles that fleet operators must purchase or lease when adding or replacing fleet vehicles.” All six rules applied to public operators, and three apply to private ones. Petitioner claimed the fleet rules were preempted by section 209 of the Clean Air Act (CAA). Section 209 provides: “No state or any political subdivision thereof shall adopt or attempt to enforce any *standard* relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.” According to the Court, the resolution of this case depended upon the interpretation of the word “standard.” The lower courts, and respondent, “engraft[ed] onto this meaning . . . a limiting component, defining it as only ‘[a] production mandat[e] that require[s] manufacturers to ensure that the vehicles they produce have particular emissions characteristics.’” The Court, however, believed this interpretation

It held that state officials were not protected by Eleventh Amendment sovereign immunity with respect to a federal court’s enforcement of a consent decree.

21. 540 U.S. 431 (2004).
22. 209 U.S. 123 (1908).

23. 478 U.S. 501 (1986).
24. 124 S. Ct. 1756 (2004).

In Hamdi v. Rumsfeld, Justice O'Connor announced . . . that a citizen, who was an enemy combatant . . ., was entitled to some due process of law.

“confuse[d] standards with the means of enforcing standards.”

PRESIDENTIAL POWER

In *Rasul v. Bush*,²⁵ the Court determined that alien petitioners were not barred from bringing a petition for a writ of habeas corpus in the District Court for the District of Columbia, which had jurisdiction over the petitioners' custodians, even though

they were being held outside the United States; section 2241 by its terms did not require that the petitioners reside in the district in which they were bringing their petitions, only that the court had jurisdiction over the custodians. Petitioners were foreign nationals being held in the United States Naval Base in Guantanamo Bay under Authorization for Use of Military Force (AUMF). In 2002, petitioners, through relatives acting as their next friends, filed various actions in the United States District Court for the District of Columbia, “challenging the legality of their detention at the Base.”

Justice Stevens, writing for a five-justice majority, began by stating that under 28 U.S.C. section 2241, Congress had granted federal courts “the authority to hear applications for habeas corpus by any person who claims to be held ‘in custody in violation of the Constitution or laws or treaties of the United States.’” The government relied primarily on *Johnson v. Eisentrager*²⁶ to support its argument that the district court lacked jurisdiction to issue a writ. In *Eisentrager*, the Court held that the district court lacked authority to issue a writ to German citizens “who had been captured by U.S. forces in China, tried and convicted . . . by an American military commission in Nanking, and incarcerated in the Landsberg Prison in occupied Germany.” The Court stated that the prisoners in this case differed from those in *Eisentrager*: (1) they were not nationals of countries at war with the United States; (2) they denied they had engaged in or plotted acts of aggression against the United States; (3) they had never been afforded access to any tribunal, or charged with any wrongdoing; and (4) they had been imprisoned “in territory over which the United States exercises exclusive jurisdiction and control.”

The Court determined that the holding in *Eisentrager* was justified at the time, but a similar result was not justified here. At the time *Eisentrager* was decided, the Court had just decided *Ahrens v. Clark*,²⁷ “a case concerning the application of the habeas statute to the petitions of 120 Germans who were then being detained at Ellis Island . . . for deportation.” In *Ahrens*, the Court held that the district court lacked jurisdiction to review the petitions because the statute required that the petitioners be present in the jurisdiction in which they bring their petition. The Court of Appeals, in issuing its

Eisentrager decision shortly after *Ahrens*, found an unconstitutional gap that had to be filled by reference to “fundamentals.” The *Ahrens* Court also ignored this gap and addressed only the constitutional issues raised in the Court of Appeals's decision. This gap had since been filled: In *Braden v. 30th Judicial Circuit Court of Ky.*,²⁸ the Court held, “contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not ‘an invariable prerequisite’ to the exercise of district court jurisdiction.” Instead, what was important was whether the person who holds the petitioner in custody was within the jurisdictional limits of the district court. The Court concluded that because *Braden* “overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly [did] not preclude the exercise of § 2241 jurisdiction over petitioner's claims.” Furthermore, the Court believed that “application of the habeas statute to persons detained at the base [was] consistent with the historical reach of the writ of habeas corpus.” At common law, courts readily applied the writ to persons being held within the territorial limits of the nation, “as well as the claims of persons detained in the so-called ‘exempt jurisdictions,’ where ordinary writs did not run.”

In *Hamdi v. Rumsfeld*,²⁹ Justice O'Connor announced the judgment of the Court, which concluded that a citizen, who was an enemy combatant being held pursuant to Authorization for Use of Military Force (the AUMF), was entitled to some due process of the law. After the September 11 terrorist attacks, Congress passed a resolution, AUMF, authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks or harbored such organizations or person, in order to prevent any future acts of international terrorism against the United States by such nation, organizations, or person.” Hamdi, an American citizen, was arrested by friendly forces in Afghanistan in 2001 and had been held in the United States Naval Base in Guantanamo Bay since January 2002. Hamdi's father filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. section 2241, on Hamdi's behalf and as his next friend, claiming that Hamdi's detention was not legally authorized and that, as a United States citizen, Hamdi was entitled to “the full protections of the Constitution.”

Justice O'Connor, writing for the plurality, framed the threshold issue in this case as “whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’” The plurality found that “Congress [had] in fact authorized Hamdi's detention, through the AUMF,” by authorizing the President to use “necessary and appropriate force.” The plurality agreed that Hamdi could not be held indefinitely, but read the AUMF as only authorizing detention as long as “the relevant conflict” was still ongoing. The plurality then determined “what process is constitutionally due to a citizen who disputes his enemy-combatant status.” Its analysis involved both an examination of the writ of habeas corpus and the Due Process Clause. As to the writ, the parties agreed that “absent

25. 124 S. Ct. 2686 (2004).
26. 339 U.S. 763 (1950).
27. 335 U.S. 188 (1948).

28. 410 U.S. 484 (1973).
29. 124 S. Ct. 2633 (2004).

suspension, the writ of habeas corpus remains available to every individual detained within the United States.” The parties also agreed that Congress had not suspended the writ in this instance. Therefore, the plurality must conclude that “Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241.” The parties also agreed that section 2241 “provide[s] at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review,” most notably, § 2243 provides that “‘the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,’ and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.” The question then was what due process was required. The plurality recognized that both parties “highlight[ed] legitimate concerns:” (1) the government “in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States;” and (2) Hamdi’s asserted private “interest of being free from physical detention by one’s own government.” The plurality recognized the latter interest was not reduced by the “circumstances of war or the accusation of treasonous behavior.” The plurality used the balancing test set forth in *Mathews v. Eldridge*³⁰ for determining the procedures that are necessary to ensure that a citizen is not “‘deprived of life, liberty, or property, without due process of law;” and concluded that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.” However, at the same time, the plurality conceded that in a time of war, it must not unduly burden the government. Therefore, the government’s burden of proof might be relaxed in some ways, *i.e.*, the use of hearsay evidence.

Justice Scalia disputed that the AUMF “authorize[d] detention of a citizen with the clarity necessary to satisfy the interpretative canon that statutes should be construed so as to avoid grave constitutional concerns . . . or with the clarity necessary to overcome the statutory prescriptions that ‘no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.’” He also noted that Congress failed to suspend a detainee’s right to seek a writ. Therefore, instead of “making up for Congress’s failure to invoke the Suspension Clause and its making up for the Executive’s failure to apply what it says are needed procedures,” the Court should have concluded that “Hamdi [was] entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus.”

Justice Souter, concurring in part, dissenting in part, and concurring in the judgment, also believed the Government had shown that “the Force Resolution authorize[d] the detention complained of here even on the facts the Government claims.” Furthermore, Justice Souter concluded that if Hamdi was being held as a prisoner of war, then his treatment must also fall within the Geneva Convention, which would require,

30. 424 U.S. 319 (1976).

among other things, “a ‘written record . . . of proceedings.’” He would not reach the question of what process Hamdi was due because he would find that the government was not authorized to detain Hamdi in the first place. Justice Thomas also dissented, but reached the conclusion that petitioner’s writ should fail: “This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.”

In *Rumsfeld v. Padilla*,³¹ a 5-4 Court dismissed the habeas petition of a detainee being held pursuant to the Authorization for Use of Military Force (AUMF) because the petitioner named the Secretary of Defense Donald H. Rumsfeld as the respondent instead of Commander of the Consolidated Naval Brig, Melanie A. Marr, who was his actual physical custodian. Petitioner also filed his action in the Southern District of New York when he was being held in South Carolina. The Court broke down the question of whether the Southern District had jurisdiction over Padilla’s petition into two related subquestions: (1) “who [was] the proper respondent to the petition?;” and (2) “[did] the Southern District have jurisdiction over him or her?” As to the first subquestion, the Court wrote: “The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is ‘the person who has custody over [the petitioner].’” Generally, there is only one proper respondent in a petition, the custodian, who is “‘the person’ with the ability to produce the prisoner’s body before the habeas court.” There are exceptions to this rule, but the Court found that neither the recognized nor proposed ones were applicable here. The case law instead stood for the “simple proposition that the immediate physical custodian rule, by its terms, [did] not apply when a habeas petitioner challenges something other than his present physical confinement.” The Court turned to the second subquestion and concluded that the District Court did not have jurisdiction over Commander Marr: “District courts are limited to granting habeas relief ‘within their respective jurisdictions.’” The Court interpreted this rule to require only that “the court issuing the writ have jurisdiction over the custodian.” Congress added the limiting clause that district courts could only issue a writ “within their respective jurisdictions.” Accordingly, “with respect to habeas petitions ‘designed to relieve an individual from oppressive confinement,’” the traditional rule is that “the Great Writ is issuable only in the district of confinement.” The Court also relied on other portions of the habeas statute and legislative history to support its conclusion. For example, “if a petitioner seeks habeas relief in the court of appeals, or from this Court . . . the petitioner must ‘state the reasons for not making application to *the* district court of the district *in which the applicant*

31. 124 S. Ct. 2711 (2004).

BCRA’s enactment followed the Court’s decision in *Buckley v. Valeo*, and a Senate investigation into soft-money contributions

In sum, the Court upheld the provisions of Title I, which are Congress's attempt to plug the loophole regarding the issue of soft money.

is held.” Also, it was clear that Congress legislated against a backdrop of a “district of confinement” rule as evidenced by the exceptions to the rule.

ELECTIONS

In *McConnell v. Federal Elections Commn.*³² the Court reviewed various provisions contained in Titles I through V of the Bipartisan Campaign

Reform Act of 2002 (BCRA). BCRA's enactment followed the Court's decision in *Buckley v. Valeo*³³ and a Senate investigation into soft-money contributions, issue advertising, and the political practices involved in the 1996 federal elections. Its central provisions “are designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections.” Certain provisions also attempt to provide limitations on contributions. “Soft money” refers to contributions made to state and local elections, but are used to support federal elections. Soft money is money raised and spent by political parties that is not covered by limits on contributions to candidates and committees in federal elections. Issue advertising consists of communications that do not expressly advocate the election or defeat of clearly identified candidates, *i.e.*, use “the magic words” “Elect John Smith,” but are functionally identical to such express advocacy. Plaintiffs challenged these provisions as facially invalid under the First Amendment, and as violating the Election Clause, federalism, and equal protection. Justice Stevens, Justice O'Connor, Chief Justice Rehnquist, and Justice Breyer wrote various portions of the opinion. The Court applied *Buckley's* closely drawn scrutiny test: a test less exacting than strict scrutiny, but that showed “proper deference to Congress ability to weigh competing constitutional interests in an area which it enjoys particular expertise.”

In sum, the Court upheld the provisions of Title I, which are Congress's attempt to plug the loophole regarding the use of soft money. It also upheld the majority of the provisions in Title II, relating to issue advertising, except to the extent it attempted to limit party spending during post-nomination and pre-election. This unconstitutional provision required parties to choose between two spending options: (1) a party making an independent expenditure was barred from making a coordinated expenditure; or (2) a party making a coordinated expenditure could not make an independent expenditure “*for express advocacy*.” The Court had previously held that caps on individual compensations were unconstitutional and, therefore, only addressed this statute as it applied to “coordinated expenditures.” The Court concluded that “while the category of burdened speech [was] relatively small, it plainly [was] entitled to First Amendment protection.” It found the government did not have a compelling interest in having the parties “avoid the use of magic words”: “Any claim that a restriction on inde-

pendent express advocacy serve[d] a strong Government interest [was] belied by the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is, for Congress' purposes, functionally meaningless.” Indeed, the Court concluded, Congress defined “electioneering communications” because it recognized the inadequacy of the “express advocacy” test.

The Court avoided ruling on most of the challenged provisions under Title III and IV on standing grounds, including: (1) an amendment to the Federal Communications Act, which required broadcast stations, within certain time periods to “sell a qualified candidate the ‘lowest unit charge of the station for the same class and amount of time for the same period;’” (2) the new provision “increases and indexes for inflation certain FECA contribution limits;” and (3) the “millionaire provisions,” which “provide[d] for a series of staggered increases in otherwise applicable contribution-to-candidate limits in the candidate's opponent spends a triggering amount of his personal funds.” It did, however, determine that the limits placed on contributions by minors unconstitutional: “Limitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association.”

The Court finally considered Title V, amending the Communications Act of 1934. The amendment required “broadcasters to keep publicly available records of politically related broadcasting requests.” As to the first provision, the Court determined that the regulation was virtually identical to the provision enacted by the Federal Communications Commission in 1938 and “which with slight modifications the FCC [had] maintained in effect ever since.” Therefore, the Court rejected plaintiffs' arguments that the provision was “intolerably burdensome and invasive.” For the same reasons, the Court also rejected plaintiffs' arguments that there were no important governmental interests. The FCC had pointed out that “these records are necessary to permit political candidates and others to verify that licensees have complied with their obligations relating to use of their facilities by candidates for political office pursuant to the equal time provision.” As to the second provision, referred to as “election message request” requirements, which required broadcasters to keep records of broadcast messages that refer to “a legally qualified candidate” or to “any election to Federal Office,” the Court determined that, although broader than the “candidate requests,” they served essentially the same purpose. For the same reasons discussed above, the Court could not find that they imposed an undue administrative burden and determined that they were supported by an important government interest. Finally, the Court addressed the third provision, or the “issue requirement,” which required broadcasters to keep records of requests to broadcast “message[s] related to a national legislative issue of public importance . . . or otherwise relating to a political matter of national importance.” It found that this provision was “likely to help the FCC determine whether broadcasters [were] carrying out their ‘obligations to afford reasonable opportunity for the discussion of conflicting views on issues of

32. 540 U.S. 93 (2003).

33. 424 U.S. 1 (1976) (*per curiam*).

public importance,' and whether broadcasters were too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs." The Court found that the statute was not overbroad because of its use of the term "national affairs," which was no broader than language Congress has used in other contexts to impose other obligations on broadcasters.

In *Vieth v. Jubelirer*,³⁴ Justice Scalia, writing for the plurality, determined that the Court's decision in *Davis v. Bandemer*³⁵ was in error: political gerrymander claims were not justiciable. Justices Stevens and Souter, the latter who was joined by Justice Ginsburg, would hold that political gerrymander claims were justiciable on a district level, while Justices Breyer and Kennedy would continue to adjudicate them on a statewide level.

Plaintiffs challenged Pennsylvania's redistricting plan, alleging, among other things, it constituted an unconstitutional gerrymander. Political gerrymandering existed before the constitution was signed and "remained alive and well . . . at the time of the framing." The Framers provided a remedy in the Constitution, Article I, section 4, leaving "in state legislatures the initial power to draw districts for federal elections," but permitting Congress to "make or alter" those districts if it wished." Congress had continuously attempted to restrain the practice of political gerrymander. The Court too had taken a role: "[e]ighteen years ago, we held [in *Bandemer*] that the Equal Protection Clause grants judges the power—and duty—to control political gerrymandering." However, since that decision, the Court had failed to articulate a judicially discoverable and manageable standard for resolving political gerrymander claims, indicating that they were likely "political questions" or nonjusticiable claims.

The plurality began its analysis by stating that the "judicial power" created by Article III, was not the power of a court to do whatever it wishes, but "the power to act in the manner traditional for English and American courts." One important tradition was that a court's action be governed by *standard*, by *rule*. In *Bandemer*, six justices determined "since it was 'not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided,' . . . such cases *were* justiciable." This decision improperly shifted the burden of proof. Furthermore, the six justices could not decide on what standard should apply, four applying a different standard than the other two. Since *Bandemer*, the Court had not revisited the issue, although lower courts have continually applied the plurality standard, essentially resulting in the refusal of a court to intervene: "[t]hroughout its subsequent history, *Bandemer* had served almost exclusively as an invitation to litigation without much prospect of redress." The plurality addressed each of the dissent's proposed standards and the plaintiffs' proposed standard, finding that none were workable.

Justice Stevens would "require courts to consider political gerrymander challenges at the individual-district level," much like the Court's standard in racial gerrymandering cases.

Justice Souter, like Justice Stevens, would "restrict these plaintiffs, on the allegations before us, to district-specific political gerrymandering claims." However, Justice Souter "recognize[d] that there is no existing workable standard for adjudicat[ing] such claims." The standard he created was loosely based on Title VII cases, "complete with a five-step prima facie test sewn together from parts of, among other things, our Voting Rights Act jurisprudence, law review articles, and apportionment cases." Justice Breyer would attack the problem on a statewide level. He proposes the criterion that "nothing is more precise than 'the *unjustified* use of political factors to entrench a minority in power.'" He invoked the Equal Protection Clause, but "unjustified entrenchment" was really measured by his own theory of "effective government." Justice Kennedy also recognized the shortcomings of the other standards considered to date, but "conclude[d] that courts should continue to adjudicate such claims because a standard *may* one day be discovered."

Justice Stevens would require courts to consider political gerrymander challenges at the individual-district level, much like the Court's standard in racial gerrymandering cases.

CIVIL STATUTORY INTERPRETATION

In *Hibbs v. Winn*,³⁶ a 5-4 Court, in an opinion written by Justice Ginsburg, determined that the Tax Injunction Act, 28 U.S.C. section 1341, did not bar a lawsuit questioning the constitutionality of a state tax, it only barred those suits filed by taxpayers seeking to avoid payment of tax liabilities. Arizona law "authorize[d] income-tax credits for payments to organizations that award educational scholarships and tuition grants to children attending private schools." Respondents brought an action seeking to enjoin the state from giving tax credits on Establishment Clause grounds. The state sought dismissal based upon the TIA, which prohibits a lower federal court from restraining "the assessment, levy or collection of any tax under State law." The Court stated that "[t]o determine whether this litigation falls within the TIA's prohibition, it [was] appropriate, first, to identify the relief sought." The Court concluded respondent was seeking only prospective relief. The next question then was whether the relief sought seeks to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." The answer, the Court stated, turned on the meaning of the word "assessment."

Turning to the Internal Revenue Code and then the context in which the word assessment was used in the TIA, the Court concluded "an assessment [was] closely tied to the collection of a tax, *i.e.*, the assessment [was] the official recording of liability that triggers levy and collection efforts." The Court next turned to the history of the TIA to support its conclusion. It

34. 124 S. Ct. 1769 (2004).
35. 478 U.S. 109 (1986).

36. 124 S. Ct. 2276 (2004).

**The Court
assume[d]
Congress legislated
against this
background of
law, scholarship,
and history**

stated: “Congress modeled [TIA] upon earlier federal ‘statutes of similar import,’ laws that, in turn, paralleled state provisions proscribing ‘actions in State courts to enjoin the collection of State and county taxes.’” Congress drew heavily on the Anti-Injunction Act (AIA), “which bars ‘any court’ from enter-

taining a suit brought ‘for the purpose of restraining the assessment or collection of any [federal] tax.’” The Court had recognized that AIA served two purposes: (1) it protects the government’s need to assess and collect taxes in a timely fashion; and (2) “require[s] that the legal right to the disputed sums be determined in a suit for refund.” Similarly, the TIA “shields” a state’s assessment and collection of taxes from federal-court restraints. Also, it forces individuals who wish to challenge the assessment of taxes to pursue those procedures specified by the taxing authority. The Court next pointed out that in prior cases involving the TIA, it had recognized TIA’s principal purpose as limiting “drastically federal-court interference with the collection of [state] taxes.” Most telling for the Court were its prior cases dealing with desegregation. The Court stated: “In a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court ever raised a § 1341 objection that, according to the petitioner in this case, should have caused us to order dismissal of the action for want of jurisdiction.”

A unanimous Court in *Barnhart v. Thomas*³⁷ determined the Social Security Administration (SSA) did not need to consider whether a claimant’s previous job existed in significant numbers in the national economy when determining whether the claimant was disabled. Respondent, a former elevator operator, applied for disability benefits, which were denied by the SSA. An administrative law judge concluded that she was not disabled because “her ‘impairments do not prevent [her] from performing her past relevant work as an elevator operator.’” The ALJ rejected respondent’s argument that because the work no longer existed “in significant numbers in the national economy,” she was unable to do her work, as did the Court. Title II’s definition of disability is qualified by the language that “[a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that *he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.*” The question before the Court was whether “exists in the national economy” only modified the “substantial gainful work” or whether it also modified “unable to do his previous work.” The SSA had determined that it did not need to determine whether a claimant’s previous work “exist[ed] in the national economy.” Because the SSA was the agency charged with enforcement of this statute, the Court, in

accordance with its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,³⁸ must defer to the SSA’s determination if it was reasonable. The Court found that it was. Grammatical rules regarding the last antecedent state “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” Furthermore, the SSA’s interpretation did not “lead to ‘absurd results.’” The Third Circuit concluded that there was “no plausible reason why Congress might have wanted to deny benefits to an otherwise qualified person simply because that person, although unable to perform any job that actually exists in the national economy, could perform a previous job that no longer exists.” In response, the Court identified the “proxy theory”: “Congress could have determined that an analysis of a claimant’s physical and mental capacity to do his previous work would ‘in the vast majority of cases’ serve as an effective and efficient administrative proxy for the claimant’s ability to do *some* work that does exist in the national economy.” The Court recognized that this proxy rationale might produce undesirable results in some circumstances; however, it stated “[t]hat [the Third Circuit’s] logic would invalidate a vast number of the procedures employed by the administrative state;” every legal rule has imperfect applications.

Under the Freedom of Information Act (FOIA), “Exemption 7(C) excuses from disclosure ‘records or information compiled for law enforcement purposes’ if their production could reasonably be expected to constitute an unwarranted invasion of personal privacy.” In *National Archives and Records Administration v. Favish*,³⁹ a unanimous Court held that Exemption 7(C) recognized family members’ rights to personal privacy in the death-scene images of their close relative. In order to overcome this privacy interest, a requester must (1) assert a significant public interest to be advanced by the information sought; and (2) where the interest sought to be advanced was that the government acted negligently or inappropriately, produce sufficient evidence that would warrant belief by a reasonable person that the alleged government impropriety might have occurred.

The Court agreed with NARA’s denial of respondent’s request under the FIOA for the death scene photos of Vincent Foster, Jr., deputy counsel to President Clinton. It notes that the Exemption 7(C)’s language was “in marked contrast to the language in Exemption 6, pertaining to ‘personnel and medical files,’ where withholding [was] required only if disclosure ‘would constitute a clearly unwarranted invasion of personal privacy.’” The Court drew two conclusions from these differences: (1) the use of the word “clearly” and the use of the phrase “would constitute” versus “could reasonably,” clearly indicates Exemption 7(C) was broader than Exemption 6; and (2) the data compiled in law enforcement documents contain information on individuals other than the person being investigated, *i.e.*, witnesses and initial suspects. As to the latter, the Court wrote, “[t]here [was] special reason, therefore, to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course.”

37. 540 U.S. 20 (2003).

38. 467 U.S. 837 (1984).

39. 124 S. Ct. 1570 (2004).

First, traditional burial rights and common law acknowledge “a family’s control over the body and death images of the deceased.” The Court “assume[d] Congress legislated against this background of law, scholarship, and history” as well as “the background of the Attorney General’s consistent interpretation of the exemption to protect members of the family of the person to whom the information pertains.” The protection in Exemption 7(C) “[went] beyond the common law and the Constitution” and, therefore, “it would be anomalous to hold in the instant case that the statutes provide[d] even less protection than does the common law.” Second, if the Court adopted Favish’s position, “child molesters, rapists, murderers, and other violent criminals” could obtain information regarding their victims. FOIA requests cannot be denied based on the identity of the person; therefore, the Court’s holding “ensure[d] that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases.”

The Court stated that its conclusion above did not end its inquiry. While a family’s privacy interest falls within the exemption, “the statute directs nondisclosures only where the information ‘could reasonably be expected to constitute an unwarranted invasion’ of the family’s personal privacy.” According to the Court, “[t]he term ‘unwarranted’ requires [it] to balance the family’s privacy interest against the public interest in disclosure.” Therefore, while the person requesting the information typically need not give a reason for a request, when limitations, such as personal privacy protection, come into play, he or she must. The Court applied a balancing test, stating that the person requesting the information must “establish a sufficient reason for disclosure” by showing that: (1) “the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake;” and (2) “the information is likely to advance that interest.”

OTHER SIGNIFICANT DECISIONS

In *Bedroc Limited, LLC v. United States*,⁴⁰ the Court declined to extend its holding in *Watt v. Western Nuclear, Inc.*,⁴¹ relating to the Stock-Raising Homestead Act of 1916 (SRHA), to the Pittman Underground Water Act of 1919. The issue before the Court was whether sand and gravel were “valuable minerals” reserved to the United States in any land grants made under the Pittman Act. While the Court determined that gravel constituted a mineral under the SRHA reserved to the United States, the plurality, in this instance, determined that sand and gravel were not “valuable minerals” reserved to the United States under the Pittman Act. The Court relied on the plain language of the Pittman Act, which referred to valuable minerals and the statutory context of the Act as it related to the General Mining Act, under which sand and gravel would not constitute “valuable mineral deposit[s].” Justice Thomas concurred in the judgment but believed the Court relied too heavily on the Acts use of the word “valuable.”

In *Virginia v. Maryland*,⁴² a 7-2 Court resolved the latest dis-

pute between the two states relating to use of the Potomac River. Chief Justice Rehnquist, writing for the majority, held that Maryland did not have the right to regulate Virginia’s construction of the water intake structures or water withdrawal. The Court concluded that even though Maryland owned the river-bed to the low-water mark, the 1785 Compact

granted Virginia the right to build improvements from its shore and the Black-Jenkins Award did not in any way limit those rights. The state’s long-standing dispute regarding ownership of the river led to two major resolutions: (1) the 1785 Compact, which “resolved many important navigational and jurisdictional issues, but did not determine the boundary line between the States;” and (2) the Black-Jenkins Award, an arbitration award issued in 1877, which placed the boundary line between the states at the low-water mark on the Virginia shore of the Potomac, thereby awarding Maryland ownership of the entire bed of the river. The latter, however, also awarded Virginia “such right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.” In 1933, “Maryland established a permitting system for water withdrawal and waterway construction taking place within the Maryland territory” and, for the last 50 years, has issued numerous permits to Virginia entities. Virginia now contended that Maryland’s regulation of the river was in violation of the 1785 Compact and Black-Jenkins Award.

The Court agreed. Prior to the 1785 Compact and the Black-Jenkins Award, the ownership of the river was contested. However, the Award, while vesting ownership in Maryland, also granted Virginia “the sovereign right to use the River beyond the low-water mark.” Thus, the Court concluded, “Maryland’s necessary concession that Virginia own[ed] the soil to the low-water mark must also doom her claim that Virginia [did] not possess riparian rights appurtenant to those lands to construct improvements beyond the low-water mark and otherwise make use of the water in the River.” The Court also concluded that “[i]n granting Virginia sovereign riparian rights, the arbitrators did not construe or alter any private rights . . . rather, they held that Virginia had gained sovereign rights by prescription.”

Finally, the Court addressed the issue of whether Virginia “ha[d] lost her sovereign riparian rights by acquiescing in Maryland’s regulation of her water withdrawal and waterway construction activities.” To succeed, Maryland needed to show by a preponderance of the evidence “[1] a long and continuous . . . assertion of sovereignty over Virginia’s riparian activities, as well as [2] Virginia’s acquiescence in her prescriptive acts.”

In *Virginia v. Maryland*, a 7-2 Court resolved the latest dispute between the two states relating to the use of the Potomac River.

40. 124 S. Ct. 1587 (2004).
41. 462 U.S. 36 (1983).

42. 540 U.S. 56 (2003).

The Executive Branch, at its highest level, [was] seeking the aid of the courts to protect its constitutional prerogatives.

The Court concluded that Maryland “ha[d] not carried her burden.” First, although the period for prescription by one state over another was not set, the Court had previously indicated that it must be “substantial.” The prescriptive period began in 1957, when Maryland issued its first permit, and ended in 2000, when Virginia sought

leave to file a complaint in this Court. The Court believed in this circumstance, where Virginia’s sovereign right was clearly established and Maryland sought to defeat those rights, “it [was] far from clear that such a short prescriptive period [was] sufficient as a matter of law.” Second, the Court stated that even if this amount of time was sufficient, Maryland had not shown Virginia’s acquiescence. In 1976, during a dispute between the states about water rights, Maryland tried to assert exclusive authority to allocate the water of the Potomac. Virginia protested Maryland’s position. Therefore, contrary to Maryland’s assertions, Virginia had not acquiesced to Maryland’s assertions that it had regulatory authority over construction and water withdrawal.

Justice Scalia delivered the opinion of a unanimous Court in *Norton v. Southern Utah Wilderness Alliance*,⁴³ which held the Administrative Procedure Act (APA) did not provide a remedy to compel the Bureau of Land Management (BLM) to ban the use of off-road vehicles (ORVs) in certain wilderness areas. Furthermore, the land use plan itself was agency action so there was no duty to supplement the environmental impact statement prepared in compliance with the National Environmental Policy Act (NEPA). The Court first provided a lengthy summary of the statutes that applied to this case. In brief, the Federal Land Policy and Management Act (FLPMA) “establishe[d] a dual regime of inventory and planning.” In addition, The Wilderness Act of 1964 required the Department of Interior to designate some lands as wilderness areas, which “subject to certain exceptions, shall [have] no motorized vehicles, and no manmade structures.” The Secretary of the Interior had “identified so-called ‘wilderness study areas’ (WSAs), roadless lands of 5,000 acres or more that possess ‘wilderness characteristics,’ as determined in the Secretary’s land inventory.” WSAs, as well as some previously designated lands, “have been subjected to further examination and public comment in order to evaluate their suitability for designation as wilderness.” The BLM designated portions of Utah as WSAs. It continued to operate those areas under land management plans and allow access by ORVs. Respondents argued that the BLM’s actions violated the BLM’s nonimpairment obligation under FLPMA and that the BLM was required to implement provisions in its land use plans relating to ORV use. Furthermore, respondents contended that the BLM had failed to take a “hard look” at whether, pursuant to the NEPA, it

should have undertaken supplemental environmental analyses for areas in which ORV had increased. The Court concluded that respondents had not stated a claim for relief.

The APA “authorize[d] suit by ‘[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’” The reviewing court “shall . . . compel agency action unlawfully withheld or unreasonably delayed.” The Court stated that “the only action that can be compelled under the APA [was] an action legally *required*.” Thus, the APA barred “any kind of broad programmatic attack,” such as the Court rejected in *Lujan v. National Wildlife Federation*.⁴⁴ Furthermore, a court cannot compel an agency to act in a certain manner. With these principles in mind, the Court turned to the present action, analyzing each claim in turn. SUWA’s first claim was that BLM “violated its mandate to continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for wilderness.” The Court stated that the provisions under FLPMA were mandatory, but “[left] BLM a great deal of discretion in deciding how to achieve it.” Therefore, the Court determined that it could not compel BLM to comply with the nonimpairment mandate, without telling BLM how to comply with the mandate. Similarly, the Court could grant relief on SUWA’s allegations that the BLM failed to comply with “certain provisions of its land use plans” as that would require the Court to compel the BLM to take certain actions. The Court finally turned to SUWA’s third claim. Prior to deciding if a NEPA-duty was actionable under the APA, the Court first decided whether any duty exists. NEPA required that a federal agency prepare an environmental impact statement (EIS) “as part of any ‘proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.’” SUWA argued “that evidence of increased ORV use [was] ‘significant new circumstance or information’ that require[d] a ‘hard look,’” thus, creating a duty to supplement the EIS. “The Court disagreed. The approval of a land use plan was a major federal action; however, “that action [was] completed when the plan [was] approved.” The plan “[was] the ‘proposed action’ contemplated by the regulation,” and, therefore, there [was] no ongoing action that would require supplementation.

In *Cheney v. District Court*,⁴⁵ the Court, in an opinion written by Justice Kennedy, determined that when a court considers whether to issue a writ of mandamus in a civil action that involves the President or Vice President, it should not deny the writ on the grounds other relief was available because the President and Vice President can assert Executive Privilege. The Judicial Watch and the Sierra Club filed separate actions, later consolidated, seeking declaratory and injunctive relief to require the National Energy Policy Development Group (NEPDG), an advisory committee established by President Bush, to produce all material subject to requirements of the Federal Advisory Committee Act (FACA). The district court issued a writ of mandamus, pursuant to 28 U.S.C. section 1361, allowing respondents to conduct limited, “tightly-

43. 124 S. Ct. 2373 (2004).
44. 497 U.S. 871 (1990).

45. 124 S. Ct. 2576 (2004).

reined” discovery into the issue of whether “non-federal employees,’ including ‘private lobbyists,’ ‘regularly attended and fully participated in non-public meetings.’” If they did, they were considered *de facto* members of the committee, which would subject NEPDG to FACA’s disclosure requirements.

The common-law writ of mandamus was codified by 28 U.S.C. section 1651(a). It is “drastic and extraordinary” and should only be issued if: (1) no other adequate relief exists; (2) the right to relief is “clear and indisputable;” and (3) “the issuing court, in its discretion, must be satisfied that the writ is appropriate under the circumstances.” The Court stated that because Vice President Cheney was a party to the case, it was removed from “ordinary” and the Court’s analysis was different. The orders issued by the district court “threaten[ed] substantial intrusions on the process by which those in closest operational proximity to the President advise the President.” The Court believed that “separation-of-powers considerations should inform a court of appeals’ evaluation of a mandamus petition involving the President or the Vice President.” The Court concluded that the lower court’s reliance on *United States v. Nixon*⁴⁶ to establish that the Vice President and his former colleagues were responsible for asserting particularized privileges was misplaced. *Nixon* dealt with criminal proceedings while this one was civil. According to the Court, “the criminal context [was] much weightier because of our historic[al] commitment to the rule of law . . . that guilt shall not escape or innocence suffer.” Here, however, the discovery requests were not only about a party’s need for documents, but also “the burden imposed by the discovery orders.” Furthermore, this was not a routine discovery dispute: “The Executive Branch, at its highest level, [was] seeking the aid of the courts to protect its constitutional prerogatives.” Unlike in *Nixon*, it could not be said in this case that the “production of confidential information would not disrupt the functioning of the Executive Branch.” In light of the overly broad requests, the Court determined that *Nixon* could not provide “support for the proposition that the Executive Branch ‘shall bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections.” The Executive Privilege “is an extraordinary assertion of power not to be lightly invoked.” Once it is asserted, “coequal branches of the Government are set on a collision course.” Therefore, it was better that courts explore other avenues before “forcing the Executive to invoke the privilege.”

In *Sosa v. Alvarez-Machain*,⁴⁷ the Court determined that an alien taken into custody in a foreign country by foreign nationals and transferred to the United States, where he was immediately arrested and arraigned, could not (1) state claim under the Federal Tort Claims Act (FTCA) against the government or (2) state a claim against one of the individuals involved in the kidnapping under the Alien Torts Statute (ATS). The Drug Enforcement Agency (DEA) believed respondent was involved in the torture and murder of one of its officers in Mexico. When the DEA failed to obtain help from the Mexican government in extraditing respondent for prosecution, the DEA

“approved of a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial.” Respondent was acquitted and subsequently brought an action against the government and several individuals involved in his kidnapping in Mexico.

The FTCA “was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual.” One exception was for “any claim arising in a foreign country.” The Court concluded that the circumstances that took place in Mexico were the “kernel” of the claim and, therefore, respondent’s claim arose in Mexico. Thus, the claim fell within the exception for which the government had not waived immunity. Furthermore, unlike the Ninth Circuit, the Court found the “headquarters doctrine” inapplicable. For the doctrine to apply, a court must find that the act or omission at the headquarters “was sufficiently close to the ultimate injury, to make it reasonable to follow liability back to the behavior at headquarters.” The Court believed that use of the doctrine would subject the government to liability beyond that which was reasonable and, further, that it would circumvent the Court’s understanding of proximate cause.

The Court also determined that respondent did not state a claim against one of the individuals involved in the kidnapping based on the ATS, which provided that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The Court concluded that “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations,” *i.e.*, safe conducts, infringement on rights of ambassadors, and piracy. The Court also believed judicial caution should be exercised when expanding the traditional category of actions that could be brought under the ATS and found that respondent’s claim was not one of the circumstances that would justify overcoming that caution. The Court wrote, however, that “the door is still ajar” under the ATS for tort claims based on more definite and accepted “customary law,” and mentioned “prolonged arbitrary detention” as one possible such claim.



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46. 418 U.S. 683 (1974).

47. 124 S. Ct. 2739 (2004).



Letters

A Judiciary as Good as Its Promise

I was greatly impressed by one recent article in *Court Review*. The article by Judge Kevin S. Burke (“A Court and a Judiciary That Is as Good as Its Promise,” Summer 2003) was so inspiring that I photocopied it and put it on our bulletin board.

Weldon Copeland, Judge
Collin County Probate Court
McKinney, Texas

The Unchanging Role of the Judge

In response to Roger Hanson’s Winter 2002 article (“The Changing Role of a Judge and its Implications”), a different perspective is herewith submitted.

When judges step out of their traditional role as interpreter of the plain meaning of the law and apply it strictly to the facts in an instant case, they invite justifiable criticism. Consideration of socially desirable consequences are better left to the other branches of government. Changing roles of judges, creation of new types of courts, becoming partners with social agencies to resolve social maladies can only dilute the court’s effectiveness and make it merely another social agency.

Contrary to current thought, judges at the trial level become intimately involved with the knowledge of litigants and their circumstances through the evidence presented in court. This is a forum unlike the social agency, which receives much biased and self-serving information that often is unchallenged and accepted as fact.

Has the role of judges and the judiciary changed since the establishment of the Constitution of the United States? The Constitution provides separate, but not necessarily equal branches of the federal government. In logical sequence, it provides in Article I a legislature to make laws; Article II an executive to enforce laws; and Article III a judiciary to interpret and apply the laws.

Legislative law is created and enforced by the Executive Branch without interference of the judiciary, with some notable exceptions. Laws that are unconstitutional or executed in violation of the Constitution are set aside by the judiciary. Interpretation and application of the law when challenged in a court of jurisdiction is the proper function of the judiciary.

There are those both in and out of the legal community who believe it is the judge’s role to adapt the law to changing circumstances and technologies, to consider socially desired consequences in resolving specific disputes. They deny the brilliance of our founding fathers, who provided no such thing with their Constitution. In their foresight, they established a government and a constitution that withstands time, changing circumstances, and technologies. They have even provided for amendment of this Constitution for a new and different one if we desire it and have the courage and fortitude of such beliefs.

For the first 150 years of our country, the judges confined themselves to interpreting the plain meaning of the law and applying it strictly to the facts in an instant case. This has been called exercising judicial restraint, which is a misnomer since judges were thoroughly exercising the powers granted by the Constitution. The courts were respected as the final word on the law and judges in general were held in high esteem. The law was certain and business dealings could rely on it, because precedents were given their just value and seldom overturned.

In the last 50 years, judges have turned away from their prior established principles and entered the fields of making law and reaching for socially acceptable results. Judges have stretched the plain language of the law to impose their beliefs in what may seem popular or desirable ways.

Those who are unable to convince the legislature that the people will buy their special interest have found a weakness in the government—the judiciary. Why try to convince Congress of a cause when a judge or judges already bent in your direction may willingly exceed the written law to attain the desired social result?

As a result, judges have become judicial activists disregarding the precedent

and plain meaning of the law to obtain a socially desirable result. More cases are now filed. More meaningless and frivolous lawsuits are filed in the hope that a trial judge or a majority of appellate judges will determine that the end result justifies the means, even if it means stretching or disregarding the law.

If a statute or law is unacceptable, the court should properly point it out and recommend its change, but enforce it until it is properly changed. Activism for social change is a proper and needed function for the legislative and executive branches of government, but not the judiciary. Judges and the forum of the court should not be the vehicle for promoting social change, no matter how desirable.

Respect for the courts is diminished when controversial social changes are promoted. Because judges vacillate on applying the law, the law is no longer constant. Thus, the trial court proceeding, whether by judge or jury, is no longer honored. Participants in the court system just consider it as the first required procedure to obtain their desired result. They intend to appeal until a judge or court in the state or federal system will find in their favor.

Appellate judges should be looking to uphold the trial court or jury decision unless there has been a severe misapplication of the law. Appellate judges should not proceed as if the case were presented to them on first impression and disregard or hold little respect for the decision of the trier of fact.

Only those cases that are clearly unconstitutional or in which gross error has been committed should be overruled. Appellate judges should not substitute their discretion for that of the trial judge.

Analyzing the roles set forth in Roger Hanson’s article, judges should be adjudicators, emphasizing deciding cases. In so doing, they should be law interpreters, not law makers, and should adhere to the Constitution. It goes without saying that judges should expedite cases and manage them in an efficient manner. Justice delayed is no justice at all.

The judge is not a mediator, peacekeeper, or policy maker. He is a law interpreter who decides cases. Who wants to change the role of a judge?

Continued on page 24

The Resource Page: Focus on Judicial Independence



BOOKS OF NOTE

JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman, eds.). Sage Publications, 2002 (\$46.95). 283 pp.

In 2001, 30 prominent scholars with a background in judicial independence issues spent two days at the University of Pennsylvania Law School, discussing and debating them in a forum sponsored by the American Judicature Society and the Brennan Center for Justice at New York University. Afterwards, papers by 13 of the participants were revised and collected for this book, which offers an excellent overview—and an in-depth discussion of—judicial independence. Professor Roy Schotland has included excerpts from several of the papers in this book in the materials he has compiled for this issue of *Court Review* (see pp. 41-46).

JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Peter H. Russell & David M. O'Brien, eds.). Univ. Press of Virginia, 2001 (\$22.50). 312 pp.

This book also originated in a conference, this time a 1996 forum held at Hebrew University in Jerusalem by the International Political Science Association's Research Committee on Comparative Judicial Politics. Additional papers were prepared for a later, 1998 meeting of the group at Northeastern University in Boston. Fifteen papers from both conferences, revised after the discussions, are included in this book. One paper, by Peter Russell, attempts to lay out a general theory of judicial independence; others look at the topic in the United States, Japan, Russia, Germany, England, and several other countries.

UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS (Thomas O. Sargentich, Paul D. Carrington, Barbara E. Reed, Charles Gardner Geyh & Erwin Chemerinsky,

reporters). Century Foundation Press, 2000. 238 pp. Available at http://www.constitutionproject.org/ci/reports/uncertain_justice.pdf (last visited October 10, 2004).

Citizens for Independent Courts, a project formed in June 1998 by the Constitution Project, set up four task forces to make recommendations that would better the judiciary. The four task forces were on federal judicial selection, state judicial selection, the distinction between intimidation and legitimate criticism of judges, and the role of the legislature in setting the power and jurisdiction of the courts. Each task force was led by an able and distinguished reporter. Each set forth detailed factual materials about their topic, along with recommendations. Although the book is out of print, it can be obtained through used book sellers (like www.abebooks.com and www.amazon.com) and is also available in full text on the web.



WEBSITES

Justice at Stake Campaign

www.justiceatstake.org

The Justice at Stake Campaign is a national, nonpartisan campaign to keep courts fair and impartial. The group has done impressive national opinion surveys of both judges and the public on judicial independence issues, as well as several state surveys, all available for review at the website. On the front page of the website, you can find a link to a good September 27, 2004 article from *Business Week*; current materials are routinely updated in the "Focus" section on the website's home page. The Justice at Stake Campaign is supported by a number of groups, including the American Bar Association, the American Trial Lawyers Association, the National Center for State Courts, the Constitution Project, the League of Women Voters, and the Brennan Center for Justice at New York University School of Law.

National Ad Hoc Advisory Committee on Judicial Campaign Conduct

www.judicialcampaignconduct.org/

Established by the National Center for State Courts, this site includes a 50-page handbook on setting up an effective judicial campaign conduct committee. Such committees, composed of lawyers and lay members, educate judges and candidates about ethical campaign conduct, encourage appropriate campaign conduct, and publicly criticize inappropriate conduct when it cannot otherwise be resolved. In addition to that handbook, the website includes a discussion of relevant court decisions, information about existing judicial campaign conduct committees, and links to other websites of interest.

Lawyers Committee for Civil Rights Under Law

www.lawyerscommittee.org

This website includes a large section on judicial independence, found under the "Public Policy" tab on the home page. A 49-page policy paper on the importance of judicial independence to the civil rights community, as well as links to articles and websites on judicial independence, can be found there.

ABA Standing Committee on Judicial Independence

www.abanet.org/judind/home.html

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

American Judicature Society Center for Judicial Independence

www.ajs.org/cji/default.asp

The American Judicature Society's website includes a section on judicial independence issues, including several articles that could, like those found at the ABA's website, be fashioned into a civic club or school presentation.



The Resource Page



BOOKS ON BROWN v. BOARD OF EDUCATION

RICHARD KLUGER, *SIMPLE JUSTICE*. Vintage Press, rev. ed. 2004 (\$24.00). 836 pp.

PAUL E. WILSON, *A TIME TO LOSE: REPRESENTING KANSAS IN BROWN V. BOARD OF EDUCATION*. Univ. Press of Kansas, 1995 (\$24.95). 245 pp.

ROBERT J. COTTRILL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION*. Univ. Press of Kansas, 2003 (\$15.95). 275 pp.

JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY*. Oxford Univ. Press, 2001 (\$16.95). 268 pp.

2004 marked the 50th anniversary of the United States Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In the last issue, we noted a website containing materials that judges who might wish to make a school or civic club presentation about the case could use. In this one, we briefly review four books about the case, its background, and its aftermath.

Size alone qualifies Richard Kluger's *Simple Justice* as the leader of the pack, but the book has more than size going for it—his coverage is sweeping, moving, and elegant.

This book was originally issued in 1976 and has never gone out of print. Patterson issued a revised edition this year, making some revisions and adding a new chapter full of the perspectives that come from revisiting a topic like this many years after one's first, full examination of it.

Two of the other books are similar in nature. Cottroll, Diamond, and Ware are professors, collectively, of law, history, sociology, African studies, and public policy. They bring the thorough skills of a

group of scholars to the task. Important details are noted, including the intricacies of the prior case law in the lower courts over a period of decades that set the stage for *Brown*. They included the term "caste" in the title of the book, and they present detail after detail of the way exclusion had become a central feature of race relations in America. History professor James Patterson provides a highly readable book as well. For those looking for something more manageable than Kluger's 836-page book, either of these would provide both the story and its context.

Our final selection is the memoir of the late Paul Wilson, the young Kansas assistant attorney general who got the job of preparing a brief and an argument in the Supreme Court only 10 days before oral argument. Wilson had never before argued an appellate case—anywhere. Kansas had been ordered by the Supreme Court to file a brief; its attorney general had previously declined involvement and, upon receipt of the order, passed it off to Wilson.

Kluger is generally complimentary of Wilson ("Wilson turned out a concise, direct, and clearly competent brief."), but began his mention of him this way: "By Eastern standards, Paul Wilson was a hayseed." Hayseed or not, Wilson had a knack for storytelling and he puts those skills to good use in this book. His writing style is easy to take. Two excerpts will suffice.

At the outset, he notes that he writes largely from memory, having not kept any diary at the time: "The memories of old men are sometimes tinged with romance. They remember things not as they were, but as they might have been or ought to have been. Here, I appear as a witness, testifying as to things that happened a long time ago. I am mindful of the witness's obligation to tell the truth, the whole truth and nothing but the truth. But I am also an old man."

He concludes the book this way: "Fifty years later our across-the-street neighbors are black. . . . Elsewhere in the community, blacks and whites enjoy equal access to public places and equal

opportunity in the marketplace. These things within my personal experience, augmented by knowledge of black achievements elsewhere, persuade me that Americans are nearing the goal of equality before the law. The more elusive but important goal is the time and place where people stand equal before one another."

Wilson's book, along with the others listed here, may help to move us along that path.



ON THE WEB

The Center for Court Solutions
<http://solutions/ncsconline.org>

The Center for Court Solutions is a new, cooperative venture seeking to develop and implement innovative solutions in key areas of concern for courts. The Center is a joint initiative of the State Justice Institute, the National Center for State Courts, and the Center for Effective Public Policy.

The Center provides assistance in five areas: (1) *diversity*, including cultural and language issues, (2) *emergency management and security*, (3) *family and juvenile justice*, including the development of innovative practices, better decision making, and holistic, integrated family justice, (4) *pro se/pro bono service response*, and (5) *sentencing alternatives*.

For more information, contact Pam Casey at the National Center for State Courts (757-259-1508 or e-mail: pcasey@ncsc.dni.us) or Peggy Burke at the Center for Effective Public Policy (301-589-9383 or e-mail: pburke@cepp.com).



FOCUS ON JUDICIAL INDEPENDENCE

The Resource Page focuses on resources relating to judicial independence on page 63.