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002	Report	Judicial Nominees	5	04/10/2002	PRM;
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SERIES:
Kavanaugh, Brett - Subject Files

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[Judicial Rules]

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United States Department of Justice
Office of Legal Policy

JUDICIAL CONFIRMATION HEARINGS AND THE RULE OF LAW: A REPORT TO THE ATTORNEY GENERAL

March, 2002

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Executive Summary

I. Introduction

In 1835 Alexis de Tocqueville, the son of a French courtier, published an account of his recent travels through the United States, a tour that provided him—and Europe—with a first-hand look at the fledgling American republic. Tocqueville's self-assigned task was to ascertain why democracy had proven so successful in the New World, when similar experiments in his native France had produced Robespierre, Napoleon, and the guillotine. The American polity had been spared from such excesses, he concluded, in part because it had developed cultural norms and institutions that tended to mitigate the "tyranny of the majority."

Tocqueville was struck by the power of American courts to declare acts of legislatures to be unconstitutional, a power that he saw as "one of the most powerful barriers that have ever been devised against the tyranny of political assemblies."[1] As a result, "[s]carcely any political question arises in the United States that is not resolved sooner or later into a judicial question."[2] But Tocqueville also recognized that judges' commitment to the rule of law prevented them from abusing that power.

> [T]he American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice. He performs his functions as a citizen by fulfilling the precise duties which belong to his profession as a magistrate.[3]

Tocqueville did not suggest that the judges who decided political cases decided them politically. For Tocqueville, the American judiciary entered the political fray only reluctantly. Judges decided such cases, not according to their own estimation of what was politically expedient, but by discharging their "duties . . . as a magistrate."

The ideal of the judge as a neutral arbiter of the meaning of the law, and the concomitant distinction between law and politics, has come in for a beating lately. A growing chorus of commentators expects, and even demands, that judges will act as political operatives; that they will decide cases with an eye toward securing what they deem to be a "just" result.

Some of the most forceful salvos directed at the traditional understanding of judicial decisionmaking have been launched from the legal academy. Several related schools of thought, collectively known as "noninterpretivism," instruct that the role of the courts is to "update" the law—both the Constitution and, in some cases, statutes—to fit society's changing circumstances and expectations. According to noninterpretivists, the Constitution was "launched upon a historic voyage of interpretation in which succeeding generations, looking at the entire text of the Constitution as amended from time to time, would elaborate what the text means in ways all but

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[1] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 103 (Phillips Bradley trans., Alfred A. Knopf 1994) (1835).

[2] *Id.* at 280.

[3] *Id.* at 103.

certain not to remain static."[4] As a result, federal judges are duty-bound to "do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command."[5]

Noninterpretivism's implicit premise—that judges are essentially political actors who decide cases in order to secure outcomes that are desirable from the standpoint of contemporary political sensibilities—has become explicit with the rise of the Critical Legal Studies movement, or "cls." According to cls, "there is no interesting difference between legal discourse and ordinary moral and political discourse."[6] The law both reflects certain political biases and, in turn, can be used to advance certain political visions of the good.[7] As a result, it is meaningless say that any given judicial decision is legally "correct." "There is never a 'correct legal solution' that is other than the correct ethical or political solution to that legal problem."[8]

Nor are the professors alone in their efforts to undermine the neutral-judge ideal. Even members of the United States Senate are coming to embrace the concept of the judge as a political actor who is charged with implementing sound policies. In the summer and fall of 2001, a subcommittee of the Senate Judiciary Committee held a series of hearings entitled "Should Ideology Matter?: Judicial Nominations 2001." A number of witnesses and Senators alike answered that question in the affirmative, and concluded that the Senate should evaluate candidates for the federal bench based on the likelihood that they would reach outcomes of which it approves from a policy standpoint. One member of the committee stated his view that "[i]t is high time we returned to a more open and rational consideration of ideology when we review nominees."[9]

This report aims at revitalizing the ideal of the judge as a neutral arbiter of the law's meaning. Its claim is simple: judges must decide cases according to the law's requirements, and the Senate must ensure that judicial nominees commit to doing so. For judges to rule on the basis of extrinsic considerations, such as their personal policy preferences or society's changing expectations, or for the Senate to evaluate nominees based on the likelihood that they will reach outcomes of which the Senate approves, would undermine both the rule of law and judicial independence.

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[4] Laurence H. Tribe, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 70 (1997).

[5] RONALD DWORKIN, LIFE'S DOMINION 145 (1993).

[6] Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1524 (1991).

[7] *Id.* at 1526 ("The concept of 'reasonableness' used in tort law is political in the sense that it implicitly and sometimes explicitly relies on images of male behavior to define the norm of reasonableness. The related concept of 'rationality' was politically defined to justify the expansion of European states into regions occupied by other peoples.").

[8] Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW 47 (David Kairys ed., 1982).

[9] *Should Ideology Matter?: Judicial Nominations 2001: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Sen. Schumer).

This report is divided into two main sections, which correspond to the two elements of its claim about the respective roles of federal judges and of the Senate. The first section considers the judiciary's function in a republican form of government, and on what bases judges properly may decide cases. **[Summary of first section to be added]**

The second section examines what standards the Senate properly may use when deciding whether to confirm a judicial nominee. (Much of the literature discusses the Senate's role in confirming nominees to the Supreme Court, but this report also addresses candidates for the lower courts, which have begun to receive an increasing amount of attention.) This report argues that the Senate may, and indeed must, ensure that judicial nominees possesses the skills, intellect, and character necessary to serve as federal judges. In addition the Senate may, and indeed must, take into account what may be called their "judicial philosophy"; the methodology they would use to decide cases, including their fidelity to a law's text and structure, their willingness to follow binding precedent, their commitment to setting aside personal biases, and their reluctance to substitute their policy preferences for those of Congress.

The Senate must not, however, evaluate judicial nominees based on their respective tendencies to reach outcomes of which the Senate approves; that is, based on their "ideologies." To do so would be to manipulate the judicial confirmation process in an effort to influence the results in individual cases. Nor should the Senate demand that nominees commit to ruling a particular way in a given case; for example, insisting that they agree not to overturn a precedent of the court to which they have been nominated. It also is improper to scrutinize nominees' political affiliations and beliefs, which play no legitimate role in the judicial decisionmaking process. The Senate should not ask nominees who currently serve as judges to justify their past rulings, as such questions imply that the legislature may oversee the decisions of the federal courts, and could lead to uncertainty about the meaning of the precedent. And, the Senate should not undertake to bring ideological "balance" to the federal courts, even if it were possible to accurately predict how a judge would behave once on the bench. To the extent that "balance" is a legitimate goal, it is best achieved by electing a new President, not by distorting the confirmation process.

Ultimately, the role of judges in deciding cases, and the role of the Senate in confirming judicial nominees, is the same: to preserve the rule of law and with it judicial independence. Our nation's courts must be staffed by jurists who are committed to deciding cases by setting aside their personal biases, interests, and political beliefs, and ruling on the basis of the law as it has been promulgated by the relevant lawgiver. They can do so only if the Senate resists the temptation to adopt judicial nominees' policy preferences as the criterion of their fitness for the federal bench.

II. Judicious Choices for Nomination

A. The Rule of Law

To understand the proper workings of the appointment process, we must understand the proper role of the judiciary to which the Administration's nominees are to be appointed. Courts exist to safeguard the rule of law through interpretation and application of the law. Only where

all branches of government act within the bounds of the law they seek to impose on the governed can our system continue to operate with presumed legitimacy. Our Constitution establishes a system of three separate branches of government – executive, legislative, and judicial – each with limited powers. No one disagrees or is ignorant of this general structure, yet the division of powers among these branches continues to be blurred.

Our rule of law system requires that courts be bound by the law and thus members of the judiciary must apply the law as it exists and not as the individual judges would like it to be.[10] To legitimize the court's authority to create or rewrite law is to shift away from our founding and basic principles of separation of powers, popular sovereignty, republican government, representation, the constitutional amendment process, bicameralism, federalism, and other forms of checks and balances established to keep the government subservient to the governed.

A rule of law system is one that is ruled by a set of laws. This concept may seem obvious, but it is what operating within a set of laws provides that truly defines our system. Under the rule of law, our government is subject to the same laws it would impose on us, we, the governed, are provided predictability as to the legal consequences of our actions, and we are able to expect equal application of the law to all. Individuals and entities must be able to predict the legal consequences of their actions *ex ante*. This predictability is important for fairness and because individuals can be presumed to act, in most instances, with a practical rationality that keeps their conduct within the bounds of the law.

First and foremost, the rule of law requires a government that voluntary subjects itself to these laws. For the judiciary, then, judges must be governed by a process of deciding cases under the law and not governed by the judges' beliefs about what is the just result in a given dispute.[11] And, it is the judge himself who must enforce and protect this limitation on his own powers to avoid the usurpation of power from the governed and their representatives.

In our system, the people and not the government are the true sovereigns. The rule of law is "the system of wise restraints that make men free."[12] And, a truly limited government must recognize it is controlled by this freedom, which freedom can only be guaranteed through law. Our founders recognized that a system is best that is governed by law and not by men: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[13] It is now, more than ever, a time to remind ourselves that this principle applies to judges as it applies to other government actors.

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[10] Criticism of the rule of law does exist, most predominantly from the Critical Legal Studies movement, but the Administration fully believes we are a society governed by law and not by men and power. Based on that belief, those selected for nomination to the federal bench must also agree that they are governed by the laws adopted through the democratic process and are not to rule based on their own preferences.

[11] Our system is a legal system based in law and not a system of equity. The equities in our constitutional structure are weighed not by our federal courts, but by our elected representatives in their formulation of policy.

[12] Statement of Professor John M. Maguire, marking tercentenary of Harvard University in 1936.

[13] *Federalist* No. 51.

B. Protection of Democratic Decisionmaking

Unlike state courts, where much law is court-created or common law, the federal courts serve a more limited role under the Constitution, which established a role for this third branch as the "least dangerous" branch. The Constitution created a federal government of enumerated powers, in which the law creating power was delegated to Congress.[14] Thus, courts are governed by the laws of Congress.

This control of courts by the law protects the ideals of republican government and the concept of self-governance embodied in our constitutional system. By recognizing the proper role of the judiciary, we preserve democratic decisionmaking by acknowledging the elected legislature as the appropriate policymaking body. And, the ultimate guarantors of the freedom of the people are thus the people themselves.[15] It is precisely because the Administration trusts and relies on our constitutional structure of republican government and self-governance that it cannot accept unlimited or unchecked judicial authority.

A system of laws that governs courts *and* litigants limits the judiciary to the role of interpretation and prohibits the exercise by the judiciary of the role of legislating through expansion or retraction of constitutional or statutory provisions endorsed by the people. This separation of powers between the judiciary and the political branches is necessary for an independent, unbiased, and neutral judiciary and to maintain confidence in the rule of law.

Our system of self governance does not (and cannot) provide legislative power to courts controlled by judges who are not elected and, except in extreme cases warranting impeachment, cannot be held accountable for their policy decisions. Judges must, therefore, be bound by the law as written by the proper legislating bodies. The courts and the legislature must be respectful of each other's power and not usurp the powers granted to the other. Just as the legislature cannot adjudicate, the judiciary shall not legislate.[16]

It is within this framework of limited, delegated powers, and only within this framework, that the Administration believes judges can operate effectively and with legitimacy. And, proper functioning within this framework requires judges who understand it, understand they are bound by it, and will not put their policy decisions in place of the decisions of the democratically elected legislators. The question then becomes, once it is agreed that judges have only the power to interpret the law as it exists, what does interpretation entail. This is where the conflict truly lies and over which confirmation battles are fought.

C. Different Theories of "Interpretation"

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[14] U.S. CONST. art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." (emphasis added)).

[15] Virginia Declaration of Rights art. II, reprinted in the George Mason Lectures at 20 (1776) ("[A]ll power is vested in, and consequently derived from, the People."). Our government "derives their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[16] U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

Despite the limitations imposed by our constitutional system, different theories and judicial philosophies, masquerading as mere theories of interpretation, exist. For reasons explained later, the Administration does not believe the result-oriented approach to judging put forth by and exercised by a number of scholars and judges properly recognizes the judiciaries intended role in our rule of law system.

The various theories of interpretation generally fall into two categories: theories that look to the desired result in a given case and determine the best rationale for that result and those that look to a result-blind process for determination or interpretation. Adherence to an objective *process* is the preferred method of interpretation as it minimizes any role of the judge's own personal opinions by requiring the result reached through the chosen process and not by permitting the process to be altered or manipulated to reach a different, perhaps preferable result. It is the method and not the outcome that should guide our judiciary.

The Administration, therefore, seeks to appoint those who view themselves as bound by a particular method of decisionmaking and not by any results, i.e. those who understand and accept that in our system they too are bound by the rule of law. Thus, it is not the individual or personal opinions of a nominee that concern the Administration. Instead, an effort has been and will continue to be made to nominate and support judges who view and conduct themselves as interpreters and not as policymakers.

Commitment to a process of interpretation removes individual preferences of the unelected federal judge from altering the will of the people; a will evidenced by ratification of constitutional provisions and enactment of statutes. If the methodology is good, the result is legitimate. Thus, a statute only requires judicial interference where it conflicts with a reasonable reading of constitutional text.[17] The Administration understands that this commitment to the rule of law and to an objective process for interpreting that law does not ensure a single, correct interpretation in any given case; but what falls within the range of reasonable meanings of a particular text is limited and, therefore, limits the conduct of the judiciary. Innovative readings of the text, particularly the Constitution, are not a proper exercise of judicial power. Innovation, rather, requires a change and thus a formal amendment to the text.

Adherence to an objective process, therefore, must be the preferred method of interpretation as it minimizes any role of the judge's own personal opinions, which could be used to subvert the formal amendment process of Article V of the Constitution or to subvert the proper lawmaking procedures of bicameral passage and presentment to the President.[18] The proper result of a case, then, is that result which is necessarily reached by the accepted process of interpretation.[19] The process cannot be altered in order to reach a different, perhaps preferable,

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[17] It is this deference to the policy decisions of the people's representatives that drives the interpretative rule that statutes will be read, to the extent possible, not to conflict with other statutes or the Constitution. Thus, the will of the people is upheld to the maximum extent possible. Cite cases.

[18] *See* U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States").

[19] "A principled decision is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

result. It is this somewhat strict view of a judge's role and the judicial act of interpretation that has brought about criticism of the Administration, and past Administrations, from those who seek particular results or who fear such an objective method of interpretation reasonably leads to a result these critics deem incorrect as bad "policy." And although "[c]onstitutional philosophies always have political results. They should never have political intentions."[20]

D. A Living Constitution is Inconsistent with Our Constitutional Structure

It is precisely this distaste for any objective rules of interpretation that has led some, including many academics, to propose the alternative theory that the Constitution is a living, changing set of principles subject to the whim of judges.[21] The concept of a living or evolving Constitution presupposes the existence of some natural law, a law that is whatever the sitting judge declares it to be.[22] Unlike our written Constitution, this natural law presumably provides a set of implied, unknowable rules that should govern us, thereby defeating the predictability created by written law, eliminating any restraints on our government, and jeopardizing our constitutional structure.[23]

Early in our country's history, the Supreme Court itself realized its limitations and the error of imposing natural law upon the people through the courts. In 1798, Justice James Iredell wrote in *Calder v. Bull*, that "[i]f ... the legislature of the union, or the legislature of any member of the union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed on the subject."[24]

To counter criticism of this results-oriented approach, its proponents argue that regardless of any espoused decisionmaking process, all judges essentially reason backward, determining first the result they would like and then finding a way to reach that result.

> The Yale thesis, crudely put, is that any judge chooses his results [those reflecting current mores] and reasons backward. The resources of legal artifice, the ambiguity of precedents, the range of applicable doctrine, are all so extensive that in most cases in which there is a reasonable difference of opinion a judge can come out on either side without straining the fabric of legal logic. A naïve judge does this unconsciously and conceives himself to be an objective interpreter of the law. A wise judge knows that political choice is inevitable; he makes no false

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[20] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 177 (1990).

[21] It is difficult to understand how the Constitution could ever have been intended to be "living" or "changing" such that its provisions would be altered by judges when the document itself includes an amendment process that has been used effectively.

[22] Many invoke the spirit of the Constitution; but its spirit may be found only in its words.

[23] ALEXANDER BICKEL, THE MORALITY OF CONSENT 120-21 (1975) ("It is the premise of our legal order that its own complicated arrangements, although subject to [some] evolutionary change, are more important than any momentary objective.").

[24] 3 U.S. 386, 399 (Dall. 1798).

pretense of objectivity and consciously exercises the judicial power with an eye to social results.[25]

Accepting such a proposition as a true description of all judicial decisionmaking is to accept that law does not truly govern, men govern. And, these men are not those who have been elected but are those who have been appointed for life to the federal bench, who will be self-empowered to do what could not be done through the legislative process. In addition, such a proposition overlooks judges whom often reach a result that is not consistent with what is known about the judge's personal views. (cite examples). Accepting this proposition further requires acceptance that the judiciary is not an unbiased, objective arbiter, but rather an interested policymaking body whose policies cannot be corrected at the polls and who will in the future be the decisionmaker in cases involving policies created by them in the first instance. Where the court itself has a policy agenda, it cannot be unbiased between litigants.

This "Yale thesis" as stated suggests that no matter the language of the governing statute or constitutional provision, a judge will and should look only to the result and not to the words of the governing law. This approach simply cannot be correct; otherwise written law becomes unnecessary or merely suggestive rather than controlling.

The thesis that all judges do or should merely reason backward is internally unsound and incorrect. Such a proposition does not explain why judges have typically only sought to "update" provisions of the Constitution where it can be argued those provisions are ambiguous and in need of updating to reflect current mores, such as has been done with "due process." Unambiguous provisions have not been subject to this rewriting of the law. For example, no judge would unilaterally change the presidential age limits. But ambiguity cannot be a legitimate criterion for determining what provisions are open to judicial alteration if the basis for the judicial power to make these changes is the need to update, innovate, or otherwise be progressive legal interpreters that power extends to all law.

Unfortunately, the theory that judges do have the expansive authority to rewrite constitutional or statutory text has gained in popularity among academia and judges,[26] resulting in decisions with no reasonable basis in any text. But this authority is in direct conflict with and is a danger to the unbiased, objective judiciary our citizens have come to expect. Judges are expected to rise above their personal interests, their partisan affiliations, and their ideology and no less should be expected of them.

Our constitutional system separates the governmental powers – executive, legislative, and judicial – to protect us from the very power with which opponents of this Administration's nominees would seek to provide to the judiciary. Only the legislative branch and the States have the power to "update" the Constitution and laws. Acceptance of the court's role as one that can change the provisions of the Constitution to represent an "interpretation" in tune with current thinking, or at least the deciding judge's current thinking, necessitates the acceptance of

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[25] Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Vol. 35, Jan. 1947, pp. 73, 201-02.

[26] *See* Lord Acton, Letter to Bishop Mandell Creighton 1887 ("Power tends to corrupt, and absolute power corrupts absolutely.").

interpretations that could just as easily contract as expand our rights and freedoms. Such unilateral alteration of the rights guaranteed to us is prohibited by the very existence of our Constitution and would result in what Raoul Berger deemed "Government by Judiciary."[27]

A written constitution cannot be a document open to alteration of meaning without alteration of text. The nature of a written constitution is to restrain majorities and governments from acting outside of the powers granted to them in Constitution. The mores of the day can only be identified as those of the current majority, whose control over a changing constitution would undermine the very protections set forth therein. Ultimately, our Constitution – through interpretation and application by the judiciary – must protect the majority and the minority equally.

Judicial lawmaking, through "updating" of written law, is equally dangerous to all political views, liberal and conservative. Just as recent cases have expanded the rights of individuals, acceptance of the judge as the appropriate authority for amending these rights would permit a contraction of personal rights. Judge-made law is not the result of the people's representatives' reflection and choice and thus should not properly be called law. As President Lincoln warned, "[i]f the policy of the government, upon vital questions ... is to be irrevocably fixed by decisions of the Supreme Court ... the people will have ceased to be their own rulers, having ... practically resigned their government, into the hands of that eminent tribunal."[28]

E. The Law Must Come from its Words

Only through words can law provide the predictability and knowability necessary for the governed to act in accordance with that law. Not only does the law inform the governed what they may or may not do, but more importantly it informs the government what it shall not do.

> If the courts are fee to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.[29]

A court endangers the Constitution where it curbs lawmaking by democratic majorities in the absence of any concrete foundation in the text.[30] "[Electoral majorities] should, of course, be so restrained where [their] program violates clear and explicit terms of the Constitution, such as the specific prohibitions in the Bill of Rights. But to use vague clauses to import doctrines of restraint ... is to set up the judiciary as a check on elections, a nullification of the process of government by consent of the governed."[31]

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[27] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

[28] ROY P. BASLER, ED., COLLECTED WORKS OF ABRAHAM LINCOLN, Vol. IV, 268 (March 4, 1861).

[29] SCALIA, *supra* note 4, at 47.

[30] ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY at 320-24 (1941).

[31] *Id.* at 319.

The law itself must be what governs the judiciary. Thus, the Administration believes the only appropriate view of the written laws that govern our federal courts – the Constitution and duly enacted statutes – is one that recognizes the power of the States and the legislative branch to create law that cannot be changed by the judiciary.[32] It is the legislatures' role to update laws that by changing societal standards are outdated, while judge's remain bound by the law as adopted and as it stands at the time of the judge's decisionmaking.

The law as adopted is defined by its words. The only objective evidence of the law is the text. Where unambiguous, a court is bound to apply the law as written. "[Courts] do not inquire what the legislature meant; [they] ask only what the statute [or constitutional provision] means."[33] To go beyond unambiguous text in applying or interpreting law is fundamentally legislative as it amends the law outside the proper legislative process. Being bound by the text, therefore, limits the range of outcomes that can be considered legitimate, adding the necessary stability, predictability, and knowability of the law and its consequences our system demands.

Where the text of a law is ambiguous, the goal of the court must be to discern the *objective* intent of the law. "The first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms, and the intention of the parties."[34] Such has been the accepted method of interpretation since before our nation's founding with regard to interpretation of private contracts and the same should apply to the interpretation of the public contract we have with our government in the form of the Constitution and the laws duly adopted thereunder. But any investigation of intent must be objective and derived from the text itself.[35] Chief Justice Taney explained this process of interpretation with the following words:

> In expounding this law, the judgment of the court, cannot, in any degree, be influenced by the construction placed upon it by the individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity

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[32] Michael McConnell, *Book Review*, 98 YALE L.J. 1501, 1529 (1989) ("The force of the [this] argument is that the people had a right to construct a Constitution, and that what they enacted should therefore be given effect, including the portions allocating powers to representative institutions.").

[33] OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920), *quoted in Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring).

[34] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES vi 135 (1833, reprinted 1987).

[35] CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 35 (1986) (Discussing the views of Alexander Hamilton, the idea has been expressed in these words: "[I]f a particular effect of a law is fairly derivable from the words properly construed, the framers of the law cannot in effect say 'that may be so, but that is not what we meant' (unless they choose to say this by repealing the old law or passing a new one).").

> exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.[36]

The founders, as well, had this view of the judiciary: "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. . . . [t]he legitimate meaning of the Instrument must be derived from the text itself."[37] It must be remembered that the Constitution is essentially a contract, with its parties being the States and the people. And, where the Constitution is silent, the issue is for the people to decide.

Courts that are not bound by text create in themselves a veto power not authorized in our constitutional structure. If such an expansive judicial power is endorsed, or if the Administration's nominees who have a more limited view of judicial authority are not confirmed, an awesome power will have been bestowed on our courts, a power from which the governed have little recourse.

We acknowledge that "[l]anguage is sometimes hard to interpret, but that does not suggest that it can be made to mean anything."[38] "What a court is to do is to declare the law as written, leaving to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."[39]

F. Separation of Powers

Separation of powers doctrine dictates a limited and independent view of our judiciary. As the only non-political branch in our government, it is imperative that its proper place be respected by those who seek to serve as judges and those who seek to fulfill their responsibilities in the appointment process.

Our founders brilliance can be seen in their keen understanding that power should be divided to avoid its abuse, and interaction among the branches must come in the from of "checks and balances." "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."[40]

> There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' [Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the

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[36] *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845).

[37] GAILLARD HUNT, ED., THE WRITINGS OF JAMES MADISON 9:219 (1910).

[38] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 218 (1990).

[39] THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (1903 ed.).

[40] *Federalist* No. 47.

> acts of each other.' . . . [Monstesquieu's] meaning, as his words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.[41]

It must be reiterated that legislation is not the prerogative of the judiciary. Although de Tocqueville was probably right that "[s]carcely any political question arises in the United States that is not resolved sooner or later into a judicial question,"[42] judges should not decide political questions politically.

Politics is the business of the other branches. By seeking to nominate judges committed to the rule of law and a method of decisionmaking consistent with it, the Administration does not seek to control the outcomes of cases, but to ensure the people continue to operate as the ultimate arbiters of policy through election of those in the political branches – those who can be held accountable for their actions.

III. The Role of the Senate in Confirming Federal Judges

The overriding goal of the judicial appointment process—including both the President's decision to nominate a candidate and the Senate's decision to confirm him—is to ensure that our nation's courts are staffed by judges who are committed to the rule of law. But judges can discharge their duty to be neutral arbiters of the law's meaning only if they are independent of the two democratically elected branches. As Senator Kennedy has affirmed, judicial independence "is at the heart of the rule of law."[43] A judge must decide individual cases based solely on the merits, and without regard to extrinsic considerations—for example, the hope of financial gain or fear of financial loss, personal policy preferences, or an estimation of what outcomes others may desire. According to Archibald Cox, "the idea of judicial independence implies . . . that judges shall decide lawsuits free from any outside pressure: personal, economic, or political, including any fear of reprisal."[44]

The importance of judicial independence—especially independence from the legislative branch—has a long pedigree in American history. Since the founding, Americans have insisted that those who sit in judgment of them must be independent of the organs of government responsible for policymaking. The Declaration of Independence complained that George III "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and

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[41] *Federalist* No. 47.

[42] 1 TOCQUEVILLE, *supra* note 1, at 280.

[43] Senator Edward M. Kennedy, Speech at the Alliance for Justice Annual Luncheon (Apr. 30, 1997).

[44] Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996); *see also* Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 646 (1995) ("[J]udicial independence means simply that a life-tenured federal judge is free from all political and other outside pressures to decide cases in a wholly impartial manner. . . . . Prevailing political winds have no effect.").

payment of their salaries."[45] The colonists believed that the King's control of the purse gave royal judges an incentive to decide cases in a way that was consonant with his interests. Moreover, because George III viewed royal judges as mere agents of the crown, he asserted—and not infrequently exercised—the right to remove from office the ones with whom he was displeased.[46]

Because of their experiences with a dependent judiciary, the Framers of the Constitution sought to shield federal judges from the influence of the legislative branch, both economic and political. According to *Federalist No. 78*, judicial independence "is an excellent barrier to the despotism of the prince" in a monarchy, and "in a republic it is no less an excellent barrier to the encroachments and the oppressions of the legislative body."[47] Thus the Constitution prohibits Congress from reducing federal judges' salaries. It also guarantees that judges will remain on the bench "during good Behavior," and allows Congress to remove them only by impeachment.[48] Both protections were born of the Framers' fear that the legislature, like George III before it, would pressure judges into reaching outcomes of which it approved.

The twin imperatives that judges respect the rule of law, and that they be independent of the legislature, have broad implications for the criteria that the Senate properly may consider when deciding whether to confirm one of the President's judicial nominees. The bright line that separates legitimate from illegitimate inquiry is the distinction between process and outcome. Stephen Presser of the Northwestern Law School explains the difference this way:

> It might also be helpful, initially, to draw a distinction between what we might describe as an ideology of substance or results, and an ideology of process. An ideology of results might be an appropriate means of evaluating the elected officials in a government, particularly those in the executive and the legislature, but an ideology of process would be a more sensible means of evaluating the behavior of the judiciary.[49]

As Senator Biden explained in a 1994 speech, the Senate properly may evaluate nominees based on their qualifications and character. First, nominees must have "the capacity, competence, and temperament to be on the court of appeals or a trial court." Second, they must be "of good character" and "free of conflict of interest." Third, candidates must "faithfully apply the Constitution and the precedents of the Supreme Court." If nominees satisfy those three elements—and if they are not "so out of the mainstream" that one has reason to question their competence, character, or temperament—then "they should be given an opportunity to fulfill [sic] the seat for which they have been named."[50] The Senate also must ensure that candidates

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[45] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

[46] *See* Cox, *supra* note 44, at 570 & n.13.

[47] **CITE**

[48] U.S. CONST. art. II, § 4; art. III, § 1.

[49] Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 246 (2001).

[50] 140 CONG. REC. S4281-03, S4282 (daily ed. Apr. 14, 1994) (statement of Sen. Biden).

have not been nominated because of their personal or political connections. In *Federalist No. 76*, Alexander Hamilton predicted that the Senate confirmation process would be "an excellent check upon a spirit of favoritism in the President," and would "prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[51]

In addition to a nominee's qualifications and character, the Senate may, and indeed must, consider his judicial philosophy: the methodology by which he would decide cases, including his fidelity to constitutional and statutory text; his commitment to precedent, especially Supreme Court precedent; and his willingness to set aside personal biases. The Senate must ensure that the nominee clears the hurdle described in a report of the Miller Center of Public Affairs at the University of Virginia: he must have "a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result. The law should be fairly read and applied, irrespective of the judge's personal views as to its wisdom. Where the judge is the finder of fact, the facts will be fairly found."[52]

Consideration of these factors will help ensure that the federal judiciary is staffed by qualified and ethical jurists. But regrettably, a growing chorus of commentators has urged the Senate to look beyond the traditional prerequisites for service on the federal bench—intellect, temperament, and integrity—and evaluate nominees based on the extent to which they share the Senate's policy preferences, and the likelihood that they will reach outcomes that are desirable as a matter of public policy. In the same vein, the Senate has been invited to demand that nominees commit to ruling a particular way in future cases, and to scrutinize nominees' past political affiliations. More alarmingly still, some commentators propose that the Senate use the confirmation process to ensure ideological "balance" in the federal courts. If the Senate accepts these invitations, it risks undermining the rule of law and judicial independence—and indeed democracy itself.

A. Outcomes

In 1985 Abner Mikva, then a judge on the U.S. Court of Appeals for the D.C. Circuit, urged the Senate to refrain from requiring judicial nominees to disclose their views on controversial legal issues. According to Judge Mikva, "the Senate ought not . . . determine, through questioning, a nominee's views on emerging constitutional doctrine, on issues likely to face courts in the near future . . . because these questions are really a signal to a nominee that he will become a judge only if he promises to be obsequious, to be a yes man to the powers that be."[53] Judge Mikva's objections are equally valid today. For while it is perfectly acceptable to insist that nominees decide cases consistent with precedent and statutory text and structure, evaluating them on the basis of their tendency to reach outcomes of which the Senate approves as a matter of public policy—that is, screening nominees for "ideology"—would have disastrous implications for the rule of law and judicial independence. It would undermine the rule of law

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[51] **CITE**

[52] MILLER CENTER COMMISSION NO. 7, REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES 10 (1996), *available at* http://millercenter.virginia.edu/pdf/commissions/commission7.pdf

[53] Abner Mikva, *Judge Picking*, DISTRICT LAW, Sept.-Oct. 1985, at 37, 39.

by encouraging judges to favor particular classes of litigants. And by pressuring nominees to decide cases based on the Senate's view of which outcomes are desirable from a policy standpoint, such inquiries would damage judicial independence—especially when they concern legislation then pending before Congress, or matters in which the Senate has an institutional interest. More alarmingly still, evaluating nominees based on their anticipated outcomes undemocratically would assign judges a policymaking function that our Constitution reserves for the legislature and executive.

Professor Laurence Tribe of the Harvard Law School is a characteristic proponent of the view that nominees should be confirmed or rejected based on the outcomes they can be expected to reach. Professor Tribe recently explained his view that the Senate should ensure that judicial nominees demonstrate not only "exceptional intellect and wisdom and integrity," but also "the understanding of and commitment to those constitutional rights and values and ideals that the Senator regards as important for the republic to uphold." Although he stops short of proposing an outright litmus test, Professor Tribe leaves little ambiguity on which "values and ideals" he views as prerequisites for service on the federal bench. The judicial confirmation process is an opportunity to ensure that federal judges will reach satisfactory answers to such questions as whether government may ban embryonic stem-cell research, whether federal civil-rights statutes are to be "rendered virtually enforceable," and whether state legislatures may "regulate the most intimate sexual details of what we do behind closed doors with those we love."[54]

Professor Tribe's reluctance to propose an explicit test was not shared by all of his colleagues. Yale Law School Professor Judith Resnik testified that a nominee's solicitousness toward the interests of women is a crucial measure of his fitness for the federal bench. She urges the Senate to "continue its work of shaping legal norms to ensure women's equality," and only confirm those nominees who view the law "as having an affirmative role to play in expanding opportunities for all." She continues: nominees must demonstrate that "they can be sensitive to the fact that disputants are often needy," and that they "support[] ready access to the federal courts."[55] Similarly, *Wall Street Journal* columnist Al Hunt proposes that the Senate should reject nominees who "would reverse many federal protections in civil rights, women's rights, environmental protection, campaign finance reform, privacy and abortion rights," or who "would severely curtail the role of the federal government and reshape the economic and social structure of the country well to the right."[56]

Perhaps the most explicit call for an outcome-oriented confirmation process appears in a *Washington Post* editorial by Joseph A. Califano Jr., a former official in the Johnson Administration.[57] Califano urges the Senate to subject judicial nominees to a "penetrating policy

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[54] *Should Ideology Matter?: Judicial Nominations 2001: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Laurence H. Tribe, Professor, Harvard Law School) [hereinafter *Tribe Testimony*].

[55] *The Senate's Role in the Nomination and Confirmation Process: Whose Burden?: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Judith Resnik, Professor, Yale Law School) [hereinafter *Resnik Testimony*].

[56] Albert R. Hunt, *The Politics of Lifetime Appointments*, WALL ST. J., Mar. 14, 2002, at A19.

[57] Joseph A. Califano Jr., *Yes, Litmus-Test Judges*, WASH. POST, Aug. 31, 2001, at A23.

MRI." It should "nail[] down" their views on a wide range of controversial matters—including "tobacco policy, prison reform, control of HMOs, the death penalty, abortion, environmental issues, the constitutionality of redistricting for House elections, gun control and the rights of women and minorities"—to ensure that they will reach desirable outcomes when those issues come before them. Nominees who would "make national policies" of which the Senate approves are entitled to confirmation; those who would not, are not.

The proposition that the Senate should screen judicial nominees based on the outcomes they are likely to reach poses a grave threat to the rule of law. A core requirement of the rule of law is that judges render justice impartially and impersonally, without regard to the identity of the litigants before them.[58] As Senator Leahy affirmed in 1994, it is "essential" for a judge to "provide a fair and impartial hearing," "[n]o matter what the cause or whom the litigant" and without regard to "[w]hether a petitioner is rich or poor."[59] But outcome-oriented commentators effectively are arguing that judges should favor the interests of a particular class of litigants, be it racial minorities, women, federal agencies, or Congress. Indeed, their claim is not that federal judges *may* favor a class of litigants, but that they *must*—and, moreover, that the Senate should refuse to confirm any nominee who will not commit to doing so.

To take an example almost at random, Professor Resnik argues, somewhat vaguely, that federal judges should use their positions to "ensure women's equality."[60] She does not explain how this imperative is to be carried out in practice—for example, in a female plaintiff's Title VII lawsuit alleging that her employer discriminated against her on the basis of her sex. Two possibilities come to mind. On the one hand, Professor Resnik might mean that the judge should decide the case in light of the hornbook truism that all litigants, women as much as men, are entitled to a fair hearing before the courts. (Though if this is her argument, it is difficult to see why she would testify before Congress to make such an uncontroversial claim.) On the other hand, and more ominously, she might mean that the judge presumptively should side with the sex-discrimination plaintiff—perhaps by announcing a new plaintiff-friendly legal rule, or by denying the defendant's otherwise-meritorious motion for summary judgment—and use the case as a vehicle for pursuing a broader policy agenda.

The proposition that judges should favor the interests of certain litigants is fundamentally different than the canons of construction commonly used by the federal judiciary. For example, courts presume that statutes enacted by Congress and signed by the President are constitutional,[61] and that all funds held by the United States for Indian tribes are held in trust.[62] But the reason why statutes are presumed to be constitutional is not because courts favor the federal government's interests over those of private litigants. Rather, the presumption is a rule of comity by which the judiciary defers to the determination, sometimes implicit, of its co-equal branches

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[58] **cite**

[59] 140 CONG. REC. S14,789, S14,790 (daily ed. Oct. 7, 1994) (statement of Sen. Leahy).

[60] *Resnik Testimony*, *supra* note 55.

[61] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 607 (2000).

[62] *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 225 (1983).

that the statute passes constitutional muster.[63] And the reason why Indian funds are presumed to be held in trust is not because courts favor Indians' interests over those of the federal government (or of non-Indian citizens), but because the treaty obligations between the United States and the separately-sovereign Indian tribes create a unique relationship.[64] The deference courts show to their co-equal branches and to Indian tribes is no precedent for granting privileged status to women, racial minorities, or any other favored group of litigants.

Besides posing a risk to the rule of law, examining a nominee's propensity to reach outcomes of which the Senate approves also undermines the independence of the judiciary. Judicial independence is an essential feature of a rule-of-law regime because it enables a judge to decide a given case according to its own merits, not based on extrinsic considerations.[65] But by evaluating a nominee's anticipated outcomes, the Senate would be trying to influence the nominee to decide the case based the Senate's view of desirable public policy and other extrinsic considerations. In effect, the Senate would be manipulating the confirmation process to ensure that judges reach particular outcomes in individual cases.

The threat to judicial independence is especially pronounced when the Senate examines nominees' views on a piece of legislation then pending before Congress. Sometimes Senators inquire about a nominee's views on whether the legislation is desirable as a matter of public policy. For example, Senator Kohl recently asked a nominee whether he would support a piece of legislation that would limit federal judges' ability to attend privately-funded seminars:

> On the financial disclosure forms it says that you have attended a significant number of seminars for judges, also known as "junkets for judges." Senators Feingold and Kerry are concerned about such seminars and are proposing legislation that would curtail these activities. Might you support limits on these "junkets for judges?"[66]

In 1997, Senator Thurmond asked an appellate-court nominee for her opinion on whether Congress should eliminate the United States Sentencing Guidelines: "Some argue that the Federal sentencing guidelines do not provide enough flexibility for the sentencing judge and some even say they should be abolished. What is your view of the Federal sentencing guidelines, based on your experience with them?"[67] And in 1992, Senator Heflin sought a nominee's views on a proposal to limit federal courts' habeas corpus jurisdiction:

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[63] *See Morrison*, 529 U.S. at 607 (citing United States v. Harris, 106 U.S. (16 Otto) 629, 635 (1883) ("Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power.")).

[64] *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

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[66] *Nomination of Edith B. Clement to be Circuit Judge of the United States Court of Appeals for the Fifth Circuit: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (Oct. 4, 2001).

[67] *Nomination of Sonia Sotomayor to be Circuit Judge of the United States Court of Appeals for the Ninth Circuit: Hearings Before the Senate Comm. on the Judiciary*, __ Cong., 33-34 (1997).

> Your opponents also criticize your activity pertaining to proposed legislation before Congress dealing with habeas corpus, particularly in regards to . . . whether or not the Federal court would have jurisdiction on habeas corpus by putting a requirement that there had to be proof that a full and fair adjudication or procedure, a full and fair procedure was not conducted at the State court, and there has been criticism of that. What do you say to that charge?[68]

On other occasions, the Senate asks nominees whether they would uphold the constitutionality of a proposed piece of legislation. Senator Metzenbaum asked a Seventh Circuit candidate whether Congress constitutionally could limit the jurisdiction of the Supreme Court: "What is your view with respect to the matter of legislation that would strip the Supreme Court of its jurisdiction to hear certain cases?"[69] Sometimes, the constitutional inquiry is veiled. For instance, less than a month after the terrorist attacks of September 11, 2001, Senator Kohl asked a nominee "[w]ith legislation being discussed to decrease the threat of terrorism, what do you believe is the tradeoff between liberty and security and how can this be achieved?"[70]

Regardless of whether the Senate asks nominees for their views on the desirability or the constitutionality of pending legislation, the threat to judicial independence remains the same. Such questions imply that the Senate will only confirm judges who can be trusted to approve, or uphold the constitutionality, of its actions. They thus raise the possibility of collusion between the Senate and the nominee. The danger is that the Senate will offer confirmation in exchange for the nominee's agreement to uphold the Senate's powers—that the nominee will become, in Judge Mikva's apt phrase, "a yes man to the powers that be."[71]

It is even more damaging to judicial independence when the Senate evaluates nominees based on their anticipated rulings on issues in which the Senate has an institutional interest. For example, during the Senate's hearings on the nomination of Judge Robert Bork to the Supreme Court, Senator Grassley asked for the nominee's views on the legislative veto, which the Supreme Court in *INS v. Chadha*[72] had held to be a violation of the Constitution's bicameralism and presentment requirements. "[W]hat if Congress would enact a legislative veto that provides 1) bicameral passage and 2) presentment to the President? Isn't that about all that *Chadha* would require for a constitutional veto?"[73]

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[68] *Nomination of Andrew J. Kleinfeld to be Circuit Judge of the United States Court of Appeals for the Ninth Circuit: Hearings Before the Senate Comm. on the Judiciary*, __ Cong., 43 (1992).

[69] *Nomination of Daniel A. Manion to be Circuit Judge of the United States Court of Appeals for the Seventh Circuit: Hearings Before the Senate Comm. on the Judiciary*, ___ Cong., 212 (1986).

[70] *Nomination of James H. Payne to be District Judge of the United States District Court for the Eastern District of Oklahoma: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (Oct. 4, 2001). **[Need formal transcript]**

[71] Mikva, *supra* note 53, at 37, 39.

[72] 462 U.S. 919 (1983).

[73] 1 *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 396 (Comm. Print Draft 1987) [hereinafter *Bork Hearings*].

Perhaps the most explicit example of the Senate using the confirmation process to advance its institutional interests occurred when various Senators asked Supreme Court nominees to endorse the doctrine of congressional standing, which allows individual members of Congress to challenge Executive Branch actions which they believe are unconstitutional.[74] For example, during Judge Bork's confirmation hearings, Senator Specter asked:

> Then we have reason to think you are against us on the [congressional-standing] procedure. Now, given the concern of the United States Senate for having [the War Powers Act] interpreted, number one, and then interpreted as the Senate sees it, why should we confirm a nominee who is likely to find against us on both those important grounds?[75]

Senator Byrd pressed the same line of inquiry during Justice Anthony Kennedy's confirmation hearings:

> [W]ould you care to indicate whether or not you feel that there is – do you have any problem with Congress being able to get standing to receive justice in the Court if you become a member of the Supreme Court and there is a serious question that arises between the executive branch and the legislative and the country's national security interests, let's say, are involved?[76]

The implication was clear: a nominee who could be counted on to uphold the Senate's institutional prerogatives would be confirmed, while a nominee who displayed no marked pro-congressional bias would not.

By evaluating nominees' views on legal issues that implicate its own interests, the Senate is not simply manipulating the confirmation process to influence the outcome of a hypothetical case involving two third parties. It is attempting to influence the outcome of a hypothetical case to which it would *itself* be a party. Indeed, seeking assurances that a judicial nominee will uphold congressional prerogatives such as the legislative veto and congressional standing is the equivalent, in both intent and effect, of a party bribing a judge who is expected to hear his case. The Senate would be offering an inducement—namely, confirmation to the federal bench—in exchange for the nominee's commitment to decide a case in a way that is favorable to the Senate's interests. Such a transaction may run afoul of the "illegal gratuity statute," which prohibits giving "anything of value" (which presumably includes a job) to a present, past, or future public official (including a federal judge) "for or because of any official act performed or to be performed by such public official."[77] In fact, because receiving a bribe is an offense for which a federal judge can be impeached,[78] such inquiries effectively ask nominees to engage in conduct that would be grounds for removing them from office if they were then on the bench.

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[74] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998).

[75] 1 *Bork Hearings*, *supra* note 73, at 697.

[76] *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary, Dec. 15, 1987*, 100th Cong., 197-98 (1987) [hereinafter *Kennedy Hearings*].

[77] 18 U.S.C. § 201(c)(1)(A) (2000).

[78] *See* U.S. CONST. art. II, § 4; United States v. Hastings, 837 F. Supp. 3 (D.D.C. 1993).

Evaluating nominees on the basis of their anticipated outcomes does not just undermine values that are the special province of the legal system, such as the rule of law and judicial independence. It also threatens the basic principle of American democracy: that the people are sovereign, and therefore are entitled, subject to a few clearly defined constitutional limitations that themselves reflect the will of the people, to live under laws of their own choosing.[79] If the Senate screens nominees for their policy preferences, basic disputes about the public good will come to be resolved, not by the people's elected representatives through the give and take of legislative action, but by unelected and unaccountable judges. Judge Learned Hand recognized nearly half a century ago that such an arrangement would be antithetical to American constitutionalism:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[80]

Nowhere is the threat to democratic decisionmaking more clear than in Professor Resnik's claim that the Senate should ensure that members of the judiciary "represent" various constituencies among the American people. "Those who sit in judgment," she argues, should "reflect more of the characteristics of those whom they judge." And again: the Senate has an obligation to ensure that life-tenured judges "represent all of America rather than only a narrow slice of our legal, political, and social life."[81]

On its surface, this argument appears to be an attempt to extend democratic principles into the judicial branch. Judges, like legislators, are thought of as "representatives." And judges, like legislators, are urged to act as "architects of public policy."[82] But ironically, importing the democratic norms of policymaking and representation into the judicial decisionmaking process would result in a system that is profoundly undemocratic. Judicial policymaking involves setting aside the decisions of democratically elected officials, who presumably are acting in the interests of their constituents. Far from enhancing democracy, judicial policymaking would deprive the people of their authority to enact laws of their choosing, and arrogates to the judiciary a power that the Constitution assigns to the legislature and executive.

Moreover, judges lack the accountability that is a prerequisite for policymaking authority in a democracy. The reason why Congress and the President properly have the authority to set policy is because they must stand for election regularly, which enables the public to express its

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[79] **CITE**

[80] LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958).

[81] *Resnik Testimony*, *supra* note 55.

[82] Califano, *supra* note 57, at A23.

disapproval with their choices. Indeed, because Americans of the founding generation believed that "'where ANNUAL ELECTION ends, TYRANNY begins,'"[83] every state except South Carolina initially provided for yearly referenda.[84] By contrast, the public has no regular opportunity to pass judgment on the decisions of the federal courts. Simply put, judges do not "represent" the people's interests, except insofar as the people have an interest in an independent judiciary that respects the rule of law.

The Senate's responsibility to advise and consent to the President's judicial nominations is a solemn one. That body must ensure that our nation's courts are staffed by qualified, competent, and ethical jurists. And yet a more searching inquiry, one that would ascertain nominees' views on controversial issues of public policy, or even pressure them into reaching results that are consistent with the Senate's ideological outlook, would unravel America's legal and political systems. As Senator Metzenbaum argued in 1981, when he defended then-Judge Sandra Day O'Connor's refusal to discuss her views on abortion, "I believe there is something basically un-American about saying that a person should or should not be confirmed for the Supreme Court or should or should not be elected to public office based upon somebody's view that they are wrong on one issue."[85] Senator Kennedy concurred: "It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single-issue interest group."[86] A nominee's reluctance to submit to such litmus testing is not a sign of unfitness. Rather, as Judge Mikva argues, "the refusal to respond to improper questions . . . tells us that this nominee possesses the independence and courage we ought to want in our judges."[87]

B. Commitments

For the same reasons that the Senate should not screen nominees for ideological orthodoxy—i.e., their tendency to reach outcomes of which the Senate approves as a matter of public policy—it also must forbear from demanding that nominees commit to ruling a particular way in a future case; for example, upholding a favorite precedent. The Senate is entitled to seek assurances that a nominee will not flout governing caselaw announced by a superior court. The rule of law requires lower courts to adhere to binding precedent announced by a higher court, and the Senate must ensure that district- and appellate-court judges are committed to applying the decisions of the Supreme Court. But extracting a nominee's commitment to uphold prior precedent of the court to which he is nominated—especially in the case of the Supreme Court—

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[83] H. TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 191 (1965) (footnote omitted).

[84] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 166 (1969).

[85] **cite** (statement of Sen. Metzenbaum).

[86] *Nomination of Sandra O'Connor: Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States*, 97th Cong., at 6 (1981) (statement of Sen. Kennedy) [hereinafter *O'Connor Hearings*]; *see also The Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., at 356 (1980) (statement of Sen. Metzenbaum) ("You don't mean that every nominee up for confirmation ought to have his or her views explored . . . on all of the controversial issues . . . ?").

[87] Mikva, *supra* note 53, at 40.

does more than undermine the rule of law and judicial independence. It also is ethically problematic, as the Code of Judicial Conduct requires judicial candidates to refrain from pledging to do anything beyond faithfully discharging their duties. Moreover, demanding commitments raises a host of practical difficulties, as judges cannot easily announce how they would rule without benefit of briefing and oral argument.

Regrettably, the Senate traditionally has been all too willing to demand that judicial nominees commit themselves to upholding a particular precedent. During confirmation hearings for Justice David Souter, Senator Cranston explained that "a nominee who would vote to overturn *Brown* [*v. Board of Education*] . . . or refuse to discuss that case would be rejected on the basis of the single issue of desegregation."[88] And the day the Supreme Court announced its holding in *Stenberg v. Carhart*,[89] which invalidated a Nebraska law outlawing partial-birth abortion, New York Senate candidate Hillary Rodham Clinton announced "My position is clear: as a member of the United States Senate, I will not vote for a nominee to the Supreme Court who would oppose *Roe* [*v. Wade*]."[90]

Perhaps the most extensive demands that a nominee give assurances that he would uphold prior precedents occurred during Judge Bork's confirmation hearings. Chairman Biden began the proceedings by predicting that "the one question to be raised in these hearings is whether or not you are going to vote to overturn Supreme Court decisions."[91] His colleagues made him look like a prophet. Senator Leahy sought to extract a commitment to uphold the Supreme Court's privacy jurisprudence: "Would you agree or disagree with this proposition, that the cases establishing a constitutional right to privacy in these matters became part of our law, and that whatever theoretical challenges may be available to them, it is too late for the Supreme Court to tear them up?"[92] (Senator Specter similarly expressed his belief that it was "too late to tear up the doctrine of privacy."[93]) Senator Packwood demanded a more particular commitment from Judge Bork: "If I think there is any possibility that you would vote to overturn *Roe vs. Wade* . . . then I'm going to oppose you. My standard is going to be beyond a reasonable doubt—I've got to be convinced that you will not vote to overturn it."[94]

Seeking assurances or outright commitments that a nominee would not overrule a past case raises a host of practical difficulties. Such inquiries are inappropriate for the simple reason that nominees often have not had an adequate opportunity to study the question. Judges typically decide cases—including whether to overturn their courts' precedents—only after receiving briefs from adverse parties, conducting oral argument, performing their own research, consulting with

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[88] 136 Cong. Rec. 25,293 (1990) (statement of Sen. Cranston).

[89] 530 U.S. 914 (2000).

[90] *See Hillary in Agreement with* Stenberg v. Carhart*; Supreme Court Decision Reaffirms* Roe v. Wade, *at* http://www.hillary2000.org/news/articles/000628.html (June 28, 2000).

[91] 1 *Bork Hearings*, *supra* note 73, at 112 (statement of Sen. Biden).

[92] *Id.* at 419 (statement of Sen. Leahy).

[93] *Id.* at 618 (statement of Sen. Specter).

[94] *Quoted in* Jonathan Wolman, *Court Nomination Is Caught in Political Undertow*, ASSOCIATED PRESS, July 13, 1987.

their clerks, and discussing the issues with their colleagues. Chief Judge Wald of the U.S. Court of Appeals for the D.C. Circuit argued that "it is singularly inappropriate to decide a first-time-in-the-circuit issue of such momentous consequences . . . without the benefit of full briefing and oral argument."[95] The same is true of judicial nominees. They cannot accurately determine how they would rule on a given legal issue until they have had the opportunity to study it in detail that they would have as judges.

Moreover, the question whether to discard a past precedent or to retain it often raises a number of issues that can only be resolved on a case-by-case basis, in light of a particular case's unique factual background. Under the doctrine of stare decisis, a number of "prudential and pragmatic considerations" are relevant to whether a past decision should be revisited. They include (1) whether the precedent "has proven to be intolerable simply in defying practical workability," (2) whether the precedent "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling," (3) whether "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and (4) whether "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[96] Nominees who have devoted a great deal of study to the precedent may be able to assess whether, as an original matter, it was decided incorrectly. But until they are presented with a specific factual record, they are not able to ascertain how extensively individuals have relied on the preexisting legal rule. Absent this crucial factor, nominees have no way to determine the continuing validity of a prior decision.

Even if nominees were in a position to assess whether a past decision should be retained, demanding that they agree to uphold a precedent could run afoul of ethical prohibitions.[97] Canon 5A of the American Bar Association's Model Code of Judicial Conduct provides that candidates for elective judicial office "shall not" "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office," or "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."[98] This prohibition extends only to elected judges, but the same standard should apply to federal judicial nominees. Although they do not attempt to convince the general public to support their candidacy, federal nominees appear before the public's representatives in the Senate in an effort to win confirmation. The incentive that drives Canon 5A's prohibition on making pledges—___—thus is present.

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[95] National Trust for Historic Preservation v. FDIC, 995 F.2d 238, 241-44 (D.C. Cir. 1993) (per curiam), *aff'd and reinstated on reh'g*, 21 F.3d 469 (D.C. Cir. 1994).

[96] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-55 (1992).

[97] *See O'Connor Hearings*, *supra* note 86, at 388 (statement of Stephen Gillers, Professor, New York University Law School):

[I]t would be dangerous to our constitutional government and would ultimately seriously weaken the Court if a nominee's willingness to be pinned down on future votes on matters that are likely to come before the Court could be used as a condition for approval or disapproval of a nomination. Certainly it could raise questions of ethics should that nominee then proceed, if confirmed, to sit on a case in which he or she has already made a commitment.

[98] Model Code of Judicial Conduct Canon 5A(3)(d) (1990).

A nominee who assured the Senate that he would uphold a past precedent may think that he is obligated, once confirmed, to recuse himself from any case presenting related issues. Canon 2A of the Code of Judicial Conduct requires federal judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[99] And 28 U.S.C. § 455 provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[100] A litigant who petitions the Supreme Court to overturn *Hans v. Louisiana*,[101] which held that states are immune in federal court from lawsuits brought by their own citizens,[102] and who faces Justices who assured the Senate that they would not revisit the Court's sovereign-immunity precedents, would have reason to wonder whether the Court would consider his argument with "integrity and impartiality." For this reason, during his confirmation hearing Justice Thurgood Marshall refused to answer a series of questions about the Fifth Amendment. "I do not think you want me to be in the position of giving you a statement on the fifth amendment, and then, if I am confirmed and sit on the Court, when a fifth amendment case comes up, I will have to disqualify myself."[103] Indeed, to the extent that nominees who commit themselves to upholding a precedent would recuse themselves from such cases, the Senate's strategy of seeking assurances would not just violate ethical rules; it would be counterproductive.

Perhaps in recognition of these concerns, the Senate questionnaire which all judicial nominees are required to complete a

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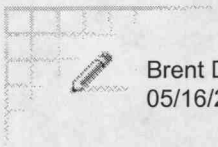

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The Washington Post, 07/06/01:

What Judges Do

By Benjamin Wittes

The unanimous decision last week by the D.C. Circuit Court of Appeals in the case of U.S. v. Microsoft should give a moment's pause to anyone certain that ideology ought to be a central consideration when the Senate examines President Bush's judicial nominees. Seven judges of extremely diverse politics took on a politically divisive case that involved a complex record and had significant implications for the national economy. Defying almost all predictions, they put ideology aside and managed to craft a ruling that every member of the court could sign in its entirety. The D.C. Circuit did not look much like a partisan battleground last week. Rather, its judges looked, well, like judges -- neutrally applying complicated precedents to even more complicated facts and striving successfully to get the right answer.

The debate over ideology and the courts is a frustrating one because the hypocrisy on both sides runs so thick. These days, Republicans like to pretend that ideology has no legitimate role in the judicial confirmation process. But this claim doesn't pass the laugh test after the past few years, during which some of those same Republicans waged war against President Clinton's nominees for their alleged tendency toward "judicial activism." It actually didn't pass the laugh test before that either: It simply defies logic to insist that a senator must support a nominee whose approach to judging offends that senator's conscience. On the other side, however, the new-found Democratic infatuation with subjecting nominees to ideological examination stinks of purity tests. Few are bothering to define what they mean by judicial ideology -- though it usually seems to have something to do with abortion -- or to specify in what universe of cases they think it matters.

The controversial nominees now before the Senate have been named to appeals courts, and the truth is that the average case before such courts -- even the average important, high-profile case

-- is far more like Microsoft than like Roe v. Wade. Since the turn of the year, the D.C. Circuit has decided nearly 120 cases unanimously. In the same period, only 13 cases have produced dissents. Most of these dissents were on technical matters, with no ideological dimension at all. Only a few cases could plausibly be described as ideologically tinged, and in only one -- an affirmative action case last month -- did judicial philosophy play an obvious role.

Longer-term data compiled by the court's chief judge, Harry Edwards, likewise suggest only a minimal role for ideology on the D.C. Circuit. Edwards has reported that between 1995 and 1999, no more than 3 percent of cases produced dissents in any given year. Of those cases in which dissents were filed, only about half involved disputes between judges appointed by presidents of opposing parties. The court's handling of Microsoft, however striking in the current environment, is actually typical.

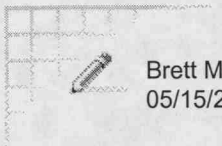
The point is not that ideology should be a forbidden subject, only that the ideological stakes in the appointment of lower court judges should not be overstated. At the Supreme Court level, a nominee's views on abortion and other divisive social issues may matter enormously. At the courts of appeals, however, these are largely symbols that have come to serve as badges identifying the types of judges we expect individuals to be.

The trouble is that the badges can be extremely misleading. With a few exceptions -- affirmative action most notably -- the labels "liberal" and "conservative" say very little about how a judge is likely to resolve a given case. The craft of judging is far more important to the day-to-day work of the lower federal courts than are the political issues that drive the debate over the judiciary's future.

The legitimate place of ideology in the discussion of judicial nominees is, therefore, limited -- limited to those nominees whose ideology is so strong that it might interfere with judicial decision-making. The more ideological the judge -- in any direction -- the less respectful of precedent and the less constrained by the facts of a given case he or she may be.

A senator who has reason to believe that a given nominee's pursuit of the right answer will be compromised by ideological precommitments should certainly vote against that nominee. But without some good reason to think a nominee's ideology will adversely impact his or her handling of a discernible body of cases, opposing that nominee on the basis of ideology is nothing more than punishment for his or her beliefs. That's a dangerous game.

The writer is a member of the editorial page staff.
Brett M. Kavanaugh



Brett M. Kavanaugh
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CODE OF JUDICIAL CONDUCT

Canon 1 A Judge Should Uphold the Integrity and Independence of the Judiciary.

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

Canon 3. A Judge Should Perform the Duties of Office Impartially and Diligently.

Canon 4. A Judge May Conduct the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations.

Canon 5. A Judge Should Refrain From Inappropriate Political Activity.

Canon 6. A Judge Shall Comply with the Code of Judicial Conduct.

Canon 7. Effective Date of Compliance

Canon 8. Construction and Terminology of the Code.

PREAMBLE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

CANON 1

Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

Avoiding Impropriety and the Appearance of Impropriety In All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence

the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

CANON 3

Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the

judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

CANON 4

Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business. A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a "publicly owned business" is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship.

(3) A judge should manage any investments and other economic interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other economic interests that might require frequent disqualification. A judge shall be informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to be informed about the personal economic interests of any family member residing in the judge's household.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge;

(d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the

performance of official duties.

G. Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Extra-Judicial Appointments. Except as otherwise provided by constitution and statute, a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

I. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall file financial and other reports as required by law.

CANON 5

Refraining From Inappropriate Political Activity

(1) A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

(2) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

(3) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(4) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

CANON 3[2]

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law*. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias

2. Amended August 10, 1999, American Bar Association House of Delegates, Atlanta, Georgia, per Report 123.

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or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general

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public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary:

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than [$] within the prior [ ] years to the judge's election campaign,[3] or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless

(a) the position is substantially uncompensated;

(b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or

(c) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.

Commentary:

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority*.

3. This provision is meant to be applicable wherever judges are subject to public election; specific amount and time limitations, to be determined based on circumstances within the jurisdiction, should be inserted in the brackets.

are subject to public election; specific
stances within the jurisdiction, should

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority*.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary:

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household*, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge* likely to be a material witness in the proceeding;

(e) 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 [[[$] for an individual or [$] for an entity]]] [[is reasonable and appropriate for an individual or an entity]].[4]

Commentary:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably

4. This provision is meant to be applicable wherever judges are subject to public election. Jurisdictions that adopt specific dollar limits on contributions in section 5(C)(3) should adopt the same limits in section 3(E)(1)(e). Where specific dollar amounts determined by local circumstances are not used, the "reasonable and appropriate" language should be used.

be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

CANON 4

A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.*

Commentary:

Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest" as explained in the Terminology Section. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section 4H requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

CANON 5[5,6]

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

A. All Judges and Candidates

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(5), a judge or a candidate* for election or appointment to judicial office shall not:

5. Introductory Note to Canon 5: There is wide variation in the methods of judicial selection used, both among jurisdictions and within the jurisdictions themselves. In a given state, judges may be selected by one method initially, retained by a different method, and selected by still another method to fill interim vacancies.

According to figures compiled in 1987 by the National Center for State Courts, 32 states and the District of Columbia use a merit selection method (in which an executive such as a governor appoints a judge from a group of nominees selected by a judicial nominating commission) to select judges in the state either initially or to fill an interim vacancy. Of those 33 jurisdictions, a merit selection method is used in 18 jurisdictions to choose judges of courts of last resort, in 13 jurisdictions to choose judges of intermediate appellate courts, in 12 jurisdictions to choose judges of general jurisdiction courts and in 5 jurisdictions to choose judges of limited jurisdiction courts.

Methods of judicial selection other than merit selection include nonpartisan election (10 states use it for initial selection at all court levels, another 10 states use it for initial selection for at least one court level) and partisan election (8 states use it for initial selection at all court levels, another 7 states use it for initial selection for at least one level). In a small minority of the states, judicial selection methods include executive or legislative appointment (without nomination of a group of potential appointees by a judicial nominating commission) and court selection. In addition, the federal judicial system utilizes an executive appointment method. See State Court Organization 1987 (National Center for State Courts, 1988).

6. Amended August 6, 1997, American Bar Association House of Delegates, San Francisco, California, per Report No. 112, and August 10, 1999, American Bar Association House of Delegates, Atlanta, Georgia, per Report No. 123.

(a) act as a leader or hold an office in a political organization,*
(b) publicly endorse or publicly oppose another candidate for public office;
(c) make speeches on behalf of a political organization;
(d) attend political gatherings; or
(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

Commentary:

A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

(2) A judge shall resign from judicial office upon becoming a candidate* for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law* to do so.

(3) A candidate* for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family* to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

Commentary:

Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

(b) shall prohibit employees and officials who serve at the pleasure of the candidate*, and shall discourage other employees and officials subject to the

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candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly* permit any other person to do for the candidate* what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) 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; or

(iii) knowingly* misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

Commentary:

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the ABA Model Rules of Professional Conduct.

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;

(b) a non-judge candidate* for appointment to judicial office may, in addition, unless otherwise prohibited by law*:

(i) retain an office in a political organization*,

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

Commentary:

Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

Although under Section 5B(2) non-judge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 5B(1), 5B(2)(a), 5E and Application Section.

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate* subject to public election* may, except as prohibited by law*:

(a) at any time

(i) purchase tickets for and attend political gatherings;

(ii) identify himself or herself as a member of a political party; and

(iii) contribute to a political organization*;

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy;

(iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and

(iv) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

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Commentary:

Section 5C(1) permits judges subject to election at any time to be involved in limited political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity.

(2) A candidate* shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

Commentary:

There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyer who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. This is among the reasons that merit selection of judges is a preferable manner in which to select the judiciary. Notwithstanding that preference, Section 5C(2) recognizes that in many jurisdictions judicial candidates must raise funds to support their candidacies for election to judicial office. It therefore permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. In order to guard against the possibility that conflicts of interest will arise, the candidate must instruct his or her campaign committees at the start of the campaign to solicit or accept only contributions that are reasonable and appropriate under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification as provided under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible. Such committees must at all times comply with applicable statutory provisions governing their conduct.

Section 5C(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

(3) A candidate shall instruct his or her campaign committee(s) at the start of the campaign not to accept campaign contributions for any election that exceed, in the aggregate*, [$] from an individual or [$] from an entity. This limitation is in addition to the limitations provided in Section 5C(2).[7]

(4) In addition to complying with all applicable statutory requirements for disclosure of campaign contributions, campaign committees established by a candidate shall file with [ ][8] a report stating the name, address, occupation and employer of each person who has made campaign contributions to the committee whose value in the aggregate* exceed [$].[9] The report must be filed within [ ] [10] days following the election.

(5) Except as prohibited by law*, a candidate* for judicial office in a public election* may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

Commentary:

Section 5C(5) provides a limited exception to the restrictions imposed by Section 5A(1).

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law*, the legal system or the administration of justice, or (iii) as expressly authorized by law.

Commentary:

Neither Section 5D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official

7. Jurisdictions wishing to adopt campaign contribution limits that are lower than generally applicable campaign finance regulations provide should adopt this provision, inserting appropriate dollar amounts where brackets appear.

8. Each jurisdiction should identify an appropriate depository for the information required under this provision, giving consideration to the public's need for convenient and timely access to the information. Electronic filing is to be preferred.

9. Jurisdictions wishing to adopt campaign contribution disclosure levels lower than those set in generally applicable campaign finance regulations should adopt this provision, inserting appropriate dollar amounts where brackets appear.

10. A time period chosen by the adopting jurisdiction should appear in the bracketed space.

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activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates*. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to [Rule 8.2(b) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. Anyone, whether or not a lawyer, who is an officer of a judicial system[11] and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

Commentary:

The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall the judge is considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

B. Retired Judge Subject to Recall. A retired judge subject to recall who by law is not permitted to practice law is not required to comply:

(1) except while serving as a judge, with Section 4F; and
(2) at any time with Section 4E.

11. Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges. See, e.g., Model Code of Judicial Conduct for Federal Administrative Law Judges, endorsed by the National Conference of Administrative Law Judges in February 1989.

Nominations to the U.S. Courts of Appeals

The U.S. Courts of Appeals review appeals from decisions of the federal trial courts and are empowered to review the orders of many administrative agencies. Cases are generally presented to the courts sitting in panels consisting of three judges.

Often called circuit courts, the U.S. Courts of Appeals are divided geographically into 12 circuits (including one for the District of Columbia), each having from six to 28 judges. There is also a Court of Appeals for the Federal Circuit (consisting of 12 judges), which has nationwide jurisdiction and which reviews, among other things, lower court rulings in patent, trademark, and copyright cases.[12]

Altogether, 179 permanent circuit judgeships are authorized by law. During the 103rd through the 106th Congresses, 65 of President Clinton's 106 nominations to the circuit courts received Senate confirmation, and all but two of the 65 appointees were serving as active circuit judges when President Clinton left office on January 20, 2001.[13]

At the beginning of the 107th Congress, with less than three weeks left in his presidency, Mr. Clinton re-submitted nine circuit court nominations which had been submitted, but not confirmed, in the previous 106th Congress. By mid-February 2001, these nominations remained pending in the Senate, with newly inaugurated President George W. Bush not having indicated whether he would support any of the nominations or withdraw them. Earlier, on December 27, 2000 (between the final adjournment of the 106th Congress and the convening of the 107th Congress), one of the nine nominees, Roger L. Gregory of Virginia, had received a recess appointment from President Clinton to the same Fourth Circuit judgeship for which he soon thereafter would be re-nominated.

Upon being transmitted by the President to the Senate, circuit court nominations are referred to the Committee on the Judiciary.

During the 103rd Congress, 19 of President Clinton's 22 nominees to the Courts of Appeals received Senate confirmation. Three other nominations failed to be confirmed and were returned to the President at the *sine die* adjournment of the second session of Congress, pursuant to Rule XXXI of the *Standing Rules of the*

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[12]Besides lower court rulings in patent, trademark, and copyright cases, this court reviews certain appeals from U.S. district and territorial courts in contract, internal revenue, and other cases; decisions of the U.S. Court of Federal Claims and the U.S. Court of International Trade; and administrative rulings by the Patent and Trademark Office, the U.S. International Trade Commission, the Secretary of Commerce, agency boards of contract appeals, and the Merit System Protection Board.

[13]One Clinton appointee nominated and confirmed in 1994, Judge H. Lee Sarokin of the U.S. Court of Appeals for the Third Circuit, retired in 1996. See Neil MacFarquhar, "Federal Judge to Resign, Citing Political Attacks on Judiciary," *New York Times*, June 5, 1996, pp. B1, B4. Another Clinton appointee, John D. Kelly of North Dakota, received Senate confirmation to the U.S. Court of Appeals for the Eighth Circuit on July 31, 1998 but died on October 21, 1998, shortly after taking office.

Senate. Subsequently, during the 104th Congress, the names of these three nominees were resubmitted by President Clinton and received Senate confirmation.[14]

During the 104th Congress, the Senate received 20 Courts of Appeals nominations from the President. Eleven of these nominations were confirmed, one was withdrawn by the President (at the nominee's request),[15] and eight were returned to the President at the *sine die* adjournment of Congress, pursuant to Senate Rule XXXI. Of the eight returned nominations, four had been reported favorably by the Senate Judiciary Committee, but failed to be considered by the full Senate; one had received a committee hearing, but was not reported, and three had failed to receive committee hearings. Subsequently, during the 105th Congress, the names of six of these eight nominees were resubmitted by President Clinton, with four of the six then receiving Senate confirmation.

During the 105th Congress, President Clinton submitted 30 appeals court nominations to the Senate (including the six re-submissions noted above). Of the 30 nominations, 20 were confirmed, one was withdrawn by the President,[16] and nine were returned to the President at the end of the 105th Congress, pursuant to Senate Rule XXXI.. Of the nine returned nominations, two had been reported favorably by the Judiciary Committee but failed to be considered by the full Senate, one had received a committee hearing but was not reported, and six had failed to receive committee hearings. Two of the returned nominations were re-submissions from the 104th Congress. Subsequently, during the 106th Congress, the names of six of the returned nominees were resubmitted by President Clinton, with four of the six then receiving Senate confirmation.

During the 106th Congress, President Clinton submitted 34 appeals court nominations to the Senate (including the six re-submissions noted above). Of the 34 nominations, 15 were confirmed, one was withdrawn by the President, and 18 were returned to the President (17 at the *sine die* adjournment of Congress). Sixteen of the returned nominations failed to receive committee hearings.

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[14]While two of the three nominations were confirmed routinely during the 104th Congress, the third was confirmed only after narrowly surviving a Senate floor vote on a motion to recommit to the Judiciary Committee. See January 31, 1995 nomination of James L. Dennis of Louisiana, in Table 2.

[15]See in Table 2 the October 27, 1995 nomination of Charles R. Stack of Florida. For background on circumstances surrounding the withdrawal of this nomination, see Joan Biskupic, "Appeals Court Nominee Says No Thanks," *Washington Post*, May 10, 1996, p. A17.

[16]See in Table 2 the June 27, 1997 nomination of James S. Ware of California. For background on circumstances surrounding the withdrawal of this nomination, see Victoria Slind-Flor, "Ware's Replacement? Hunting for a Sub," *National Law Journal*, vol. 20, Nov. 24, 1997, p. A4.

During the entire Clinton presidency, there were 23 Senate roll call votes on appeals court nominations (three during the 103rd Congress, one during the 104th Congress, seven during the 105th Congress, and 12 during the 106th Congress).[17]

As of February 5, 2001, two weeks after President Clinton left office, there were 29 vacant U.S. circuit judgeships.

Most of the nominations listed below were made to fill judicial vacancies created by the death, retirement, or resignation of the previous officeholder. Some of the nominations, however, were to judgeships which had been vacant since their creation by the Judicial Improvements Act of 1990 (104 Stat. 5089, 28 U.S.C. 44); each of these judgeships is identified below by the phrase "new position."

Table 2. Presidential Nominations to the U.S. Courts of Appeals During the 103rd-107th Congresses, 1993-January 20, 2001

Nominee	Circuit	Nominate	Hearings	Reported	Confirmed
103rd Congress					
Pierre N. Leval of New York	Second	08/06/93	10/07/93	10/14/93	10/18/93
M. Blane Michael of West Virginia	Fourth	08/06/93	09/23/93	09/30/93	09/30/93
Martha Craig Daughtrey of Tennessee	Sixth (New position)	08/06/93	10/20/93	11/18/93	11/20/93
Rosemary Barkett of Florida	Eleventh	09/24/93	02/03/94	03/17/94	04/14/94 61-37 vote
Judith W. Rogers of the District of Columbia	D.C.	11/17/93	01/27/94	03/09/94	03/10/94
Fortunato P. Benavides of Texas	Fifth	01/27/94	03/25/94	05/05/94	05/06/94
Robert M. Parker of Texas	Fifth	01/27/94	05/25/94	06/14/94	06/15/94
Carl E. Stewart of Louisiana	Fifth (New position)	01/27/94	04/21/94	05/05/94	05/06/94
Diana Gribbon Motz of Maryland	Fourth (New position)	01/27/94	05/25/94	06/14/94	06/15/94

[17]The closest roll call votes were on the following nominations: a 61-37 vote on April 14, 1994, confirming Rosemary Barkett of Florida; a 63-35 vote on October 4, 1994, confirming H. Lee Sarokin of New Jersey; a 46-54 vote on September 28, 1995, defeating a motion to recommit the nomination of James L. Dennis of Louisiana; a 68-28 vote on October 2, 1998, confirming Sonia Sotomayor of New York; a 57-41 vote on October 8, 1998, confirming William A. Fletcher of California; votes on September 21, 1999 of 45-54 and 45-53 respectively on motions to proceed to the nominations of Marsha L. Berzon and Richard A. Paez, both of California; and votes on March 9, 2000 of 64-34 and 59-39 confirming Berzon and Paez respectively and of 31-67 on a motion to postpone indefinitely the Paez nomination.

Nominee	Circuit	Nominate	Hearings	Reported	Confirmed
Guido Calabresi of Connecticut	Second	02/09/94	06/29/94	07/14/94	07/18/94
Robert Harlan Henry of Oklahoma	Tenth	02/09/94	04/29/94	05/05/94	05/06/94
Theodore Alexander McKee of Pennsylvania	Third	03/22/94	05/12/94	05/25/94	06/08/94
H. Lee Sarokin of New Jersey	Third (New position)	05/05/94	08/03/94	08/11/94	10/04/94 83-12 vote for cloture; 63-35 vote to confirm
Jose A. Cabranes of Connecticut	Second	05/24/94	07/21/94	08/04/94	08/09/94
James L. Dennis of Louisiana	Fifth	06/08/94	09/14/94	—	Returned 11/14/94
David S. Tatel of Maryland	D.C.	06/20/94	09/21/94	09/28/94	10/07/94
William C. Bryson of Maryland	Federal	06/22/94	08/17/94	09/22/94	09/28/94
Michael D. Hawkins of Arizona	Ninth	07/13/94	08/11/94	08/25/94	09/14/94
Diana E. Murphy of Minnesota	Eighth	07/28/94	10/04/94	10/05/94	10/07/94
Fred L. Parker of Vermont	Second	08/25/94	09/28/94	10/05/94	10/07/94
Karen Nelson Moore of Ohio	Sixth	09/14/94	—	—	Returned 11/14/94
Sandra L. Lynch of Massachusetts	First	09/14/94	—	—	Returned 11/14/94
104th Congress					
Sandra L. Lynch of Massachusetts[a]	First	01/11/95	02/08/95	02/23/95	03/17/95
Karen Nelson Moore of Ohio[a]	Sixth	01/24/95	02/27/95	03/16/95	03/24/95
James L. Dennis of Louisiana[a]	Fifth	01/31/95	[b]	07/20/95	09/28/95 46-54 vote on motion to recommit; voice vote to confirm
Mary Beck Briscoe of Kansas	Tenth	03/14/95	05/04/95	05/18/95	05/25/95
Carlos F. Lucero of Colorado	Tenth (New position)	03/23/95	06/06/95	06/22/95	06/30/95
Diane P. Wood of Illinois	Seventh	03/31/95	06/27/95	06/29/95	06/30/95

Nominee	Circuit	Nominate	Hearings	Reported	Confirmed
A. Wallace Tashima of California	Ninth	04/06/95	07/18/95	07/27/95	01/02/96
Terence T. Evans of Wisconsin	Seventh	04/25/95	08/03/95	08/04/95	08/11/95
William A. Fletcher of California	Ninth	04/25/95	12/19/95	05/16/96	Returned 10/04/96
R. Guy Cole, Jr. of Ohio	Sixth	06/29/95	09/28/95	10/26/95	12/22/95
Sidney R. Thomas of Montana	Ninth	07/19/95	10/24/95	11/09/95	01/02/96
Michael R. Murphy of Utah	Tenth	07/25/95	08/03/95	08/04/95	08/11/95
Merrick B. Garland of Maryland	D.C.	09/05/95	11/30/95	12/14/95	Returned 10/04/96
Charles R. Stack of Florida	Eleventh	10/27/95	—	—	Withdrawn 05/13/96 (1)
James A. Beaty, Jr. of North Carolina	Fourth	12/22/95	—	—	Returned 10/04/96 (2)
J. Rich Leonard of North Carolina	Fourth (New position)	12/22/95	—	—	Returned 10/04/96 (3)
Richard A. Paez of California	Ninth	01/25/96	07/31/96	—	Returned 10/04/96
Eric L. Clay of Michigan	Sixth	03/06/96	03/27/96	04/25/96	Returned 10/04/96
M. Margaret McKeown of Washington	Ninth	03/29/96	—	—	Returned 10/04/96
Arthur Gajarsa of Maryland	Federal	04/18/96	06/25/96	06/27/96	Returned 10/04/96
105th Congress					
Merrick B. Garland of Maryland[c]	D.C.	01/07/97	[d]	03/06/97	03/19/97 76-23 vote
William A. Fletcher of California[c]	Ninth	01/07/97	04/29/98	05/21/98	10/08/98 57-41 vote
Richard A. Paez of California[c]	Ninth	01/07/97	02/25/98	03/19/98	Returned 10/21/98
M. Margaret McKeown of Washington[c]	Ninth	01/07/97	02/04/98	02/26/98	03/27/98 80-11 vote
Arthur Gajarsa of Maryland[c]	Federal	01/07/09	05/07/97	05/22/97	07/31/97
James A. Beaty, Jr. of North Carolina[c]	Fourth	01/07/97	—	—	Returned 10/21/98
Marjorie O. Rendell of Pennsylvania	Third	01/07/97	09/05/97	09/18/97	09/26/97

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Nominee	Circuit	Nominate	Hearings	Reported	Confirmed
Helene N. White of Michigan	Sixth	01/07/97	—	—	Returned 10/21/98 (4)
Frank M. Hull of Georgia	Eleventh	01/18/97	07/22/97	07/31/97	09/04/97 96-0 vote
Eric L. Clay of Michigan[c]	Sixth	05/07/97	05/07/97	05/22/97	07/31/97
Sonia Sotomayor of New York	Second	06/25/97	09/30/97	03/05/98	10/02/98 68-28 vote
James S. Ware of California	Ninth	06/27/97	10/09/97	—	Withdrawn 11/07/97 (5)
Ronald Lee Gilman of Tennessee	Sixth	07/16/97	09/30/97	10/09/97	11/06/97 98-1 vote
Jorge C. Rangel of Texas	Fifth	07/24/97	—	—	Returned 10/21/98 (6)
Susan Graber of Oregon	Ninth	07/30/97	02/25/98	03/05/98	03/17/98 98-0 vote
Stanley Marcus of Florida	Eleventh	09/25/97	10/28/97	11/06/97	11/07/97
Kermit Lipez of Maine	First	10/20/97	03/18/98	03/26/98	04/02/98
Rosemary S. Pooler of New York	Second	11/06/97	05/14/98	05/21/98	06/02/98
Robert D. Sack of New York	Second	11/06/97	05/14/98	05/21/98	06/15/98
Ronald M. Gould of Washington	Ninth	11/08/97	—	—	Returned 10/21/98
Barry G. Silverman of Arizona	Ninth	11/08/97	11/12/97	11/13/97	01/28/98
John D. Kelly of North Dakota	Eighth	01/27/98	06/18/98	06/25/98	07/31/98
Marsha L. Berzon of California	Ninth	01/27/98	07/30/98	—	Returned 10/21/98
Kim McLean Wardlaw of California	Ninth	01/27/98	06/18/98	07/16/98	07/31/98
Chester J. Straub of New York	Second	02/11/98	04/29/98	05/07/98	06/01/98
Timothy B. Dyk of the District of Columbia	Federal	04/01/98	07/16/98	09/10/98	Returned 10/21/98 (7)
Robert S. Raymar of New Jersey	Third	06/05/98	—	—	Returned 10/21/98 (8)
Barry P. Goode of California	Ninth	06/24/98	—	—	Returned 10/21/98
Robert Bruce King of West Virginia	Fourth	06/24/98	09/09/98	09/17/98	10/08/98

Nominee	Circuit	Nominate	Hearings	Reported	Confirmed
William B. Traxler, Jr. of South Carolina	Fourth	07/10/98	09/09/98	09/17/98	09/28/98
106th Congress					
Barbara Durham of Washington	Ninth	01/26/99			Returned 08/05/99
Marsha L. Berzon of California[e]	Ninth	01/26/99	06/16/99	07/01/99	09/21/99 45-54 vote on motion to proceed; 03/08/00 86-13 vote for cloture; 03/09/00 64-34 vote to confirm
Timothy B. Dyk of the District of Columbia[e]	DC	01/26/99	[f]	10/21/99	05/24/00 74-25 vote
Barry P. Goode of California[e]	Ninth	01/26/99			Returned 12/15/00
Ronald M. Gould of Washington[e]	Ninth	01/26/99	09/14/99	10/07/99	11/17/99
Richard A. Paez of California[e]	Ninth	01/26/99	[g]	07/29/99	09/21/99 45-53 vote on motion to proceed; 03/08/00 85-14 vote for cloture; 03/09/00 59-39 vote to confirm; 31-67 vote on motion to postpone indefinitely
Helene N. White of Michigan[e]	Sixth	01/26/99			Returned 12/15/00
Julio M. Fuentes of New Jersey	Third	03/08/99	02/22/00	03/02/00	03/07/00 93-0 vote
Robert A. Katzman of New York	Second	03/08/99	06/16/99	07/01/99	07/14/99
Raymond C. Fisher of California	Ninth	03/15/99	07/29/99	07/29/99	10/05/99 69-29 vote[h]
H. Alston Johnson, III of Louisiana	Fifth	04/22/99			Returned 12/15/00
Kermit Bye of North Dakota	Eighth	04/22/99	11/10/99	11/17/99	02/24/00 98-0 vote
Charles R. Wilson of Florida	Eleventh	05/27/99	07/13/99	07/22/99	07/30/99

Nominee	Circuit	Nominate	Hearings	Reported	Confirmed
Maryanne Trump Barry of New Jersey	Third	06/17/99	07/29/99	07/29/99	09/13/99
James E. Duffy, Jr. of Hawaii	Ninth	06/17/99			Returned 12/15/00
Elena Kagan of the District of Columbia	DC	06/17/99			Returned 12/15/00
Ann Claire Williams of Illinois	Seventh	08/05/99	10/26/99	11/04/99	11/10/99
James A. Wynn, Jr. of North Carolina	Fourth	08/05/99			Returned 12/15/00
Kathleen McCree Lewis of Michigan	Sixth	09/16/99			Returned 12/15/00
Enrique Moreno of Texas	Fifth	09/16/99			Returned 12/15/00
James M. Lyons of Colorado	Tenth	09/22/99			Withdrawn 06/06/00
Allen R. Snyder of Maryland	DC	09/22/99	05/10/00		Returned 12/15/00
Richard Linn of Virginia	Federal	09/28/99	10/07/99	10/21/99	11/19/99
Thomas L. Ambro of Delaware	Third	09/28/99	11/10/99	11/17/99	02/10/00 96-2 vote
Richard C. Tallman of Washington	Ninth	10/20/99	03/23/00	04/12/00	05/24/00
Robert J. Cindrich of Pennsylvania	Third	02/09/00			Returned 12/15/00
Kent R. Markus of Ohio	Sixth	02/09/00			Returned 12/15/00
Johnnie B. Rawlinson of Nevada	Ninth	02/22/00	06/16/00	07/20/00	07/21/00
Bonnie J. Campbell of Iowa	Eighth	03/02/00	05/25/00		Returned 12/15/00
Stephen M. Orlofsky of New Jersey	Third	05/25/00			Returned 12/15/00
Roger L. Gregory of Virginia	Fourth (New position)	06/30/00			Returned 12/15/00
Christine M. Arguello of Colorado	Tenth	07/27/00			Returned 12/15/00
Andre M. Davis of Maryland	Fourth	10/06/00			Returned 12/15/00

Nominee	Circuit	Nominate	Hearings	Reported	Confirmed
S. Elizabeth Gibson of North Carolina	Fourth	10/26/00			Returned 12/15/00
107th Congress					
Bonnie J. Campbell of Iowa[1]	Eighth	01/03/01			
James E. Duffy, Jr. of Hawaii[1]	Ninth	01/03/01			
Barry P. Goode of California[1]	Ninth	01/03/01			
Roger L. Gregory of Virginia[1 j]	Fourth (New position)	01/03/01			
Kathleen McCree Lewis of Michigan[1]	Sixth	01/03/01			
Enrique Moreno of Texas[1]	Fifth	01/03/01			
Helene N. White of Michigan[1]	Sixth	01/03/01			
James A. Wynn, Jr. of North Carolina[1]	Fourth	01/03/01			
H. Alston Johnson, III of Louisiana[1]	Fifth	01/03/01			

[a] Re-submission; see earlier nomination in 103rd Congress.
[b] Hearing held on 09/14/94, on earlier nomination in 103rd Congress.
[c] Re-submission; see earlier nomination in 104th Congress.
[d] Hearing held 11/30/95, on earlier nomination in 104th Congress.
[e] Re-submission; see earlier nomination in 105th Congress.
[f] Hearing held on 07/16/98, on earlier nomination in 105th Congress.
[g] Hearing held 02/25/98, on earlier nomination in 105th Congress.
[h] Prior to Senate confirmation vote on 10/05/99, the Fisher nomination was considered by the Senate on 10/04/99.
[i] Re-submission; see earlier nomination in 106th Congress.
[j] On 12/27/00, after the end of the 106th Congress and before the start of the 107th Congress, the nominee was appointed to the court by presidential "recess appointment," an appointment which will expire at the end of the 1st session of the 107th Congress.

■ COVER STORY ■

FYI. Brett

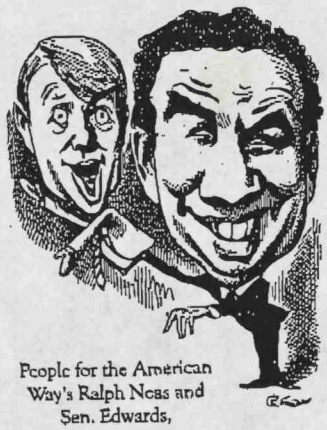
Strange Justice

The liberal coalition that killed the Pickering nomination

BYRON YORK

LATE in the afternoon on Thursday, March 14, in a crowded hallway in the Dirksen Senate Office Building, Bruce Cohen, a top aide to Senate Judiciary Committee chairman Patrick Leahy, warmly greeted Elizabeth Cavendish, the legal director and general counsel of the National Abortion Rights Action League. "Thank you," said Cohen. "No, thank *you!*" said Cavendish, smiling and grasping Cohen's hand.

The cause of the smiling and thanking was the defeat, just minutes earlier, of the nomination of Charles Pickering to a place on the Fifth Circuit Court of Appeals. The committee's narrow Democratic majority, led by Leahy, killed the nomination on a 10–9 party-line vote. What made the exchange between Cohen and Cavendish noteworthy was that a good deal of the debate leading up to the vote had concerned the role that liberal groups such as NARAL, People for the American Way, NOW, the Alliance for Justice, and the Leadership Conference on Civil Rights were playing in the opposition to the Pickering nomination.



People for the American Way's Ralph Neas and Sen. Edwards, by Roman Genn

Republicans charged that the groups—which have formed a coalition to oppose Bush nominees—were working in close coordination with committee Democrats. "Judge Pickering has been viciously attacked by outside, left-wing, liberal groups," said Iowa Republican Charles Grassley, "and unfortunately, the Democratic party has been more than willing to do the bidding of these groups, here in the Senate, to oppose Judge Pickering."

It's a charge Republicans have made for years, at least since the days of the Robert Bork and Clarence Thomas confirmation battles. But for all their anger—and there was plenty in the room during the Pickering vote—Republicans have never really offered much evidence to support their allegations. Yes, groups in the coalition are powerful and well funded—People for the American Way's budget dwarfs those of the groups that tried to defend Pickering—but do they really exercise inordinate influence on the Democratic senators who cast votes on the Judiciary Committee? It's a question that is impossible to answer definitively—no senator would admit that he follows the coalition's lead—but a close look at events during the Pickering battle suggests that the groups did indeed work in particularly close collaboration with Democrats. Coalition members, especially People for the American Way, did much of the groundwork for the case against Pickering, acting as the de facto research arm of the committee's Democratic majority. More important, Democrats seemed unusually responsive to the coalition's concerns; throughout the confirmation fight, Leahy's actions, along with those of many of his colleagues, closely tracked demands made by the coalition.

In one instance, Democrats announced plans to hold a rare second hearing for Pickering almost immediately after the coalition demanded that they do so (and at a time when there was no grassroots outcry to delay the nomination or to give it unusually close scrutiny). In another instance, Democrats abandoned tentative plans to move ahead on Pickering's confirmation after the groups demanded the nomination be delayed again to allow them more time to delve into Pickering's record. And in yet a third instance, Democrats, when questioning Pickering, appear to have relied extensively on documents gathered by People for the American Way rather than the committee's own researchers.

Together, the coalition and their Democratic allies mounted an extraordinarily effective campaign against Pickering. While that fight is now over, the groups are preparing for bigger battles to come. Taking a detailed look at the coalition's involvement in the Pickering nomination provides a preview of what will happen in the coming confirmation conflicts over some of President Bush's most anticipated appellate-court nominees—as well as what is expected to be the biggest fight of all, the battle over the next justice named to the Supreme Court.

ACTIVATING THE 'ACTIVIST NETWORK'

President Bush nominated Pickering on May 25, 2001, making him among the administration's earliest choices for the federal bench. Pickering, who had served eleven years on the U.S. District Court in Mississippi, quickly completed his Senate questionnaire and FBI background check, and by July 23, 2001, the American Bar Association finished its detailed evaluation of his time on the bench, giving him its highest rating: "well qualified." Republicans had hoped that Leahy would hold a confirmation hearing for Pickering before the August recess, but none was scheduled. After Congress returned to work, the events of September 11 led to more delays. Finally, a hearing was set for October 18.

The nomination received almost no media attention; the

papers were filled with news of the war on terrorism and, in the days before the hearing, the anthrax scare on Capitol Hill. But away from the headlines, People for the American Way had begun a campaign against the nomination. On October 15, the group sent out an urgent e-mail to its "activist network" headlined "CONTROVERSIAL HEARING SHOULD BE POSTPONED OR EXTENDED." The e-mail said that "serious questions have been raised about [Pickering's] record on civil rights and reproductive choice." It said Pickering had "hundreds of published and unpublished opinions that should be reviewed," and that a hearing on October 18 would "make it difficult to fully research Judge Pickering's complete record." The e-mail urged liberal activists to get in touch with committee senators to "demand that Judge Pickering's hearing be postponed or extended to a second session."

■

Away from the headlines, People for the American Way began a campaign against the Pickering nomination.

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Second hearings for judicial nominees are highly unusual, though not unprecedented. What was perhaps more unusual was for a group to suggest a second hearing before a first had been held. But the day after the People for the American Way e-mail, Leahy's staff laid the groundwork for a second session by asking Pickering to provide a list of all of his unpublished opinions as quickly as possible. The judge was astonished; his nomination had been announced nearly five months earlier, and Democrats had waited until two days before the confirmation hearing to make such a far-reaching request. Pickering responded that he had written opinions in about 1,100 cases—of which only about 95 were published—and could not possibly get them all together in two days.

The issue of unpublished opinions caught Republicans unaware. Judges decide when to publish their opinions; court guidelines suggest that judges like Pickering, whose cases do not often set legal precedents, limit the amount of opinions they publish to cases that either explore new legal ground or are particularly interesting in some way. That Pickering would publish 95 opinions in more than a decade on the bench seemed normal to his Republican supporters. The number was actually higher than that of some of President Clinton's nominees who had been confirmed to the U.S. circuit courts (one of them published 49 opinions in six years on the district court; another published 109 opinions in 14 years on the bench; a third published 76 cases in 16 years). Democrats had not raised objections then, but in Pickering's case Leahy wanted a list of everything. Pickering sent as much as he could to Leahy the next day, October 17.

On the 18th, the hearing was presided over by New York Democrat Charles Schumer, who had made news a few months earlier when he held a series of hearings designed to explore a new standard for evaluating judicial nominees on the basis of their ideology, regardless of their qualifications for the bench. The first issue Schumer brought up with Pickering was the unpublished opinions: "My opinion is 95 is a little too few to choose somebody for the court of appeals." Schumer told Pickering that he and Leahy had decided that there would be a second hearing, after a review of the unpublished opinions.

Republicans were dumbstruck. They had not seen the People for the American Way e-mail and did not know that Leahy and Schumer were even considering a second hearing, much less that they had agreed on one. Schumer's announcement was clearly an ominous development for Pickering, but at the time most Republicans did not believe Democrats intended to kill the nomination. "I just assumed that they were gonna beat him up a little bit for the outside groups," says one top aide.

After the first hearing, Democrats ratcheted up their requests for Pickering's unpublished opinions. First Leahy had asked for a *list* of all the opinions. Then, immediately after the hearing, he asked for the opinions themselves in cases involving abortion, the Voting Rights Act, the Fair Housing Act, equal protection, and a few other issues. Leahy later asked Pickering for unpublished opinions on cases involving the Violence Against Women Act, the Fourth Amendment, and the Eleventh Amendment. Finally, in a November 13 letter, Leahy asked for *all* of Pickering's unpublished opinions.

At that point, it would have been reasonable for Republicans to go into full emergency mode; but they still believed there was reason to remain cautiously confident that Pickering would be confirmed. During November and December, minority leader (and Pickering friend) Trent Lott spoke with Leahy on more than one occasion about the nomination, and, according to two key aides, Democrats gave Republican leaders reason to believe that Pickering would be approved before the Senate went home for its year-end recess.

But the coalition had other plans. On December 6, leaders of the Ms. Foundation for Women held a conference call with some other coalition leaders, including representatives from the Alliance for Justice, a close ally of People for the American Way. According to notes made of the call, an Alliance official told the group:

> There will be a MAJOR fight in January over Charles Pickering . . . He has a troubling record on civil and reproductive rights. He wrote [the decision] to preserve the state senate as all-white. All integrated marriages are illegal. Wants to ban abortion. Has a record he wants to hide—he does not have a lot of published opinions . . . We can win on that fight, but it will be nasty and contentious.

When one highly placed GOP staffer heard about the conference call, he phoned a Leahy aide to see what was going on. Something had changed; this time, there was no talk of confirmation. "At that point, alarm bells are going off," recalls the staffer. "They're talking about going to jihad, and they haven't read the opinions yet."

As the days ticked down to the Senate's adjournment, Republicans realized there would be no quick second hearing, and no vote on Pickering before Congress went home for the holidays. What the GOP did not know was that while Democrats on the Judiciary Committee focused on the unpublished opinions—and found little to use against the judge—researchers for People for the American Way were preparing to take the Pickering fight in a new direction.

DIALING FOR DOCUMENTS

Margaret Kinchen is the court reporter for the U.S. District Court for the Southern District of Mississippi, located in Hattiesburg. She handles requests for things like transcripts of trials, sentencing hearings, and other court proceedings. They are public documents, but anyone who wants to see them or get copies of them has to go through Kinchen to do it. She keeps records of who requests what.

On December 19, Judith Schaeffer, deputy legal director for People for the American Way, called Kinchen to request transcripts from two sentencing hearings in a celebrated Mississippi murder case tried in Pickering's courtroom. "She wanted them as fast as she could get them," recalls Kinchen, who e-mailed the documents to Schaeffer the same day.

When Kinchen returned to her office the day after New Year's, there was a message from Schaeffer wanting more transcripts. Then there were calls on January 7 and January 8: requests for still more transcripts, most of them involving sentencing hearings presided over by Pickering. On January 11, Schaeffer called again, wanting yet another transcript. Kinchen says the requests from People for the American Way were, up to that point, the only inquiries she received for Pickering-related documents—"They were the only group that asked," she says. Although one might have expected committee Democrats to request documents, given the intensity of their interest in Pickering's record, Kinchen says she did not receive any inquiries from them.

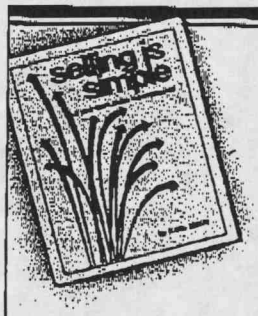
On January 24, People for the American Way president Ralph Neas held a press conference in Washington to release the group's report on Pickering's record. Although Neas had not earlier called for Pickering's defeat, at the news conference he launched an all-out attack on both Pickering and the Bush White House. "Achieving ideological domination of the federal judiciary is the top goal of right-wing activists inside and outside the Bush administration," Neas said, "and judges like Charles Pickering are the means to that end."

The report was a grab-bag of issues, all of which suggested that Pickering was an unreconstructed segregationist who was hostile to the rights of women, minorities, and the poor. The report criticized Pickering for a 1959 law-review note on Mississippi's interracial-marriage ban that Pickering wrote as a first-year law student; it accused Pickering of having had "contact" with Mississippi's racist Sovereignty Commission in the 1970s; it accused Pickering of being indifferent to equal voting rights; it said Pickering had a "troubling record of reversals in the Court of Appeals"; it said he was hostile to abortion rights; and it accused him of blurring the separation of church and state.

Republicans on the Judiciary Committee sent a staff member to the Neas press conference. But when the aide came back with a copy of the report, GOP aides simply did not take the charges very seriously. Most, if not all, of Neas's accusations seemed without merit, and many had been considered by the committee in 1990 when it unanimously approved Pickering's nomination to the district court. But what Republicans did not know was that the Neas report would have a profound effect on the Pickering battle, becoming, almost overnight, a blueprint for Democratic committee members' objections to the nomination.

Another thing Republicans did not know was that Neas's research project did not stop when the report was released. On January 29, Judith Schaeffer contacted Kinchen again to request transcripts from sentencing hearings in a case known as *United States* v. *Swan*. The case involved a cross burning in southern Mississippi in 1994, and although no one knew it at the time, *Swan* would ultimately become a critical issue in the Pickering fight. On January 30, one day after Schaeffer called Kinchen, Leahy wrote Pickering to inquire about the judge's actions "relating to the criminal case of *United States* v. *Swan*."

Pickering's second hearing was scheduled for February 7. When the judge appeared before the committee, Democratic questioning hewed closely to the lines established in the Neas report. The report had focused on Pickering's reversal rate; at the hearing, Democrat Charles Schumer focused on Pickering's reversal rate. The report focused on Pickering's decisions in employment-discrimination cases; Democrat Edward Kennedy covered that topic. The report focused on Pickering's



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"contact" with the Sovereignty Commission; Democrat Richard Durbin handled that. The report focused on Pickering's views on abortion; Democrats Dianne Feinstein and Maria Cantwell covered that. And the report focused on Pickering's views on habeas corpus; Leahy handled that. The only new ground covered in the hearing was the *Swan* case, which had not been in the Neas report (Schaeffer did not request the *Swan* transcripts until five days after the report was released, suggesting that People for the American Way did not know about the case before that time). At the hearing, North Carolina Democrat John Edwards interrogated Pickering about *Swan*, implying that Pickering had gone to unethical lengths to go easy on a white man convicted of burning a cross in the yard of a mixed-race couple.

■

At each step of the way, Republicans underestimated the nature of the threat that Pickering faced.

■

A week after the hearing, on February 14, Democrat Joseph Biden sent Pickering a series of follow-up questions about *Swan*. The first question began, "According to court documents . . ." and went on to recount details about the case that were available only in the court documents that Margaret Kinchen had sent to People for the American Way. While it is not clear how Biden learned about the details of *Swan*, a source close to the senator says Biden's staff first heard of the case "around the time of the People for the American Way press conference" and later got documents on the case "from other committee staffers." On February 15, the day after Biden sent his questions and long after People for the American Way had already gotten the information, Leahy finally asked for a transcript of *Swan*. By then, the work had been done—not by the committee, but by People for the American Way.

POWERFUL—AND RICH

At each step of the way in the Pickering nomination, Republicans underestimated the nature of the threat that Pickering faced from committee Democrats and, perhaps just as important, from People for the American Way and the rest of the coalition. Unknown to GOP staffers, coalition researchers were far ahead of them—and Democrats, for that matter—as they dug into Pickering's record.

One of the reasons Republicans miscalculated the threat was that they knew little about the power and scope of People for the American Way. It is an extraordinarily rich and well-run organization—two organizations, actually, both of them tax-exempt under Internal Revenue Service rules. One, People for the American Way, is a so-called 501(c)(4) organization—named for the section of the IRS code that provides for such groups—that is legally allowed to engage in partisan political activity. The other, the People for the American Way Foundation, is a 501(c)(3) organization, which is allowed to receive tax-deductible donations and which is prohibited by law from engaging in partisan political work. To qualify as a 501(c)(3), groups like the People for the American Way Foundation have to state on their tax forms that they will not engage in any activity "to influence national, state, or local legislation, including any attempt to influence public opinion on a legislative matter or referendum."

Together, the two branches collect an impressive amount of money. According to tax records for the year 2000, People for the American Way took in $5,140,131 in contributions, while the People for the American Way Foundation took in $7,469,722—for a total of $12,609,853 in one year alone. Much of that money came in large chunks from wealthy donors. In its 2000 return, the foundation listed anonymous individual donations of $540,000, of $432,488, of $314,058, of $250,000, and many more in the six-figure range (the law requires the foundation to list the donations, but not the names of the donors).

Even though the foundation is forbidden to engage in political lobbying, there appears to be significant overlap between the two arms of People for the American Way. Neas's salary, for example, is paid by both the main group and the foundation. In 2000, he received $79,556 in salary from People for the American Way, the political arm, and $119,335 from the People for the American Way Foundation, the non-partisan arm. The salary of People for the American Way's number-two officer, Carol Blum, was also divided between the two parts of the organization. (Officials of People for the American Way told NATIONAL REVIEW they were too busy to be interviewed for this article.)

While People for the American Way has an impressive bankroll, it was just one part of the anti-Pickering coalition. To its $12.6 million budget must be added the budgets of groups such as NARAL, NOW, the Alliance for Justice, the Leadership Conference on Civil Rights, the NAACP, and others—a total that might well approach $50 million.

The numbers point to a striking disparity in the ongoing battle over judicial nominations. On the pro-Republican side, there simply was no group fighting on behalf of Pickering that had anything approaching the coalition's resources. Yes, there are rich conservative organizations like the National Rifle Association and National Right to Life Committee (which also maintain tax-exempt 501(c)(3) arms), but none was deeply involved in the Pickering battle. Instead, there were a few small groups like the newly formed Coalition for a Fair Judiciary, which was created after the near defeat of the John Ashcroft nomination and which operates with one employee, working out of her home in suburban Virginia.

That imbalance virtually assures that the Pickering situation will play out again in the future, with Republicans significantly outgunned in the lobbying battle. Democrats have made no secret of their intention to defeat more of the president's judicial nominees, and People for the American Way and other coalition members are already at work on coming campaigns. The close coordination between committee Democrats and the coalition during the Pickering fight will no doubt be a model for future efforts. What worries many conservatives is that the meagerly funded, poorly organized effort on Pickering's behalf might become a model for the Republican side. If that is the case, it will not be long before Republicans are again left fuming after another bitter defeat. NR

RESOLUTION NO. 6

IN SUPPORT OF TIMELY REVIEW FOR JUDICIAL NOMINATIONS

WHEREAS, The biblical witness reveals that God has ordained civil government to serve good and punish evil (Romans 13:1-6); and

WHEREAS, Scripture warns that the neglect or subversion of justice is an abomination to God (Proverbs 17:15), with destructive moral and spiritual consequences for families and culture (Judges 21:25); and

WHEREAS, Article II of the Constitution of the United States confers to the President the power to appoint judges with the advice and consent of the full Senate; and

WHEREAS, The President of the United States has fulfilled his constitutional obligation by nominating well-qualified persons to fill existing judicial vacancies; and

WHEREAS, The Senate has failed to fulfill its constitutional obligation to act upon the nominations pending before its body; and

WHEREAS, The Senate Judiciary Committee is engaged in an unprecedented obstructionism, with many of the nominations pending for over a year; and

WHEREAS, Judicial nominees deserve to receive a fair hearing and a timely decision on their nomination; and

WHEREAS, There is nearly a twenty percent vacancy rate on the United States Courts of Appeals; now, therefore, be it

RESOLVED, That the messengers to the Southern Baptist Convention meeting in St. Louis, Missouri, June 11-12, 2002, recognize that a judicial vacancy crisis exists; and be it further

RESOLVED, That we affirm the President for his timely nomination of well-qualified candidates to fill judicial vacancies; and be it finally

RESOLVED, That we urge the Senate Judiciary Committee to act in a fair and timely manner upon the President's nominations and that we urge fair and final consideration by the full Senate.

THE WHITE HOUSE
WASHINGTON

January 28, 2002

Dear Senator Leahy:

During our brief conversation Saturday evening you asked that I identify for you the source for the statement I attributed to you in my recent *Wall Street Journal* op-ed, i.e. that you had referred to the American Bar Association as the "gold standard" for judicial nominees. I told you that I believed the quoted reference was included in a letter you and Senator Biden had sent to me.

As soon as I arrived at my office this morning I checked my correspondence file and discovered that the letter was dated March 16, 2001, was authored by Senator Schumer and you, and was addressed not to me, but to the President. In the letter you refer to the ABA evaluation as "the gold standard by which judicial candidates are judged..." I am enclosing a copy so that your files will be complete.

As I mentioned to you in our brief conversation, I am gratified that you are responding positively to my invitation to move forward on holding hearings. Your statement on the Senate floor on Friday promising to hold hearings for Justice Priscilla Owen, Judge Charles Pickering, Miguel Estrada and Professor Michael McConnell was a welcome step.

For our part, we commit to continue to send to the Senate judicial nominees of the highest quality, whether judged by the ABA "gold standard" or by any reasonable measure.

Sincerely yours,

A. R. Gonzales

Alberto R. Gonzales
Counsel to the President

cc: The Honorable Orrin Hatch

The Honorable Patrick J. Leahy
United States Senate
Senate Russell 433
Washington, DC 20510

Jason B. Torchinsky
01/04/2002 09:07:21 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Re: NEW draft talking points on judges

Here's the Gilbert Merritt letter. I'll get you a selection of Leahy quotes.

MERRITT, GILBERT S., CHIEF JUDGE, SIXTH CIRCUIT on 6TH CIRCUIT

U.S. Court of Appeals for the Sixth Circuit
Nashville, TN, March 20, 2000
Re: Vacancies on the Sixth Circuit Court of Appeals
Hon. Orrin Hatch
U.S. Senate,
Washington, DC.

Dear Senator Hatch: Several years ago during the period that I was Chairman of the Executive Committee of the United States Judicial Conference, we met from time to time, and you were always concerned that the Senate Judiciary Committee do its duty in filling the vacancies on the various Courts of Appeals. I write now to you to request that the Judiciary Committee bring up for a hearing and a vote nominations to the Sixth Circuit Court of Appeals.

I was taken aback to see an alleged statement of Senator Mike DeWine from Ohio that no vote would be taken for a nomination to fill the vacancy currently existing from Ohio. Senator DeWine was quoted as saying that due to partisan considerations there would be no more hearings or votes on vacancies for the Sixth Circuit Court of Appeals. I hope that this was not an accurate quote.

The Sixth Circuit Court of Appeals now has four vacancies. Twenty-five per cent of the seats on the Sixth Circuit are vacant. The Court is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court. One of the vacancies is five years old and no vote has ever been taken. One is two years old. We have lost many years of judge time because of the vacancies.

By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them.

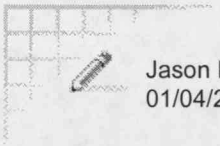
Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant. Each active judge of our Court is now participating in deciding more than 550 cases a year--a case load that is excessive by any standard. In addition, we have almost 200 death penalty cases that will

be facing us before the end of next year. I presently have six pending before me right now and many more in the pipeline. Although the death cases are very time consuming (the records often run to 5000 pages), we are under very short deadlines imposed by Congress for acting on these cases. Under present circumstances, we will be unable to meet these deadlines. Unlike the Supreme Court, we have no discretionary jurisdiction and must hear every case.

The Founding Fathers certainly intended that the Senate "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

You and other members of the Senate have appeared before the Judicial Conference and other judges' groups many times and said that you care about the federal courts. I hope that you will now act to help us on the Sixth Circuit Court of Appeals. We need your help and the help of the two Senators from Ohio, the two Senators from Tennessee, the two Senators from Kentucky, and the Senators from Michigan.

Sincerely,
Gilbert S. Merritt.



Jason B. Torchinsky
01/04/2002 09:56:08 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: Re:

Reagan nominated 45
Bush nominated 24
Clinton nominated 47
Total = 116

When divided by 3, this gives about 38.6666

These firgures came from CRS.

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The George W. Bush Library

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This Document was withdrawn on 8/15/2018 by PSC

6/7/2002

Re: Business Cases Under Judges Appointed By Democrats

The federal courts routinely issue opinions affecting the vital interests of the business community. Businesses thus have a significant interest in the composition of the federal judiciary. The judges appointed by Democratic presidents have produced an enormous body of jurisprudence that is strongly adverse to business, and the judiciary is likely to continue to grow ever more systematically hostile to the business community unless President Bush's nominees and others committed to applying the law evenhandedly are confirmed to the bench. A few examples of the sorts of decisions the business community can expect from Democrat-appointed judges, by no means the worst, include:

· *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000): A panel of the Second Circuit, including Judges Leval and Pooler, issued a jurisdictional ruling that has the effect of subjecting multinational corporations with virtually no United States presence apart from listing their stocks on a United States exchange to suits under the Alien Tort Claims Act for conduct that has occurred anywhere in the world. *Wiwa* upheld personal jurisdiction based upon these minimal contacts with the United States, and reversed the district court's application of the doctrine of *forum non conveniens* in deference to the plaintiff's choice of forum and the "interests" of the United States in hosting these foreign claims.

· *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999): The panel (Judges Nelson and Reinhardt, and over the partial dissent of Judge Trott) expansively construed the "major life activity" limitation under the Americans with Disabilities Act, holding that "interacting with others" constitutes an ADA major life activity. The panel also joined several other circuits in deeming sleeping a major life activity, and took an expansive reading of *Bragdon v. Abbott*, 524 U.S. 624 (1998), to conclude that sexual relations is a major life activity. Thus, the plaintiff employee, who was not impaired in his ability to work, was held to state an ADA claim based on an anxiety-related difficulty in interacting with others, insomnia, and impotence.

· *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998): This is another case from the Ninth Circuit (per Democrat-appointed judges Canby and Reinhardt, with Judge Restani of the Court of International Trade sitting by designation). The case exemplifies the Ninth Circuit's hostility to arbitration provisions in employment contracts, holding that the Civil Rights Act of 1991 precludes employees, as a condition of employment, from entering an agreement to arbitrate Title VII claims against the employer.

· *Childress v. City of Richmond, Virginia*: 120 F.3d 476 (4th Cir. 1997): The Fourth Circuit (in a panel including Democrat-appointed judges Michael and Phillips) held that a white male employee can state a claim under Title VII based upon allegations that his boss made derogatory comments about blacks and females. The panel relied upon an analogy to *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), to conclude that the phrase "person aggrieved" in Title VII can extend to this kind of third-party standing. *Childress* was subsequently vacated by the court *en banc*, but the case remains significant to demonstrate the likely product of a panel of this composition, rather than to establish the current state of the law.

· *Erickson v. Bartell Drug Co.*, No. C00-1213L, 2001 WL 649651, slip op. (W.D. Wash. June 12, 2001): Clinton-appointed Judge Lasnik held that an employer unlawfully discriminated on the basis of sex by excluding coverage for prescription contraceptives.

In addition to these particular example, there are numerous securities litigation lawsuits; employment-related class actions pertaining to wages, hours, and application of the Family and Medical Leave Act; and challenges to significant regulatory reforms in the areas of environmental, health, and safety regulation that work their way through the federal courts and have enormous financial and operational impact. And, of course, delay in filling judicial vacancies means further court delay, which places business planning on hold or in jeopardy.

FEDERAL COURT NOMINEES:
WHY THE BUSINESS COMMUNITY SHOULD CARE

The Problem:

With each year, aside from the growing blanket of regulation promulgated by federal, state and local agencies, regulation by litigation becomes a more common means for individuals, special interest groups, and attorneys to change legal standards, many of which directly impact business interests. In fact, these undemocratic policymaking attempts are most often aimed at businesses, which until a judge recognizes a new or expanded cause of action or accepts a significant jury award, have diligently and fully complied with already overburdening administrative regulation. Full compliance with regulation has not provided protection or immunity from lawsuits and potential liability. Businesses remain easy targets in courtrooms where all too often activist judges view their role in our system as one of policymaking and legal innovation. In the last eight years an increasing number of these activist judges were appointed to our federal courts, further promising the potential recognition of new theories of liability to be imposed on business defendants.

During the Clinton Administration, trial lawyers and other organized liberal groups experienced great success using litigation as a means of regulation. Former Secretary of Labor, Robert Reich, acknowledged that "[t]he era of big government may be over, but the era through litigation has just begun." Though the Clinton Administration no longer poses a direct threat, the threat of using the federal courts, currently staffed by a large number of Clinton appointees, to advance an agenda of bigger government is alive and well. Where the EEOC, OSHA, and the EPA stop, private interest groups such as the ACLU and the Sierra Club carry on these efforts. Thus, a change in Administration alone does not prevent continued expansion of regulation through use of the courts. Judges must be appointed to the bench who will leave the creativity and innovation in the law that is urged by these parties in the proper hands of the political branches of government. These individuals and groups should not be permitted to succeed in court where they have failed in the political process.

Recent judicial activism has permitted unimaginable decisions in our courts that have little or no basis in the laws passed by Congress. In almost all of these cases, it is businesses that are the defendants and businesses that are viewed as the deep pockets available to remedy any perceived wrong. Cases seeking to impose regulation by bypassing normal political processes and eliminating the ability of all concerned entities, including businesses, to be involved in a public debate about the prudence of such regulation, have already targeted industries such as tobacco, asbestos, lead paint, and breast implants, and are now aiming at HMOs, cell phone manufacturers, and gun manufacturers. And, these suits do not involve only those in the targeted industry, but quite often extend to distributors and small businesses who participate in some small way in the targeted industry, such as by providing materials and supplies. Without judges like those being nominated by President Bush, who have a narrow and restrained view of their authority, courts will continue to permit these lawsuits.

President Bush's Nominees:

With extensive judicial vacancies currently plaguing the federal court system, the opportunity now exists to fill these vacancies with judges who understand their limited role and will be less likely to alter or expand the law to serve their own visions of justice. The opportunity exists to select judges who do not seek to legislate or regulate from bench. President Bush's nominees to the federal courts will be individuals who seek to apply the law as it is written, providing needed predictability to businesses and reducing the types of outrageous awards that have recently degraded our legal system. The nominations made to date have demonstrated President Bush's commitment to nominating the types of judges who will provide some certainty in the law.

The business community is subject to regulation by literally hundreds of employment, workplace safety, environmental, and other statutes. These statutes reflect compromises among important competing regulatory and efficiency objectives. Traditionally, judges nominated by Republican administrations tend to respect these legislative compromises and, accordingly, to enforce statutes as written. This approach produces limited regulation, clear rules, and predictability. By contrast, activist judges, typically appointed by Democrat administrations, tend to characterize these statutes as "remedial" provisions to be broadly construed by reference to vague notions of legislative "purpose,"influenced by what the judge perceives as a just result. This approach produces more regulation (without the benefit of full policy analysis and compromise), larger verdict amounts, and greater legal uncertainty.

Runaway Juries and Runaway Judges:

What type of judge hears or decides a case is of crucial importance. Stories of million dollar awards for spilled coffee, asbestos exposure, breast implants, and racial discrimination abound. Consider the following recent court decisions as examples, primarily in the area of employment law, an area of great interest to most businesses:

In 2001, a judge appointed during the 1990s by the first President Bush, properly dismissed a claim by California state prisoners that their drug addiction was a disability under the Americans with Disabilities Act (ADA) and that the disability had been improperly considered by parole officials in denying them parole. In February 2002, however, a panel of the Ninth Circuit Court of Appeals reversed that dismissal concluding that drug addiction that hinders a major life activity is a disability covered under the ADA and remanded the case for trial. The three-judge panel consisted of judges appointed by Presidents Johnson, Carter, and Clinton. Nothing in the panel's opinion limits the conclusion that drug addiction is a disability. Thus, if drug addiction impacts employment, a major life activity, it would clearly trigger the protections of the ADA, deserving at least a consideration of reasonable accommodation by employers.

On February 27, 2002, an Eastern District of New York judge concluded that an assembly worker who had bipolar disorder had a disability under the ADA because the ability to interact and get along with others was a major life activity hindered by that affliction. That judge was appointed by President Clinton. The "ability to interact with others" has also been recognized as a major life activity under the ADA by a panel of the Ninth Circuit, the majority of whom were appointed by Democrat Presidents.

In 2001, after a $250 million punitive damages award was permitted to stand by a district judge appointed by President Carter, the Fourth Circuit properly applying South Carolina law on punitive damages reversed that award. The judges on that Fourth Circuit panel were appointed to that court by former President Bush.

And, these examples are just the tip of the iceberg as employment discrimination and harassment claims continue to rise and new theories of disability are argued, such as for those "suffering" from obesity or those who choose a vegetarian lifestyle. Businesses are also at great risk in environmental cases like those seeking clean up of environmental messes under CERCLA, an expansive reading of which threatens to crush businesses that take over the operations of other businesses or acquire assets or property with huge clean up costs. And, often these activist judges are hostile to common business practices such as mandatory arbitration provisions in employment contracts.

Restrained Republican appointed judges are far more likely to enforce federal and state constitutional and statutory limits in these settings and to recognize the limits on excessive punitive damages awards, which although more prevalent in state courts continue to be of growing concern in our federal courts as well. In addition, these judges are less likely to expand the law to cover new circumstances or facts when not clearly dictated by the applicable statute. The increasing number of job bias, harassment and discrimination cases being filed and the rise of regulatory-style class actions present real threats to businesses and the products, services, and jobs they provide. Judges not having a tendency to endorse and accept the new theories of liability in these cases may be the only protection from infinite liability.

Preemption:

State courts are filled with extreme cases, resulting in well publicized large jury awards. For example, Alabama and Mississippi juries are notorious for large jury awards in state court and are favored jurisdictions for class action plaintiffs lawyers. With current debates in Congress on the Patients' Bill of Rights and Class Action Fairness Bill, federal courts may soon be available forums in which such cases can be decided and may preempt the often more liberal state tort laws. Judges like those sought to be appointed by President Bush are far more likely to enforce congressional decisions to preempt state regulation or state tort law, protecting businesses from these unfriendly state jurisdictions.

Antitrust and Competition:

Over the last few decades, judges appointed by Republicans have recognized that the goal of antitrust is to promote economic efficiency and consumer welfare. By contrast, the enforcement policies of the Clinton Administration returned to the discredited theory that in business big is bad. In the resulting legal fights, judges appointed by Republican Presidents repeatedly allowed mergers that the Clinton Administration sought to block. President Bush's nominees are expected to continue to allow such pro-competitive activities absent clear violations of law.

Competition is encouraged both by proper enforcement of antitrust laws and through judicial restraint in tort cases that seek damages for business decisions and business conduct. Where conduct complies with current law, judges should not be the ones to change that law retroactively by expanding the types of conduct that will be considered violative of a given law, regulation, or industry standard.

The Threat to Business:

With the Bush Administration willing to work to lessen the burdens imposed by government on people and businesses, our courts cannot be left to supplant the Administration's efforts with individual judges' own policy decisions. President Bush's Administration is working to nominate judges who understand they are bound by the policy decisions of the political branches. Business interests are best served by the successful appointment of these judges. Judges who practice restraint provide businesses the legal predictability required to make wise and well-informed business decisions. Settling for extensive judicial vacancies is not an option. Currently more than 50% of the district court judges and half of the courts of appeals judges were appointed by Democrat Presidents. Allowing the current vacancies to remain is an implicit acceptance that the activist decisions of these judges in recent years is proper and should continue.

THE TORT SYSTEM OUT OF CONTROL:
EXAMPLES OF RECENT OUTRAGEOUS COURT/JURY DECISIONS

- In 2001, in Thompson v. Davis, a case brought by California state prisoners claiming drug addiction was a disability under the Americans with Disability Act (ADA) that had been improperly considered in denying the prisoners parole, a Ninth Circuit panel -- consisting of three-judges all appointed by Democrat Presidents -- concluded that drug addiction was indeed a disability and could not be considered. This decision opened the door to claims of discrimination under the ADA by drug addicts in other contexts, such as employment and in public accommodations.

  ✓ The district court judge, a Republican appointee, had dismissed the claim.

  ✓ Another Republican appointed judge confronting this issue in the Kansas District Court similarly dismissed claims that drug addiction constituted a disability under the ADA.

- In 2002, in Jacques v. DiMarzio, a judge in the Eastern District of New York -- who had been appointed to that position by President Clinton -- concluded that bipolar disorder and its affect on the ability to interact with others was a disability under the ADA, particularly since the ability to interact with others was a "major life activity" under the Act, requiring the employer to reasonably accommodate the disability.

- In 2001, in Jimenez v. Diamler Chrylser Corp., a South Carolina district court judge, appointed by President Carter, permitted a $250 million punitive damage award to stand in a case where the judge also excluded evidence that the minor had not been wearing a seatbelt when thrown from the allegedly defective minivan. Fortunately, this award was reversed by a three-judge panel of the Fourth Circuit, all of whom were appointed by Republican Presidents.

- A recent sexual discrimination case in the Northern District of Georgia, Campbell v. R&D Testing & Drilling, Inc., resulted in a verdict of $1.150 million.

- In another sexual discrimination case, a Middle District of Florida jury awarded $2.214 million, $2.1 million of which was punitive damages, against Outback Steakhouse.

- A West Virginia woman obtained a $2.699 million jury award for back injuries suffered when she opened a jar of pickles. An appellate court, despite a dissent, upheld $2.2 million of the award, most of which was punitive damages.

- Cases like these cost billions of dollars and impact the U.S. economy and the cost of doing business in this country, at a minimum the filing of lawsuits requires the incurrence of costs for some defense even of the most frivolous cases.

  ✓ A Florida man has sued a local shoe store for injuries he claims to have suffered as the result of being trampled during a shoe sale. His wife is also a plaintiff alleging loss of her husband's services, comfort, society, and attention.

  ✓ An employee is suing his employer (a catering company) when after being asked by the employer to use a side door the employee was allegedly surrounded and assaulted by a gaggle of giant geese.

  ✓ A woman who, despite warnings on the box of Kellogg's Pop-Tarts not to leave the pastries unattended in her toaster, caused a fire in her home when she put a Pop-Tart in the toaster and left the house to take her children to school sued Kellogg's and Black and Decker, the toaster manufacturer, for the damages caused by the fire.

  ✓ A Georgia man sued "Liquid Fire" drain cleaner for providing what, according to the plaintiff, appeared to be a flimsy container for the solvent, resulting in the man's transferring of the drain cleaner into a "safer container," spilling the Liquid Fire and burning himself.

CONFIRMATION DELAYS = UNPREDICTABLE "JUSTICE"

With the current delays in the United States Senate on judicial confirmations, despite extensive vacancies, the predictability and certainty of the law needed to make informed and prudent business decisions cannot exist. Justice delayed is indeed justice denied for those forced to litigate matters in courts whose dockets often result in a year or more delay before any trial or resolution and which courts are currently dominated by appointees from the prior Administration. Extensive vacancies on our federal courts delay court decisions by overloading those judges on the courts and slows dockets nationwide. Such delays result in extended litigation, often resulting in discovery that continues unnecessarily until the date of trial, costing businesses millions of dollars more to defend cases that should have reached trial and conclusion months, if not years earlier than current judicial staffing permits.

Businesses function by assessing the likely costs of conduct – whether the research and develop a product, manufacturing decisions, marketing/advertising, or defending lawsuits as opposed to opting to settle a case to avoid defense costs. Lengthy delays in our courts strip businesses and other defendants of the predictability of the costs of litigation in a given case. Without accurate predictions about how long and how costly litigation may be no intelligent decisions can be made as to the choices best for the business, its employees, and its investors.

In addition, the current vacancy crisis effectively leaves lower courts heavily packed with judges often hostile to businesses and judges who view their role as an activist in pursuit of the protection of employees, consumers and the like. The delayed confirmation of the current Bush nominees leaves these judges free to decide cases in a manner not tied to the language of the law that applies to that case and prevents the confirmation of judges who, being committed to the rule of law, will not only provide the manpower to more efficiently streamline the nation's dockets but will interpret and apply the law in a predictable fashion. This predictability provides a certainty in the likely application of the law in other contexts – businesses can rest assured that if they rely on clear statutory or regulatory language they will not incur liability – and provides the information necessary for businesses to exercise good business and legal judgment in making decisions.

Our federal courts need judges now and the courts need a higher percentage of judges who understand they are bound by the law – law that is properly considered and publicly debated where all concerned, business and consumer and employee alike, can voice their interests -- so that litigants and potential litigants can conform their conduct within predictable and certain legal boundaries.

FEDERAL COURT NOMINEES:
WHY THE BUSINESS COMMUNITY SHOULD CARE

- There is a vacancy crisis.

  ✓ Nearly 90 vacancies exist on our federal courts.

  ✓ Almost half of these vacancies are judicial emergencies.

    · A judicial emergency occurs when a position has been vacant for over 18 months and the court in which the vacancy is located handles a large number of cases.

  ✓ On the Sixth Circuit, which is encompasses Tennessee, Kentucky, Ohio and Michigan, half of the positions are vacant and several of those vacancies have been deemed judicial emergencies.

- The courts are currently dominated by Democrat-appointed judges who are hostile to businesses.

  ✓ Democrat-appointed judges often view their duty as one of creating law that will provide the most "just" result, a result that often means forcing payment by the perceived deep pockets regardless of wrongdoing.

    · These judges effectively create new regulation on the actions of businesses by imposing liability for action that prior to a given case was legal and proper.

      - tobacco litigation
      - asbestos litigation
      - lead paint litigation
      - breast implant litigation
      - HMO litigation
      - cell phone manufacturer litigation
      - gun manufacturer litigation

    · Plaintiffs and plaintiffs lawyers have learned that they can use judges like these to change law and regulation that they could not change in the political process. Such changes in law imposes liability on business for violating standards that did not exist when the business engaged in the relevant conduct.

  ✓ These judges tend to permit or to uphold excessively large verdict amounts or permit outrageous cases to proceed.

- Permitting a $250 million punitive award in a products liability case (later reversed by Republican-appointed judges)

- Permitting $1.15 million award in sex discrimination case

- Permitting a $2.669 million award in a case alleging back injury caused by opening a pickle jar

- Permitting suit alleging drug addiction as a disability that must be accommodated under the Americans with Disabilities Act

- Permitting suit alleging bipolar disorder and resulting inability to "get along" with co-workers as a disability

✓ These judges also encourage the filing of even more outrageous cases, resulting in litigation costs for the business defendants.

- Suit against shoe store for injuries suffered by customer who was " trampled" during a sale

- Suit by employee against employer for making employee use side entrance near which employee was "assaulted" by a gaggle of geese

- Suit against Kellogg's and Black and Decker for fire resulting from leaving pop-tart toasting while the plaintiff took her children to school, suit filed despite warning on pop-tart box not to leave unattended in toaster

- Suit against "Liquid Fire" drain cleaner because plaintiff thought container in which the product was sold looked flimsy and he burned himself trying to transfer the drain cleaner to a "safer" container

- Businesses are to be treated the same as any litigant and Republican-appointed judges tend to understand and follow that legal principle.

THE BUSINESS INTEREST IN JUDGES

I. The Statistics

Currently, nearly 90 vacancies exist on our federal courts. Nearly half of these vacancies have been declared judicial emergencies, which generally means that the position has been vacant for over 18 months and the court in which the vacancy exists has a significant caseload. These vacancies not only result in longer waits before a case can be concluded, but relatedly increase litigation costs as the delay simply permits litigants to engage in additional discovery up to the date of any trial.

For example, in the Sixth Circuit, which is comprised of Tennessee, Kentucky, Ohio and Michigan, currently half of the positions are vacant. This vacancy crisis has resulted in serious delays, leaving litigants in limbo with no way to accurately estimate the final costs of the ongoing litigation. In fact, several cases in the Sixth Circuit have been pending, awaiting a decision, for over a year.

II. The Cases

The courts are currently controlled for the most part by judges tending to rule against businesses and to award or permit large monetary recoveries to plaintiffs. These judges were appointed primarily by former President Clinton and other Democrat Presidents. These judges have permitted state prisoners to sue based on a claimed disability of drug addiction, which could lead to similar claims against employers in the private sector. In fact, these judges have permitted suits against employers based on the "disability" of bipolar disorder, agreeing that the disorder made the employee unable to "get along" with co-workers, which according to these anti-business judges was obviously a disability to be accommodated by the employer regardless of the cost to the employer's business.

Judges appointed by Democrat Presidents, who now dominate our lower federal courts – the courts that will make most of the decisions of how much money businesses must pay to plaintiffs – have permitted awards of $250 million in punitive damages, a decision ultimately reversed by a panel of judges appointed by Republican Presidents. These Democrat-appointed judges have also upheld outrageous awards in discrimination cases, like a $1.15 million award in a sex discrimination case in Georgia and cases alleging injuries due to the lack of safety of particular products, like a $2.669 million award to a West Virginia woman who claimed to have injured her back opening a pickle jar.

Even more egregious are the cases plaintiffs and plaintiffs' lawyers are now bold enough to file – resulting in attorneys fees for the defendant businesses regardless of the outcome of the case. Plaintiffs file these cases because the outrageous decisions of the types of judges described above have encouraged them. For example, the following cases have been filed (1) a shoe store customer sued the shoe store for injuries allegedly suffered as a result of being "trampled" during a shoe sale, his wife also sued claiming loss of her

husband's service, comfort, society and attention; (2) an employee sued his employer (a catering company) when after being asked by the employer to use a side entrance the employee was allegedly surrounded and assaulted by a gaggle of geese outside that entrance; (3) a woman sued Kellogg's and Black and Decker because when she left a pop tart unattended in her toaster while she drove her children to school it started a fire, she filed despite warnings on the Pop-Tart box not to leave them unattended; and (4) a Georgia man sued "Liquid Fire" drain cleaner for providing what, according to the plaintiff, appeared to be a flimsy container for the drain cleaner, so he transferred the drain cleaner into a "safe container," spilling it and burning himself.

The only way to prevent and discourage the filing of these cases is if we use the current vacancies that exist in the federal courts, filling those vacancies with more reasonable judges like those nominated by President Bush. The confirmation of these nominees is necessary to stop the tide of costly litigation that now plagues our nation's businesses.

III. Fair Treatment of Businesses

Republican appointed judges more consistently treat businesses just as they treat other litigants. Many of the current judges, instead, treat businesses as the deep pockets that regardless of wrongdoing should pay for the less wealthy plaintiff's misfortune. Judges are the gatekeepers against any prejudice or unfair treatment. If businesses are to enjoy fair treatment in our courts, it is imperative that President Bush's nominees be confirmed in order to counter the current trend of anti-business judicial decision making.

American Business Must Weigh In On
The Stalled Judicial Confirmation Process

American business – large and small – weighs in on innumerable political issues, from environmental statutes and regulations to securities law and beyond. All these efforts are intended to create a legal system that makes conducting business easier and more beneficial to our economy. A successful economy improves job opportunities and provides more and better products and services to our citizens. But to date, despite all the business efforts in shaping the law, businesses have been conspicuously absent in the current battle over who will be in the position of interpreting these many laws and regulations when businesses find themselves as plaintiffs or defendants in lawsuits filed in our federal courts. Indeed, despite the growing vacancy crisis in the federal court system, businesses have also failed to participate to ensure any federal judicial vacancies will be filled at all. It is time for businesses – large corporations and small Mom and Pop concerns – to demand justice from the Senate Judiciary Committee.

With each year, aside from the growing blanket of regulation promulgated by federal, state and local agencies, regulation by litigation becomes a more common means for individuals, special interest groups, and attorneys to change legal standards, many of which directly impact business interests. In fact, these undemocratic policymaking attempts are most often aimed at businesses, which until a judge recognizes a new or expanded cause of action or accepts a significant jury award, have diligently and fully complied with already overburdening administrative regulation. Full compliance with regulation has not provided protection or immunity from lawsuits and potential liability. Businesses remain easy targets in courtrooms where all too often activist judges view their role in our system as one of policymaking and legal innovation. In the last eight years, an increasing number of these activist judges were appointed to our federal courts, further promising the potential recognition of new theories of liability to be imposed on business defendants.

The business community is subject to regulation by literally hundreds of employment, workplace safety, environmental, and other statutes. These statutes reflect compromises among important competing regulatory and efficiency objectives. Traditionally, judges nominated by Republican administrations tend to respect these legislative compromises and, accordingly, to enforce statutes as written. This approach produces limited regulation, clear rules, and predictability. By contrast, activist judges, typically appointed by Democrat administrations, tend to characterize these statutes as "remedial" provisions to be construed broadly by reference to vague notions of legislative "purpose,"influenced by what the judge perceives as a just result. This approach produces more regulation (without the benefit of full policy analysis and compromise), larger verdict amounts, and greater legal uncertainty.

During the Clinton Administration, trial lawyers and other organized liberal groups experienced great success using litigation as a means of regulation. Former Secretary of Labor, Robert Reich, acknowledged that "[t]he era of big government may be over, but the era through litigation has just begun." Though the Clinton Administration no longer poses a direct threat, the threat of using the federal courts, currently staffed by a large number of Clinton appointees, to

advance an agenda of bigger government is alive and well. Where the EEOC, OSHA, and the EPA stop, private interest groups such as the ACLU and the Sierra Club carry on these efforts. Thus, a change in Administration alone does not prevent continued expansion of regulation through use of the courts. Judges must be appointed to the bench who will leave the creativity and innovation in the law that is urged by these parties in the proper hands of the political branches of government. These individuals and groups should not be permitted to succeed in court where they have failed in the political process.

Recent judicial activism has permitted unimaginable decisions in our courts that have little or no basis in the laws passed by Congress. In almost all of these cases, it is businesses that are the defendants and businesses that are viewed as the deep pockets available to remedy any perceived wrong. Cases seeking to impose regulation by bypassing normal political processes and eliminating the ability of all concerned entities, including businesses, to be involved in a public debate about the prudence of such regulation, have already targeted industries such as tobacco, asbestos, lead paint, and breast implants, and are now aiming at HMOs, cell phone manufacturers, and gun manufacturers. And, these suits do not involve only those in the targeted industry, but quite often extend to distributors and small businesses who participate in some small way in the targeted industry, such as by providing materials and labor. Without judges like those being nominated by President Bush, who have a narrow and restrained view of their authority, courts will continue to permit these lawsuits.

With extensive judicial vacancies currently plaguing the federal court system, the opportunity now exists to fill these vacancies with judges who understand their limited role and will be less likely to alter or expand the law to serve their own visions of justice. The opportunity exists to select judges who do not seek to legislate or regulate from bench. President Bush's nominees to the federal courts will be individuals who seek to apply the law as it is written, providing needed predictability to businesses and reducing the types of outrageous awards that have recently degraded our legal system. The nominations made to date have demonstrated President Bush's commitment to nominating the types of judges who will provide some certainty in the law.

But the problem we are facing is even more dire than who will be confirmed to our federal bench. To date, the vacancy rate on our federal judiciary – a shocking ___ vacancies – is as high or higher than the vacancy rate that existed with President Bush took office. This vacancy crisis prolongs litigation and provides little justice for those whose fate rests in the hands of our federal courts. President Bush has been doing his part in providing the Senate nominees who are well-qualified and exemplary members of the legal profession. It is time the Senate performed its constitutional duty in our system by providing its advice and consent. The Senate must hold hearings and vote on the large number of outstanding nominees, a number of whom have been waiting over a year for a hearing. Without at least a vote on these nominees, the vacancies for which they have been nominated will remain vacant indefinitely.

Businesses have found a voice in policymaking; so too should they find their voice to pressure the Senate Judiciary Committee and the leaders of our Senate to recognize the crisis

facing our courts and to put aside grudges and political posturing to confirm the well-qualified men and women nominated by President Bush.

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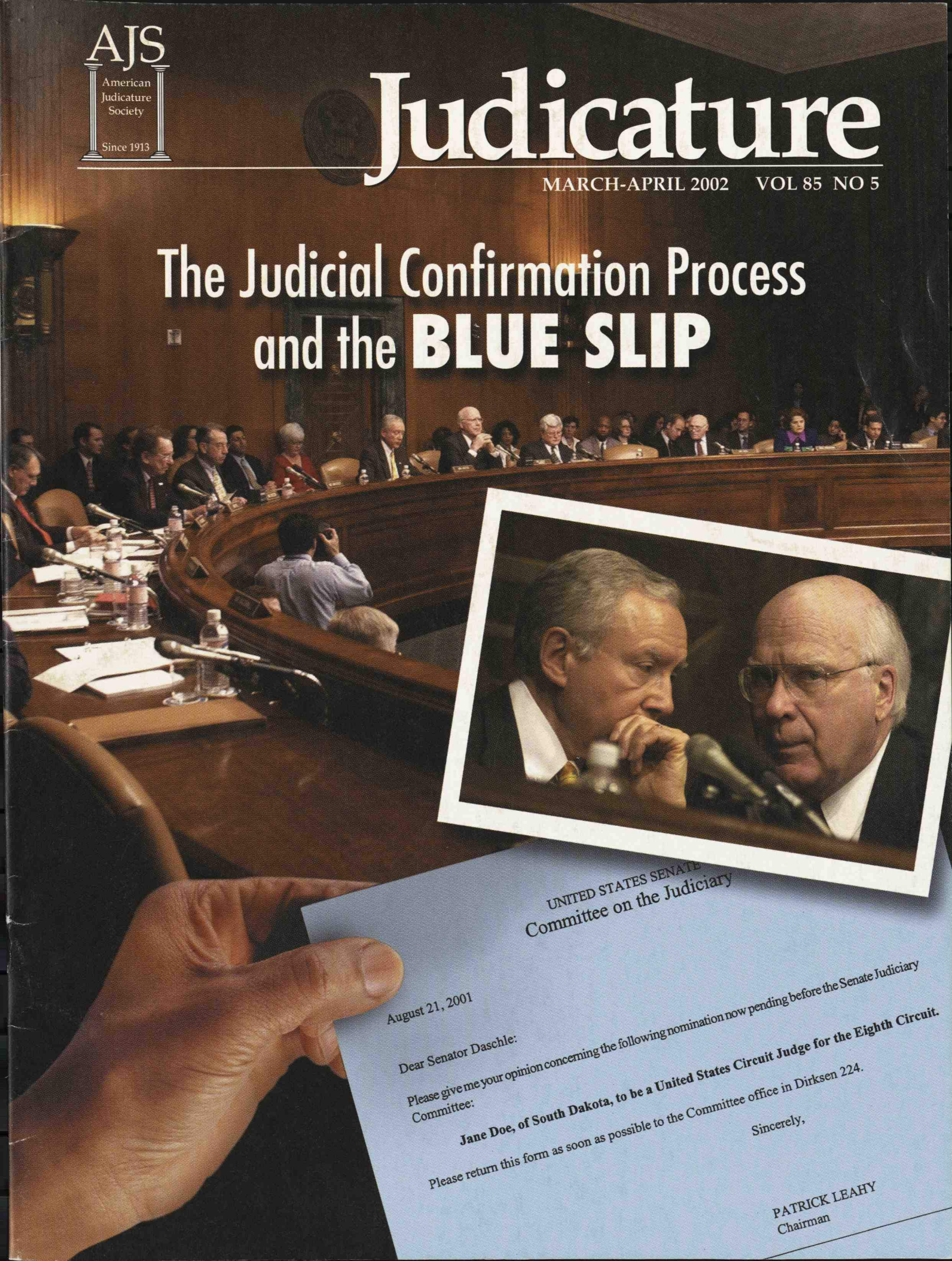
Judicature

MARCH-APRIL 2002 VOL 85 NO 5

The Judicial Confirmation Process and the BLUE SLIP



UNITED STATES SENATE
Committee on the Judiciary

August 21, 2001

Dear Senator Daschle:

Please give me your opinion concerning the following nomination now pending before the Senate Judiciary Committee:

Jane Doe, of South Dakota, to be a United States Circuit Judge for the Eighth Circuit.

Please return this form as soon as possible to the Committee office in Dirksen 224.

Sincerely,

PATRICK LEAHY
Chairman

American Judicature Society

to promote the effective administration of justice

The American Judicature Society promotes the effective administration of justice at all levels. To this end, AJS publishes this journal and other literature, conducts and disseminates empirical research, produces educational programs, and maintains an information service. AJS also operates the Elmo B. Hunter Citizens Center for Judicial Selection, the Center for Judicial Independence, and the Center for Judicial Ethics. AJS membership is open to anyone who supports the improvement of the nation's courts.

Judicature is a forum for fact and opinion relating to all aspects of the administration of justice and its improvement. Readers are invited to submit articles, news, and letters for publication. *Judicature*, a refereed journal, notifies authors of its decisions within 45 days and publishes most accepted articles within six months. Three copies of articles submitted for publication consideration are required.

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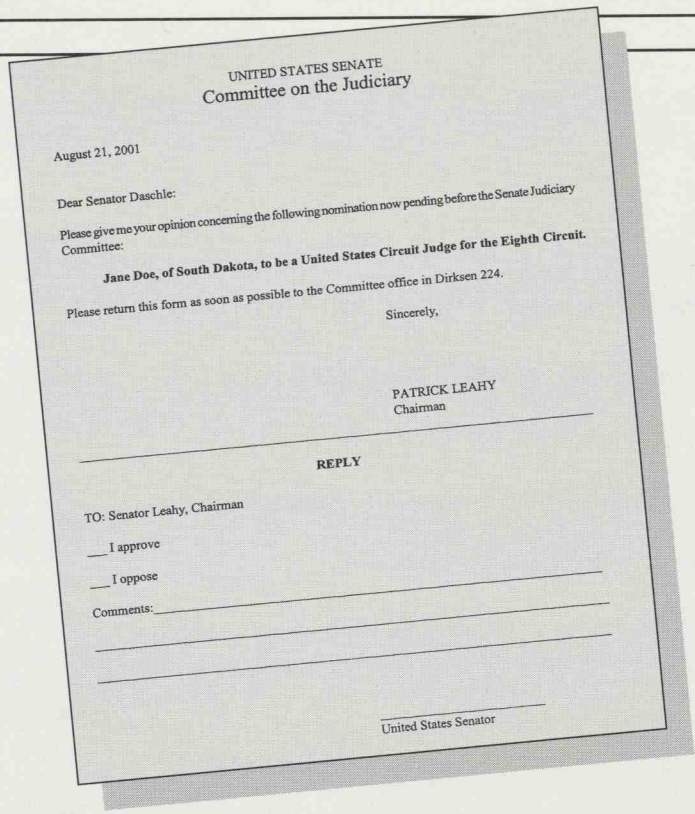

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Committee on the Judiciary

August 21, 2001

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Please give me your opinion concerning the following nomination now pending before the Senate Judiciary Committee:

Jane Doe, of South Dakota, to be a United States Circuit Judge for the Eighth Circuit.

Please return this form as soon as possible to the Committee office in Dirksen 224.

Sincerely,

PATRICK LEAHY
Chairman

REPLY

TO: Senator Leahy, Chairman

___ I approve

___ I oppose

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United States Senator

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Editorial

Judges, ideology, and accountability

As painful as they may be to politicians, transparency and accountability are necessary to informed public debate and responsible public policy concerning federal judicial selection.

Last summer, in the midst of another interbranch impasse over the appointment of federal judges, and in anticipation of its September 13 symposium on the federal judicial selection process, AJS prepared a statement on the role of ideology in that process (see page 213). The horrific events of September 11 led to the cancellation of the symposium. As the rescheduled event approaches (on May 17, see page 213), we take this opportunity to highlight and elaborate the salient points made in the statement and otherwise to make clear our views about this critically important question of public policy.

A good deal of fog, and even more hypocrisy, surrounds the question of the role that ideology plays and should play in federal judicial selection, as also the question of who is to blame for the recurrent condition of distress afflicting the system for the nomination and confirmation of Article III judges. Some of the fog results from a failure to appreciate or to acknowledge the inescapably political nature of the process. Some of it is due to a failure to be precise or candid about political agendas. And some finally is the product of a purposive political strategy to avoid accountability.

As our statement makes clear, AJS believes that the proper question is not whether ideology should play a role in federal judicial selection but what role it should play. That position reflects a considered view of the Constitution and of American history. It also reflects realism about human nature and political incentives.

Editorials are prepared by a committee of the American Judicature Society appointed by the president.

"Judges are human beings; they necessarily bring to the bench the perspectives obtained from prior life experiences. Presidents take these perspectives into account when they nominate judges. The Senate necessarily does the same."

Nor is this cause for regret. The protections afforded federal judges and their consequent insulation from democratic accountability once appointed require attention to more than professional qualifications when the President is considering nominating, and the Senate confirming, an individual to a lifetime position on the bench. Thoughtful citizens may disagree about what these additional considerations should be. AJS' position is that "judges should be chosen on the basis of established legal credentials, an ability to decide cases based upon their facts and the law, and a demonstrated capacity for open-mindedness, sound judgment, and even-handedness." In an age when the discretionary power of some judges in some cases to shape or even to make law must be acknowledged, the qualities of "sound judgment and even-handedness" assume greater importance, and they necessarily and properly take on a political hue.

Just as we should stop pretending that the policy preferences of potential appointees are or should be irrelevant in the selection process, so should we avoid the fallacy of assimilating the politics of federal judicial selection to normal politics. The qualities of "ability to decide cases upon their facts and the law," of "open-mindedness," and of "even-handedness" are fundamentally inconsistent with both partisan politics and ideology in the strong sense of that word. That is why AJS takes the position that "[n]ominees who display ideological convictions so strong as to be impervious to contrary evidence, argument, or law should not serve on the bench." Ideology in that sense—on whatever part of the political spectrum—is the enemy of the goals sought to be served by judicial independence. It should not be the aim of the President in nominating individuals to the federal bench, and the Senate has a duty to ensure that those nominated are not so tethered.

Unfortunately, it has been impossible in recent years to determine exactly what the Senate has been doing and thus impossible for the public to assess the performance of its elected representatives according to the criteria favored by AJS or any other criteria. When it considers a nomination to the Supreme Court, the Senate is engaged in a public act of obvious national importance, and its deliberations attract intense public scrutiny. Appointments to the lower federal courts have not, for most of our history, engaged remotely similar public interest, and the Senate has played quite different roles depending upon the court to which an individual has been nominated. Those roles have been dominated by patronage, backed up by the practice of "senatorial courtesy," exercised in part through the "blue slip," which allows an individual senator to put a hold on an appointment vote without explanation. As a result, the process has been stubbornly non-transparent, and senators have been unaccountable for their actions.

We sense a change in senatorial practices, greater willingness openly to confront the difficult issues and greater unwillingness to let individual Senators exercise, if not vetoes, then secret vetoes. But, even if there has been a change, it may be a response to the perceived imperatives of current domestic and international politics or it may be temporary for other reasons. As painful as they may be to politicians, transparency and accountability are necessary to informed public debate and responsible public policy concerning federal judicial selection. The brighter the sunshine, the less the fog.

AJS Statement on Ideology and Judicial Selection

It is currently a matter of controversy whether the ideology of federal judicial nominees should be taken into account by the Senate in the confirmation process. The American Judicature Society believes the appropriate question is not whether ideology should play a role, but what role it should play. Ideology always has played, and inevitably will play, a role in federal judicial selection. Judges are human beings; they necessarily bring to the bench the perspectives obtained from prior life experiences. Presidents take these perspectives and predilections into account when they nominate judges. The Senate necessarily does the same.

To say that ideology will play a role in the nomination and confirmation process, however, is not to say it should play the sole, or even a primary role. Nominees who display ideological convictions so strong as to be impervious to contrary evidence, argument, or law should not serve on the bench. Judging is not a political process, and the judiciary should not be politicized by the Executive Branch or the Senate. AJS believes judges should be chosen on the basis of established legal credentials, an ability to decide cases based upon their facts and the law, and a demonstrated capacity for open-mindedness, sound judgment, and even-handedness.

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Selecting Federal Court of Appeals and District Court Judges

An AJS Symposium Examining the Role and Responsibilities of the Executive and Legislative Branches

Moderated by Marcia Coyle of *The National Law Journal* and Nina Totenberg of National Public Radio

May 17, 2002

The Washington Court Hotel, 525 New Jersey Avenue, NW, Washington, D.C.

The symposium will begin with a breakfast and keynote address at 7:45 a.m. and will conclude at noon. The first part of the program will feature a historical overview of the federal judicial selection process, informed by the experiences of past and present White House counsel and Justice Department officials. The second part of the program will provide an examination of the Senate's role of advice and consent and of the formal and informal procedures used by senators during the nomination phase.

Speakers: *Stephen B. Burbank*, Professor, University of Pennsylvania Law School; *Hon. Jon O. Newman*, Senior Judge of the U.S. Court of Appeals for the Second Circuit; and *Elliot E. Slotnick*, Professor of Political Science, Ohio State University.

Panelists: *Eleanor D. Acheson*, Assistant Attorney General for the Office of Policy Development during the Clinton administration; *Victoria Bassetti*, Judiciary Committee counsel to Senator Herb Kohl; *Walter Dellinger*, Assistant Attorney General and head of the Office of Legal Counsel, and Acting Solicitor General during the Clinton adminstration; *Viet D. Dinh*, current Assistant Attorney General for the Office of Legal Policy; *C. Boyden Gray*, counsel to George H.W. Bush during his terms as Vice President and President; and *Michael E. O'Neill*, former general counsel to the Senate Judiciary Committee.

This event is open to the public but registration is required. To register, visit www.ajs.org/fjsp.html. For more information, contact Allan Ashman at 312-357-8825 or aashman@ajs.org.

Ask the ADR Professionals

News You Can Use from the National Arbitration Forum

Inquiring Judges and Court Administrators want to know – For the courts what will be the impact of all of the developments in arbitration law?

Oh, quite a lot... the best analysis suggests that trial judges will have fewer, but more interesting, cases.

In the past decade, events in the area of arbitration law have moved from a trickle to a torrent. In just the past year, the U.S. Supreme Court has ruled on six arbitration cases and the National Conference of Commissioners on Uniform State Laws has approved the Revised Uniform Arbitration Act ("RUAA").

The driving force behind these changes is the effort to provide all parties with timely and affordable access to justice. Arbitration, as part of the ADR evolution, relieves the extraordinary caseload of judges and allows parties to obtain reasonable and timely dispute resolution. Some commentators have referred to the changes in arbitration law as "real civil justice reform."

As a result of the changes over the past few years, contracting parties have greatly increased the number of arbitration clauses in various kinds of agreements. For the courts, this will likely mean fewer traditional lawsuit filings and more: 1) Petitions and/or motions related to arbitration awards; and, 2) Petitions and/or motions to compel (or avoid) arbitration.

These new issues will not mean more work for judges, but they will result in different work. Judges will do more "legal" and less "case management" work. A growth in the number of arbitration cases will change the volume and type of civil cases that will come before the courts.

Arbitration is a creature of statute. The FAA, UAA and RUAA all provide "due process" standards under which arbitration contracts are valid and arbitration awards are enforceable. Major arbitration administrators provide standards far above those minimums.

On substantive issues, arbitration is also a creature of caselaw. The Supreme Court has now interpreted the FAA (in applying it to almost all contracts) to require that parties receive all of their statutory rights and remedies in the arbitration process. The arbitrator in each case, therefore, serves as a "magistrate" to the trial judge. Before an arbitration award can be enforced, the trial judge must pass on the legal sufficiency of the arbitrator's action.

This, taken alone, is a substantial change from both traditional lawsuits and traditional arbitration law. Before the Supreme Court's action, the trial judge had to deal with all of the pretrial and evidentiary issues in every lawsuit. For those cases that went to arbitration, traditional arbitration jurisprudence allowed for little legal review. Now, judges will review legal issues, rather than having to laboriously conduct the entire case.

Broader use of arbitration will direct more cases to arbitration, rather than to the courthouse. The potential for more stringent review will mean that more arbitration awards will likely be challenged. Courts will likely see fewer, different and much more interesting legal matters.

Prior to an actual arbitration, judges will also see more arbitration-related motion practice. Once a dispute occurs, a party may seek an order to prevent or stay an arbitration. A party may, alternatively, seek an order to "compel" arbitration. Although the Supreme Court has set down broad guidelines related to the prospective enforcement of arbitration contracts, individual states are only now refining those standards.

These actions, too, will be new in many courts. The applicable standards will not be at the fingertips of local practitioners and guidance from appellate law defining a fair arbitration process is developing.

Arbitration law now offers almost all civil litigants an opportunity for fast, inexpensive and rational decisions, but the courts remain charged with assuring both the fairness of the arbitration process and legality of the arbitration result. The FAA, UAA, and RUAA all provide for "pre-arbitration" review of the process and "post-arbitration" review of the results.

Judges and court administrators will likely see more and more of these issues (mostly legal, rather than factual), as this part of alternative dispute resolution continues to grow. Arbitration, as a part of the overall ADR process, will become a very familiar - and hopefully friendly - part of civil caseloads.

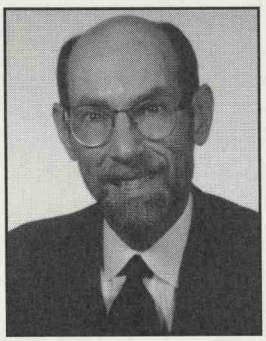
National Arbitration Forum arbitrators and mediators serve on-line and in person throughout the industrial world. For more information on the facts about arbitration, visit ARBITRATION-FORUM.COM or call 800.474.2371

AJS
American Judicature Society
Since 1913

From the executive vice president and director

A tribute to Jean Reed Haynes

by Allan D. Sobel

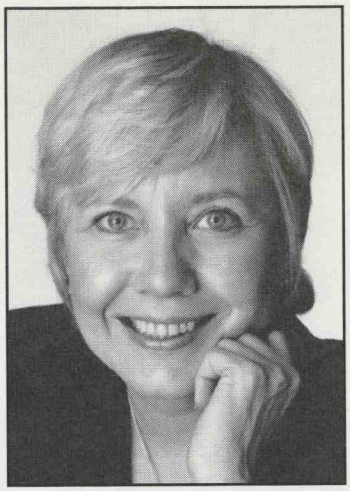


AJS suffered a great loss in March. Longtime New York director and AJS immediate past president (1999-2001) Jean Reed Haynes died on March 31, just six days shy of her 53rd birthday.

Jean's death was sudden and came as a shock to everyone who knew her. Although her tenure as AJS president ended last August, Jean continued to participate actively in the organization's strategizing and planning through her work on the executive committee, nominating committee, and the board development committee. As always, Jean was a natural leader, a confident decision maker, a thoughtful debater, and a generous supporter.

Jean was, as fellow executive committee member Stephen Burbank told those gathered at her memorial service, "formidably and relentlessly intelligent." Jean used this kind of intelligence and persistence to lead AJS out of a difficult time when the organization was experiencing financial trouble in 1999. The staff remembers Jean visiting Chicago on several occasions to provide both leadership and moral support at a time when the organization's leadership was in flux and the future of AJS—and therefore the future livelihood of staff members—seemed uncertain.

Within months after Jean became AJS president, a search began for a new executive vice-president and director who would open a new and hopefully brighter chapter in the long and accomplished history of this organization. I recall as though it were yesterday the thrill of receiving a call from Jean in January 2000 to offer me the position. Because she was instrumental in my hiring and we worked together as partners during her presidency and beyond, I personally feel a great loss with Jean's passing. But like so many others, my memories of the times and thoughts I shared with Jean cannot be taken away by her early death and will be with me as long as I live. I am especially thankful for those memories now.



Jean's work at AJS started long before she was elected president of the organization. Jean was nominated to the board in 1991. She was treasurer from 1997-1999 and a vice president from 1993-1997. During this time, Jean was a busy corporate lawyer and partner at New York's Kirkland & Ellis. After her retirement from Kirkland & Ellis last year, Jean pursued other interests, including starting her own company, J.R. Haynes, Inc. At the time of her death, she was also working on a book.

Because Jean cared so deeply about so many, she will not soon be forgotten. We will remember feeling reassured by her confidence and her take-charge approach to getting things done, but we will also remember her friendship and devotion to the people and causes she cared about most. As executive director, I had many occasions to travel to New York and usually saw Jean on these visits. Whether it was 80 people attending a lavish cocktail reception during the 2000 annual meeting in New York or a small delegation of executive committee members gathering for after-dinner drinks, visitors were always welcome at the apartment Jean shared with her true love, Robert Levy, overlooking Central Park. Jean's generosity extended to all facets of her life: her financial contributions to organizations such as AJS, her endless hours of volunteer work, her loyalty to friends.

AJS has lost a vibrant force that helped drive this organization and push it toward something better. The AJS staff, executive committee, and all those who ever worked with Jean have lost a dear friend. ⚖

Editor's note: To read more about Jean, go to the AJS website, www.ajs.org, under "What's New."

In memory of Jean Reed Haynes, AJS has established the Jean Reed Haynes Memorial Fund for the Benefit of the American Judicature Society. If you would like to make a donation in Jean's memory, please send it to: AJS, 180 N. Michigan Ave., Suite 600, Chicago, IL 60601. For more information, please call Allan Sobel at 312/357-8810 or email him at *asobel@ajs.org.*

Viewpoint

The changing role of the trial judge

Trials, to an increasing extent, have become a luxury. Correspondingly, the role of the trial judge has taken on new and larger dimensions.

by Edmund V. Ludwig

In 1970, there were 340 authorized federal district court judgeships and total dispositions amounted to nearly 116,000 cases. Of these, some 13,600, or about 12 percent, were by trials—15.5 percent criminal, 10 percent civil. Total trial dispositions per authorized judge were 40 per year or only somewhat fewer than one a week.[1]

By 2000, authorized federal district judgeships had risen to 655, having almost doubled in 30 years, and total dispositions had just about tripled, climbing to nearly 335,000. Yet total trial dispositions had declined to less than 10,000, or to 5.6 percent criminal and 2.2 percent civil. In other words, while the number of federal judgeships since 1970 multiplied roughly by two and case dispositions by three, the absolute number of trials had actually fallen by a third and the proportionate percentages by two-thirds or more. Trial dispositions per authorized judge had dropped to 15—or not many more than one a month. Trials of civil cases had been reduced by more than 75 percent.[2]

EDMUND V. LUDWIG *has been a judge on the United States District Court for the Eastern District of Pennsylvania since 1985. Prior to that he served on the state bench for 17 years.*

Still, the very same figures reflect that in 2000 the disposition rate per federal trial judgeship exceeded 510 per year as compared to 340 in 1970, a tremendous increase. If the 1970 disposition rate were projected onto the caseload in 2000, many more judges would have been necessary, together with law clerks, administrative staff, jurors, and courthouse space.

Query: What accounts for these seemingly topsy-turvy statistics, which show that district court judges are spending much less time conducting trials while their marginal productivity in disposing of cases has virtually sky-rocketed?

Profound changes

The dramatic decrease in the number of trials, in inverse ratio to the threefold increase in cases, is just one aspect of the profound changes in our justice system in the past 30 years. Changes have occurred in the nature of the adversarial process and in dispute resolution generally, in the administration of our courts, and in the processing of cases. Moreover, what has taken place in the justice system is in turn a reflection or part of a greater wave of changes that have transformed our society. This phenomenon of the latter part of the 20th century can be attributed to the problems involved in the delivery of services to large and growing concentrations of population—whether it is in providing health care, housing, mass transportation, education, or just collecting trash off the streets, or in the instance of the courts, the resolving of disputes. At the same time, some disputes have become inordinately complex and convoluted as our society has become a huge and multi-layered configuration.

Many of these developments have been driven by the expanding of human capacity enabled by technology, on the one hand, and the constraints of limited economic growth, on the other (a kind of Malthusian geometric versus arithmetical progression). And over the years this tension has been aggravated by the competing objectives of quality versus efficiency/cost considerations. The decrease in trials may be thought of as an expression by our society that on many levels trials may not be the best mechanism for resolving disputes. Instead, like radical, high-tech surgery, they have frequently become an extremely expensive and unpredictable last resort.

The self-evident reasons for the attrition in the incidence of trials are primarily economic—both in terms of individual cases and as relates to the entire justice system. Trials have become less and less affordable, and the persistent demands for containment of private and public litigation costs will continue to discourage their use as the disposition of choice—as will the perceptible rise in litigant dissatisfaction.

In an effort to deal with these issues, Congress enacted the Civil Justice Reform Act of 1991, aimed at cost and delay reduction, and, more recently, the Alternative Dispute Resolution Act of 1998, to foster court-sponsored mediation programs and other settlement strate-

1. "Trial dispositions" include all cases attached for trial whether or not they go to verdict. "Authorized judgeships" refers to positions for judges in active service—some of which, when vacated, remain unfilled for several years or more. In the 1990s, the judicial vacancy rate averaged about 9 percent. The shortage was offset by senior judges—those who retire from active service, but who retain reduced or, in some instances, full caseloads.

2. State courts reflect somewhat greater trial percentages, but a similar trend.

gies. But by the late 1980s, a majority of judicial districts had already implemented these loose-fitting legislative requirements; consequently, the laws themselves have had little effect on case management or court administration. The federal courts had already recognized the need to find less costly and more expeditious ways to deal with the enormous explosion in litigation other than the traditional trial.

A changing jurisprudence

What are *trials*—and what are the future, long-term implications of the almost dinosaur-like dwindling in their number? Litigation represents a breakdown in communication, which consists in the civil area of the inability of the parties to work out a problem themselves and, in the criminal area, of ineffectively inculcating society's rules and the consequences for violating them. Trials are the method we have ultimately used to deal with those breakdowns. However, the goal of our system is not to try cases. Rather, it is to achieve a fair, just, economical, and expeditious result by trial *or* otherwise, where communication has previously failed.

For some trial judges, the greatest day in the sun is in the bright lights of the hotly contested trial. They bitterly resent the trend that has dimmed the theatre of the courtroom and are concerned that the future of the judicial profession, if not their image as judges, is at stake. But judges can and should think of themselves as functioning within a changing jurisprudence of dispute resolution and should adapt their role accordingly. In other words, the decline in trials should not be looked upon as a belittling commentary on the significance of the trial judge but instead from an overall, societal perspective.

Specifically, as regards the importance of the judge's role, the judge will continue to be the centerpiece and dominant force in dispute resolution, a service that has never been more important to society than it is today. Judge Patrick Higginbotham, of the Court of Appeals for the Fifth Circuit, has said, "Trials are not a disease, to be avoided like the plague." While that is true and should not be lost sight of, trials are also not a fitness exercise that is necessary to maintain the system's vitality.

Judges can and should think of themselves as functioning within a changing jurisprudence of dispute resolution.

Although some judges have resisted change, many others have demonstrated a remarkable flexibility in devising methods to enhance their own efficiency and their court's capacity to dispose of cases. This has encompassed both procedural and substantive approaches and modifications. The changes in the adversarial process can be seen most graphically in class actions, the asbestos cases and other mass torts, and the multifaceted role of the multi-district litigation transferee judge. When cases are handled in a package or group instead of one at a time, it is hard, if not impossible, for the lawyers or the judge to maintain time-honored concepts of due process and the adversary system. One alternative has been to deal with these voluminous cases administratively as a matter of practicality, but in some instances mass settlements have been stricken down on appeal as violative of an individual's rights and inconsistent with adjudicative principles.

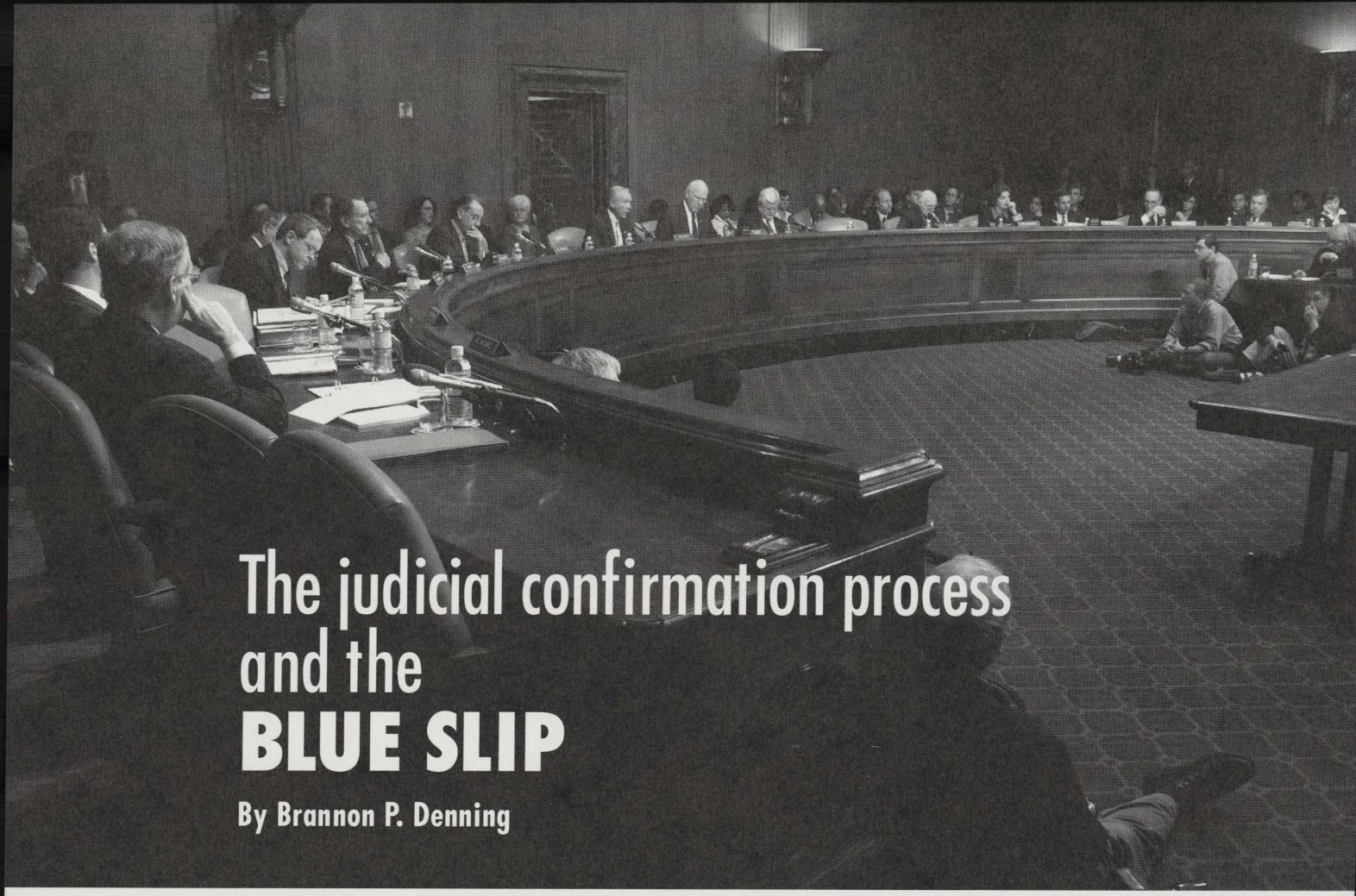
There have been a myriad of other federal court developments that have also had a substantial and cumulative effect: *Daubert* and the judge as evidentiary gatekeeper; *Celotex* and summary judgment; Rule 11 and sanctions for serious civil pleading infractions; Rule 16 and judicial case management; and the detailed discovery rules and self-executing disclosure. These, in varying degrees, have affected the nature of the process and the judge's role by injecting the judge into the pretrial phases of a case. In a sense, the judge has become the schoolmaster who encourages and often presses lawyers to do their homework and prepare for trial, instead of the neutral arbiter who lets the lawyers, for better or worse, try their own case.

So, too, on the criminal side: There has been a surge in pretrial motions, the outcome of which may often determine whether there will be a non-adversarial disposition of the case—*i.e.*, a guilty plea. Also, the Sentencing Guidelines have forced lawyers to make careful calculations about the chances of success in a trial and to prepare themselves for sentencing to an extent not known before. These changes in pretrial proceedings and the judge's pretrial and sentencing roles have also produced a proliferation in judicial work and time involvement far beyond presiding over trials. But the result has been to equip the trial judge with a variety of case management tools and to bring about a much more efficient and effective dispositional performance record than in the past.

Keeping pace

Just as it may be economically infeasible to take a particular case to trial, there is no reason to believe our judicial structure and capacity will be sufficiently enlarged to keep pace with

(continued on page 253)



The judicial confirmation process and the BLUE SLIP

By Brannon P. Denning

JAY MALLIN

If there is any bright side to the unbelievably rancorous confirmation battles that marked the Clinton years, and which are now occurring in the Bush administration, it is that they have exposed to public scrutiny customs and practices that enable individual senators to wield a *de facto* veto over presidential nominees (and the defensive measures available to presidents). After 1994, for example, when Republicans regained control of the House and Senate, senators used the power of committee chairs and the "hold" to kill nominations for cabinet positions, department heads, ambassadorships, and judgeships on what seemed to be an unprecedented scale. For this, Republicans faced intense criticism.

***BRANNON P. DENNING** is an Assistant Professor of Law at Southern Illinois University.*

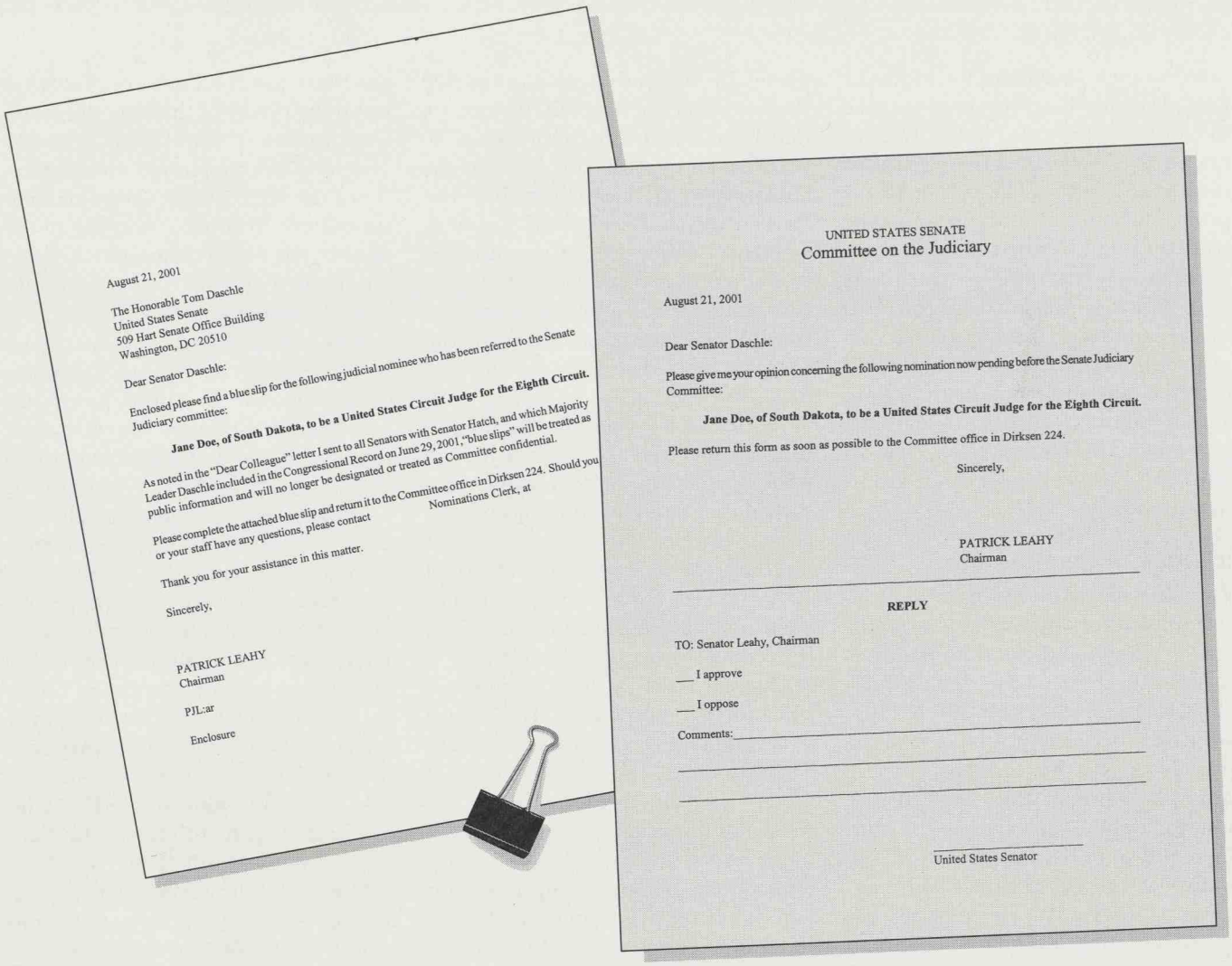
Many senators defend the blue slip as necessary to encourage the president to respect what they see as a constitutional obligation to seek senatorial advice, but in fact it has been used with increasing frequency to defeat nominees.

Now, recent controversies over President George W. Bush's judicial appointments have brought to light another obscure Senate custom, the blue slip.

The emotional aftermath of the 2000 election meant that confirmation for Bush's nominees, his judicial nominees in particular, would be rough going. Some commentators even called on the Senate not to confirm *any* Supreme Court nominees, exhorting Senate Democrats to oppose vigorously "judicial ideologues intent on a revolutionary agenda."[1] For their part, Democrats in the then-evenly-divided Senate were demanding that the President respect the blue slip procedure by agreeing to consult Democratic senators prior to nominating persons from their state to judgeships. Democrats on the Judiciary Committee were angered by then-Chairman Orrin Hatch's plan to require *both* home-state senators to withhold slips before sinking a nomination, which Democrats alleged was an abrupt change in the way Hatch had treated blue slips during the Clinton administration.

The issue became so contentious that Democrats, furious at Republican refusals to adhere to past practices, threatened either to place holds on or

1. Ackerman, *Foil Bush's Maneuvers for Packing the Court*, L.A. TIMES, April 26, 2001, at http://www.latimes.com/news/comment/20010426/t000035062.htm.



August 21, 2001

The Honorable Tom Daschle
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

Dear Senator Daschle:

Enclosed please find a blue slip for the following judicial nominee who has been referred to the Senate Judiciary committee:

Jane Doe, of South Dakota, to be a United States Circuit Judge for the Eighth Circuit.

As noted in the "Dear Colleague" letter I sent to all Senators with Senator Hatch, and which Majority Leader Daschle included in the Congressional Record on June 29, 2001, "blue slips" will be treated as public information and will no longer be designated or treated as Committee confidential.

Please complete the attached blue slip and return it to the Committee office in Dirksen 224. Should you or your staff have any questions, please contact Nominations Clerk, at

Thank you for your assistance in this matter.

Sincerely,

PATRICK LEAHY
Chairman

PJL:ar

Enclosure

UNITED STATES SENATE
Committee on the Judiciary

August 21, 2001

Dear Senator Daschle:

Please give me your opinion concerning the following nomination now pending before the Senate Judiciary Committee:

Jane Doe, of South Dakota, to be a United States Circuit Judge for the Eighth Circuit.

Please return this form as soon as possible to the Committee office in Dirksen 224.

Sincerely,

PATRICK LEAHY
Chairman

REPLY

TO: Senator Leahy, Chairman

___ I approve

___ I oppose

Comments:_____

_____

_____

_____
United States Senator

filibuster Bush judicial nominations unless they were assured that Democrats in states whose delegations were split would have the opportunity to blue-slip judicial nominees to whom they objected. Democrats thus hoped to ensure that the administration would have an incentive to consult with Democrats before formally announcing nominations.

A few days after control switched to the Democrats, the blue slip again made the news when California Senator Barbara Boxer announced her intent to use her prerogative to nix the nomination of California Representative Christopher Cox to the Ninth Circuit Court of Appeals. As a result, Cox asked President Bush to withdraw his name from consideration. Paul Gigot and William Safire criticized Boxer's move, and criticized the blue slip process, likening it to a "blackball" and a "burial shroud" for nominees.[2]

Whether or not the non-return of a blue slip would be the death knell for judicial nominees became one of the most hotly contested issues confronting the Senate as it set about reorganizing following the assumption of control by the Democrats. Republicans demanded floor votes on all of the President's judicial nominees, regardless of whether they received a favorable vote in committee; Democrats refused such blanket assurances, claiming that such a move would undermine the Senate's "advice and consent" role. In the end, Democrats only assured Republicans that they would follow the "tradition of bringing Supreme Court nominees to the Senate floor but stopped short of any iron-clad commitments."[3] Republicans, however, did get an agreement that all blue slips would be made public.[4]

News coverage of the spat raised the visibility of the blue slip, and also exposed it to criticism. In general, editorial commentary was uniformly negative, with many newspapers calling for its abolition. At least, many editorials argued, blue slips should be made public, as they eventually were under the Senate's reorganization plan. However, the coverage did

2. Gigot, *Blue Slip*, WALL ST. J., May 9, 2001; Safire, *Battle of the Blue Slips*, N.Y. TIMES, May 10, 2001, at http://www.nytimes.com/2001/05/10/opinions/10SAFLhtml. ("In olden times, the nomination . . . died [if a senator failed to return a blue slip]. No hearing; no vote; the unreturned blue slip was a form of burial shroud."). Safire went on to describe how "[i]n the 80's, under the chairmanship of Ted Kennedy and later Joe Biden, a little wiggle room was allowed: a nominee, despite being blue-slipped by the home-state senator, could theoretically get a hearing provided the president begged the senator's permission in advance." *Id*

3. Dewar, *Senate Reorganization Finalized*, WASH. POST, June 30, 2001, at A11.

4. Boyer, *Senate Concurs on Reorganization; GOP Fails to Win Pledge on Judges*, WASH. TIMES, June 30, 2001, at A4; Dewar, *supra* n. 3.

not do much to explain its origins or past practice; some coverage seemed to confuse it with the "hold." Reporters for the *Washington Post* described it only as a custom that "dates back several decades and is rooted in the tradition of 'senatorial courtesy,' which traces its roots to the presidency of George Washington."[5] It was also unclear from published reports whether a senator's failure to return a blue slip was a death blow to a nomination, as Democrats claimed; or, as Senator Hatch argued, "not an absolute bar to proceeding with a nomination . . . ."

History of the blue slip

The blue slip is the result of the institutionalization of "senatorial courtesy."[6] When a judicial nomination is made, the chair of the Senate Judiciary Committee sends "blue slips" (so called because of the color of paper used) to the senators of the nominee's home state. If even one senator declines to return the slip, then the nomination is dead in the water, or further action will be extremely difficult, depending on which practice the chair decides to follow. The blue slip procedure is only employed by the Judiciary Committee for federal judges. Other nominees, however, can be stopped by senators who put a "hold" on a nominee, or by chairs of committees who refuse to hold confirmation hearings. The Senate majority leader too can halt a nomination by refusing to schedule an up-or-down vote.[7]

The blue slip's origins are somewhat obscure. The last extensive debate on its use was in the late 1970s, when Senator Ted Kennedy, then chairman of the Judiciary Committee, announced that withholding blue slips would no longer automatically be fatal to a nominee's chances.[8] Kennedy's position was significant because of the creation of more than 100 district and circuit court vacancies under the Omnibus Judgeship Act in 1978, and by President Jimmy Carter's decision to rely on nominating commissions to select candidates by merit.

According to a memorandum prepared by the Judiciary Committee staff in 1979, the blue slip procedure had been around for more than 25 years.[9] It represented an effort by the committee to institutionalize the "senatorial courtesy" owed to fellow senators' objections to nominees from their home state. A couple of interesting facts emerged from the committee staff's description of the blue slip procedure. On the blue slip itself was written the following: "Under a rule of the Committee, unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination." But the staff memorandum reported that, as of 1979, "at least for a decade there has been no 'rule of the Committee' on the subject"—meaning that there is no formal basis in the Committee's rules for the procedure. This is still true today.[10] Second, as the blue slip literally read, failure to return it meant *no* objection, which is precisely the opposite of how the procedure works. As the staff memorandum noted, "[n]o hearing has been scheduled on a nominee in the absence of a returned blue slip" rendering it "an automatic and mechanical one-member veto over nominees."

The staff noted that presidents "can ignore a senator's personal opposition and attempt to have his nomination confirmed by the Senate"; but the memorandum also hit upon the power of the blue slip—and what makes it so difficult to study. "Generally," continued the memo, "conflicts are resolved *before* a name is submitted. In other cases, the nomination may die in committee without any record on whether a withheld blue slip was responsible."

In his opening statement to the 1979 hearings on filling vacancies created by the Omnibus Judgeship Act, Senator Kennedy stated that he would not "unilaterally table a nomination simply because a blue slip is not returned by a colleague." He conceded, however, that he could not "discard cavalierly the tradition of senatorial courtesy, exception-riddled and outdated as it may be." Therefore, in the absence of a blue slip, he proposed to bring the nomination before the committee for a vote on whether or not to proceed, "rather than letting the nomination die . . . ." Thus, said Kennedy, "[t]he committee, and ultimately the Senate, can work its will."

The "will," however, that his colleagues—particularly those in the minority party—seemed inclined to "work" was not necessarily in concert with Kennedy's reforming spirit. In his opening statement, which was read by Senator Paul Laxalt, Strom Thurmond "presume[d] that the committee will honor the blue-slip

5. Dewar, *supra* n. 3.

6. "Senatorial courtesy" itself is a term that requires some unpacking:

"Traditionally, the term *senatorial courtesy* has referred to the deference the president owes to the recommendation of senators from his own political party on the particular people whom he should nominate to federal offices in the senators' respective states. A second form of senatorial courtesy is the deference a member of Congress, particularly a senator, expects to get from his or her Senate colleagues (or, in the case of a representative, from his Senate counterparts) with respect to his or her own nomination to a confirmable post. Yet another form of senatorial courtesy is the expectation that senators (usually from the president's political party) will confer or consult with the president prior to his nominating people to fill confirmable posts in their fields of expertise . . . or people from their respective states to fill national offices."

Gerhardt, THE FEDERAL APPOINTMENTS PROCESS 143-44 (2001); *see also* Chase, FEDERAL JUDGES: THE APPOINTING PROCESS 7-13 (1972); Harris, *The Courtesy of the Senate*, 67 POL. SCI. Q. 36 (1952).

7. Means other than the blue slip were used extensively to block nominations during the Clinton administration and have been employed to prevent votes on some Bush appointees. A comparative analysis of the hold and other methods of blocking nominations and the blue slip is beyond the scope of this essay, but are discussed at length in Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with" "Advice and Consent,"* 53 ADMIN. L. REV. 1, 20-22 (2001).

8. *See Selection and Confirmation of Federal Judges: Hearing Before the Senate Committee on the Judiciary*, Part I, 96th Cong., 1st Sess. (1979) [hereinafter *Senate Hearing*]; Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?* (pt. 1), 64 JUDICATURE 60, 69-73 (1980); *see also* Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL'Y REV. 299, 328-30 (1983).

9. *See* Memorandum from Senate Judiciary Committee Staff to Senator Edward M. Kennedy, Chair, Senate Judiciary Committee, Jan. 22, 1979, *reprinted in Senate Hearing, supra* n. 8, at 118, 119.

10. No mention of blue slips is made in the rules posted on the Judiciary Committee's website. *See* http://www.senate.gov/~judiciary/rules.htm (last visited August 6, 2001).

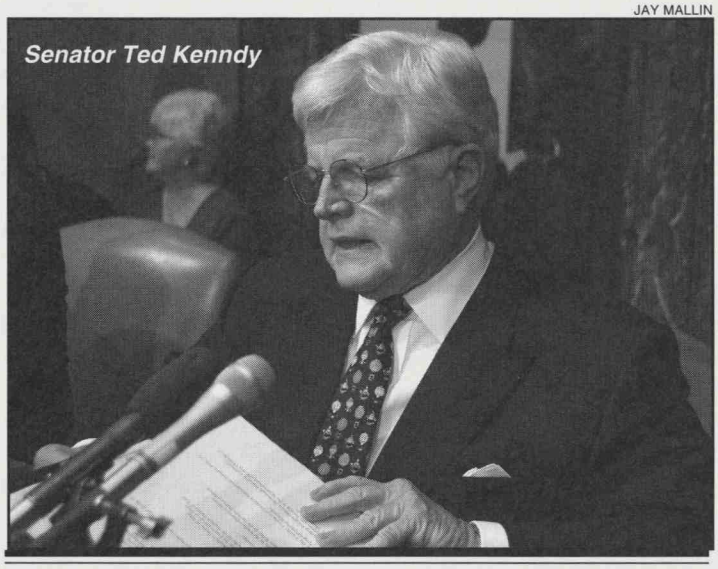
system that has worked so well in the past." Not only was this "a matter of senatorial courtesy," but was also a "means of an effective scrutiny of a candidate . . . ." In his statement, Senator Laxalt agreed:

> If we finally get through a selection process and somebody comes down here who is . . . obnoxious or otherwise is not acceptable, I think, as a matter of senatorial responsibility, we should preserve [senators' rights to withhold the blue slip]. I feel strongly about the blue slip process, since it has not been abused, that it should be retained. I hope personally that I never have to utilize it, but I never want to foreclose myself or any of my colleagues in the right case from being able to do that.

That responsibility "to call these tough shots within our States," he added, was "why we are here...."

The only other extensive treatment of the blue slip, and senators' attitudes toward it, is found in an excellent article by political scientist Elliott Slotnick, published in *Judicature* around the same time as the Senate hearings. Drawing upon interviews with senators and their staffers, Slotnick acknowledged that the blue slip process "created a sort of 'pocket veto' of judicial nominees for home state senators of both parties," and that it had become "a major target for the reform groups." But Slotnick's research suggested that it had not been used that often, and had not been abused by senators: "Surprisingly . . . 88 per cent of our respondents indicated that they had *never* used the blue slip process for *any* purpose other than signing off or commenting favorably on a nominee." Of the six respondents that had withheld blue slips, only two did not eventually return it. This suggested to Slotnick that "withholding the blue slip was a delaying tactic which allowed [senators] to make further inquiry and to negotiate on the vacancy—the 'classic' use of the blue slip."[11]

JAY MALLIN



Senator Ted Kenndy

In 1979 Kennedy stated he would not "unilaterally table a nomination simply because a blue slip is not returned by a colleague."

The most interesting aspect of Slotnick's research was the "blue slip for me, but not for thee" attitude of many senators. While a majority of the senators he surveyed favored retention of the blue slip process, a larger majority indicated that their decision to support a nominee or not would *not* be dictated by a colleague's decision to withhold the blue slip. Even among those senators who *favored* retaining the process, 39 percent would not defer to colleagues exercising their blue slip prerogative.[12] To Slotnick, this signaled a degradation of certain cherished Senate norms, like reciprocity and courtesy. He might have added that, if forced to choose, most senators would evidently support their colleagues only to ensure that *their* exercise of the prerogative would be supported in the future.

If so much distrust surrounded the procedure, then why had it been retained? For some senators, wrote Slotnick, tradition was enough. Others suggested that the blue slip preserved consensus and harmony among senators by offering an "early warning" system of sorts that could help avoid embarrassing and acrimonious controversies from occurring either in committee or on the Senate floor. Still other senators invoked the historic reason for deferring to senators' wishes regarding nominees: home state senators are in the best position to evaluate a nominee and provide unique insights.

One obvious reason for retaining the custom is that it forces an administration—even if of a different party from the senator—to deal directly with that senator on judicial nominations, thus enhancing her prestige. Perhaps even more important is the fact that it ensures that senators of the minority party can play a significant role in the nomination process. Not surprisingly, 94 percent of Republicans responding to Slotnick's study favored retaining the blue slip process. "The minority party," he concluded, "will apparently do whatever is necessary to maintain a meaningful role in the judicial recruitment process."

Still, despite the controversy generated by the process, Slotnick was able to conclude in 1980 that "the

11. Slotnick, *supra* n. 8, at 60, 62-63, 69.

12. *Id.* at 70 ("A majority (57 per cent) favored the continued existence of the blue slip process; 32 per cent thought that the process should be eliminated or the Kennedy reform initiative should be supported"; but 62 percent "also indicated that they would *not* defer as a matter of course to their colleagues' attempt to block a nomination by withholding a blue slip.").

blue slip system is rarely used and it often serves some other purpose than defeat of a nominee. Its major function seems to be to delay, not defeat, a nomination." It is instructive to compare the blue slip process circa 2001 with the process as described by Slotnick above. Though the secrecy shrouding the process—which has only recently been lifted—makes it difficult to say for sure, it appears that over the past 10 years the fears of the blue slip's critics have been realized.

If Senator Helms's continued obstruction of any North Carolina nominees to the Fourth Circuit, and Senator Boxer's treatment of Christopher Cox are at all representative, the blue slip is now seen as a means to defeat, not merely delay, a nominee; and perhaps prevent the nomination from being made in the first place. Nor is this use without precedent among the Senate's other unwritten customs: witness the hold's evolution from an accommodation to members who can't be present for a debate to a blue slip process writ large, in which legislation *and* nominees can be held up by any senator, for any reason, as long as the leadership decides to honor the hold. That she chose to threaten withholding her blue slip on ideological grounds, as opposed to any other manifest unfitness for office, suggests that Senator Boxer was taking advantage of an established practice. That is, in none of the news reports was she criticized by her colleagues for breaking with tradition. While conservative pundits criticized her action, they seemed to take it only as a symptom of the problem with the custom itself.

Moreover, the withdrawal of Cox from consideration demonstrates the real power of the blue slip: a senator need not use it in a direct confrontation with the administration over a nominee. Just making known that the senator is opposed and would, if the person is nominated, withhold the blue slip, sends a powerful signal that trouble is in the offing. Then the administration must decide whether or not it wants to pick a fight. With judicial nominations, then, the Senate has created an effective procedure for ensuring that its "advice" is sought by the president prior to the announcement of a nomination, despite suggestions that that function has been "short-circuited."[13]

Is it constitutional?

Slotnick noted that the blue slip process was inconsistent with a "minimalist" view of the confirmation process. To be sure, its presence represents a rather more complicated picture of nomination and confirmation than that suggested by Article II. But is it—and the obstacles for nominees that it produces—unconstitutional? Article II, section 2 grants presidents the power to nominate judges, who are appointed when they obtain the "advice and consent" of the Senate. Defending the system in *The Federalist*, Hamilton praised it for its transparency and its clear allocation of responsibility.[14] With the roles clearly assigned, and the matter conducted with publicity, Hamilton wrote, "[t]he blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate . . . ." Hamilton contrasted the appointment mechanism of the Constitution with New York's Council of Appointment, where, because it was unclear what part anyone played in proposing or approving nominations, and because of the secrecy in which the Council operated, "all idea of responsibility is lost."[15]

One might say the same about the blue slip process. First, it dilutes the power of the executive to appoint whomever he wishes. Knowing of the blue slip process, and of senators' expectations that the president will appoint their people for certain posts, can we assign unqualified responsibility to the president for those appointments? Second, the secrecy with which the blue slip operates (or operated, if the present agreement holds) also diffuses responsibility and reduces transparency in the process. If a senator can withhold a blue slip, give no reasons, and the public knows nothing about it, what is the check upon extreme abuses? But the most serious constitutional objection is that it allows *individuals* to exert what is supposed to be an *institutional* check. A single senator withholding consent, and depriving the Senate as a body from voting a nominee up or down, is difficult to square with the Constitution, which specifies that it is the *Senate* (not "senators") that is to provide "advice and consent."[16] While the Constitution authorizes the Senate to make its own rules, recall that there has not been a formal rule from the Judiciary Committee authorizing the blue slip for nearly a half century.

On the other hand, the Senate is not only expected to "consent" to nominations, but also to give "advice" regarding them. The Constitution does not explicitly set forth an advice-giving mechanism, but the text seems to anticipate more than a rubberstamp role for the Senate. The Constitution establishes an expectation that the president will actively seek the guidance of senators in making appointments. But, there is no mention of *how*, exactly, he is supposed to obtain the advice of the Senate,[17] thus there is no way to assure that he will do so. Moreover, because he alone is vested with the power to appoint, it is unlikely that the Senate could ever persuade a court to invalidate a presidential nomination on the grounds that it was made without

13. Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L. J. 657, 659 (1969).

14. *See* THE FEDERALIST NO. 77, at 432, 433 (Isaac Kramnick ed., 1987) (hereinafter all citations are to this edition.) ("[In the Constitution], the power of nomination is unequivocally vested in the executive. And as there would be necessity for submitting each nomination to the judgment of an entire branch of the legislature, *the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety, and the public would be at no loss to determine what part had been performed by different actors.*") (emphasis added).

15. THE FEDERALIST NO. 76, *supra* n. 14, at 434.

16. Of course, the Senate can't act but through its members; the point is that allowing 2 out of 100 to scuttle a nomination doesn't square with the majority rule requirement implied by Article II.

17. *Compare* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .").

sufficient advice from the Senate.

Thus, in the absence of an effective legal sanction, the Senate had to create a sanction that would penalize a president's refusal to seek Senate advice. The Senate decided to "encourage" him to consult with them by creating a way to sanction him if he does not—the blue slip. (Another objection may be lodged: that the blue slip procedure makes no allowance for a president who, in good faith, seeks to comply with the advice norm—as President Clinton is said to have done—but does not take the advice, which he is not required to do. One might argue that the blue slip permits an individual senator to exact an asymmetical penalty. This is a serious objection; one that suggests that reform is needed.)

The blue slip as sanction

Institutional norms and their enforcement. There is a growing body of literature that uses law-and-economics analysis to describe how and why people cooperate in the absence of legal sanction and how non-legal "norms" are derived and enforced in communities. Though even among the specialists in this area there is no one agreed-upon definition for a "norm" most agree that it is a behavioral expectation, deviation from which may call down a sanction from the community in which the norm is operative.

As Michael Gerhardt has recently demonstrated, one might extend norm theory to an institutional relationship, like that of the president to the Senate in the confirmation process.[18] I suggest that the blue slip process is the sanction that a president faces for violating the norm of senatorial courtesy in the judicial appointment process.

One of the most important norms enforced by the Senate is that the president feel obligated to seek senators' advice when the position is located within their state; or, more recently, when the potential nominee is from their state. This is one aspect of "senatorial courtesy"—and one with deep historical roots. When President George Washington failed to seek advice from the Georgia senate delegation regarding a nomination for a federal position in Savannah, Washington was forced to withdraw the nomination in favor of the person recommended by the senators.

The blue slip process is the sanction that a president faces for violating the norm of senatorial courtesy in the judicial appointment process.

While Article II's failure to provide any formal advice-giving process has led some to the erroneous conclusion that "advice and consent" was merely a term of art and not to be understood literally, or that the "advice" component has fallen into desuetude, the persistence of the courtesy norm and the evolution of the blue slip suggest the opposite. One could see the Georgia senators' move against Washington's nominee as a reaction to a violation of the expectation, created by the language of Article II itself, that the president would consult the senators prior to making formal nominations. As Harold Chase has observed, other senators were willing to support their colleagues' in their opposition to the president's choice because it was "easy for senators to see that if they joined together against the president to protect their individual interests in appointments, they could to a large degree assure that the president could only make such appointments as would be palatable to them as individuals."[19]

Both the decision to oppose Washington's appointment and the other senators' decision to support their colleagues in standing against the president were signals. To the president, the senators signaled an intention to regard prenomination consultation as a norm of the confirmation process. The other senators signaled to their Georgia colleagues that they could be counted on to support them in their decision, and, consequently, that *they* would be worthy of similar support in the future. The president, on the other hand, by withdrawing the nomination, clearly signaled to the whole Senate that he recognized the validity of the advice norm, and would abide by it.

The evolution of the advice norm as an aspect of senatorial courtesy. Though early presidents resisted, an expectation eventually emerged that presidents would, in fact, consider names for certain governmental posts from the senators and representatives in whose states or districts those persons would serve. While respecting this norm necessarily involved surrendering some of the executive power to nominate, its observance was essential because of the increase in the number of federal offices by the mid-nineteenth century and the inability of the president to evaluate candidates for those positions. By the twentieth century, as one commentator noted:

> [T]he custom of Congressional "advice" was thoroughly systematized by the Republicans. Not only were the Senators recognized as the "referees" in the case of statewide positions; but if there were two administration Senators, and especially if they were not harmonious, they made formal agreements dividing the patronage [in the state].[20]

This norm was considered firmly established by the mid-twentieth century, but was not *static*. For example,

18. *See, Norm Theory and the Future of the Federal Appointments Process,* 50 DUKE L.J. 1687 (2001).
19. *Supra* n. 6, at 7.
20. Fowler, *supra* n. 8, at 49-50.

prior to the 1950s, Joseph Harris described the custom as follows:

> Under the custom any member of the Senate may block the confirmation of a nomination by stating that the nominee is "personally obnoxious" or offensive to him. In the past, it has not been necessary for the senator to do more than merely indicate his opposition to a nomination, and repeat the customary formula. An objection to a nomination does not mean that the nominee is actually "personally obnoxious" to the objecting senator; it frequently involves no animus whatever, but merely indicates that the senator has another candidate. Formerly it was not necessary or expected that the objecting senator give any reasons to support his objection . . . Usually he advised the chairman of the committee to which the nomination had been referred, and the nomination was not reported to the Senate.

Harris noted, however, that "in recent years the objecting senator has been expected to state his reasons so that the Senate can judge whether they are sufficient."[21] In several cases he described, senators gave as the reason for opposition the fact that the president had ignored (or at least not actively sought) senators' advice on the nominees.

In one particular case, Georgia Senator Richard Russell asked the Senate to oppose a judicial nomination made by President Harry Truman for which Russell preferred another candidate, stating that senators "have a right to believe if the man they recommend is qualified the recommendation will be followed." Otherwise, Russell warned, "the constitutional power of the Senate to advise and consent to a nomination means nothing; it has no significance."[22] The president's nomination, he continued, was "contrary to custom, and in defiance of the constitutional powers of the Senate." The Senate responded to Russell's entreaties by defeating Truman's nominee without a roll call vote.

The Senate's support of Senator Russell and others came after a short period of time in which stating personal opposition was not sufficient to block a confirmation—reasons needed to accompany the charge of "obnoxiousness" so that the Senate could evaluate them.[23]

Contrasting the courtesy norm and the blue slip. Thus, the advice norm clearly preceded the blue slip, and was enforced through the support of colleagues on which objecting senators might count as an aspect of the Senate's courtesy. It is interesting, however, to note a few differences between the courtesy norm and the blue slip. In his classic article on the norm, Joseph Harris noted that the contests usually arose "between the President and members of the Senate . . . when the President declines to nominate the candidate proposed by a senator of his party, ordinarily on the ground that the . . . nominee is not qualified."

A more common objection at the time Harris was writing (1952) was the so-called "personal" objection "entered when the objecting senator concedes that a nominee is fully qualified" but whom the senator nevertheless opposes, often because "the nominee is a political opponent of the [objecting] senator . . ." The point is that *ideological* opposition did not play a large role, or at least workaday "political" concerns were more often the root source of controversies.

The advice norm was strongest when the president and the objecting senator were of the same political party. Senators of the minority party, wrote Harris, "may enter a personal objection to a nominee, and "some had been sustained, though the custom was that any objection should be based on purely personal grounds;" though, as he admits, "in practice it is frequently difficult to distinguish between personal and political objections." (But again, "political" here means that the nominee is a political rival of the senator, and not a reference to ideological objections.) Presently, though, the blue slip is available to *all* members of the Senate. Moreover, senators are extremely sensitive about diluting the power of the mechanism by requiring opposition from *both* senators.

Another interesting feature of the courtesy norm circa 1950 is that senators were somewhat limited in the *offices* to which they could object. For example, when Senator Theodore Bilbo of Mississippi objected to a court of appeals nominee, he was forced to lodge a personal objection to the nominee since "the judicial circuit included five or six states, a senator from any one of the states could not claim the right to name the person to be appointed to the vacancy . . . ." Harris also commented that objections "against nominees to national offices by a senator from the state of residence of the nominee" is "uncommon"; "courtesy is ordinarily invoked only against appointments to offices located within the state of the objecting senator." Not so the blue slip, which is available for all judicial nominations—except those to the United States Supreme Court.

Summary. The blue slip is the formal vehicle for sanctioning a president's failure to abide by senators' expectations of consultation prior to making judicial nominations from their states. Prior to the mid-1950s, the sanction was largely available only to senators of the president's own party who either objected to a president's consideration of a nominee to an office inside that senator's state who was a political rival or who simply was not the senator's preferred candidate. Moreover, an objecting senator had to make his objection publicly, and was sometimes even required to state his objections with some specificity, which his colleagues would then weigh.

Under the blue slip regime, on the other hand, senators of either party are entitled to indicate their disapproval of a judicial nominee from their state by withholding a slip of paper distributed to them by the Judiciary Committee. According to Senate custom, if even one senator from a state withholds the slip, the nomination will not go forward. While for-

21. Harris, *supra* n. 6, at 39, 40.

22. *Id.* (quoting Russell).

23. *Id.* at 62 ("For a period it appeared that the Senate would limit the use of the rule by requiring objecting senators to state their reasons, and sustain the objections only if they were found sufficient, but in the last several years the trend has been in the opposite direction.").

merly used primarily to delay candidates, the blue slip has been used with increasing frequency to defeat nominees. Until a new agreement was reached between Republicans and Democrats on the Judiciary Committee last summer, the identity of the senator withholding the blue slip was secret.

Like the arguments employed on behalf of the courtesy norms of which Joseph Harris wrote, many senators defend the blue slip process as necessary to encourage the executive branch to respect what senators see as a constitutional obligation to seek advice from senators prior to making certain judicial nominations. For its part, members of the executive branch have, in candid moments, admitted that without the blue slip presidents would have little incentive to vet nominees with home state senators. Despite its lack of explicit sanction in the Constitution, the mechanism is an outgrowth of norms that are not only suggested by the Constitution (*i.e.*, the Senate is supposed to render "*advice* and consent," not just "consent"), but also are those that have existed since the Washington administration.

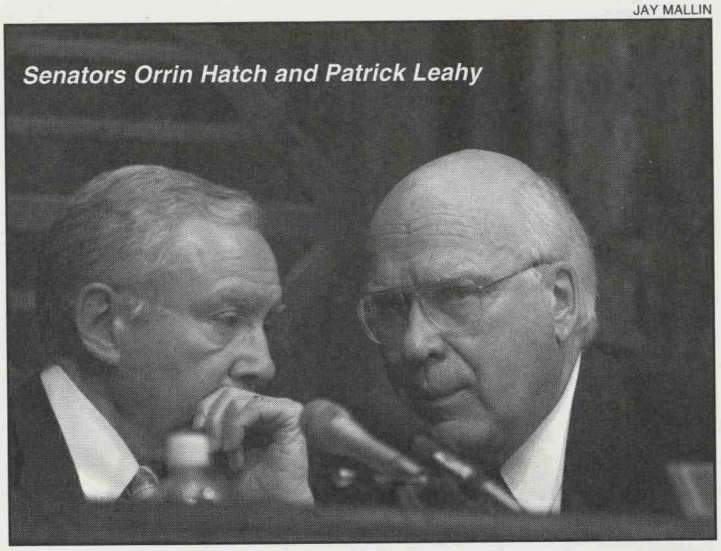
One final observation about the blue slip is appropriate here. Just because the blue slip can be characterized as "not unconstitutional" does not mean that the senators who have sustained and used it have done so without a thought to partisan political concerns. Yet, as in other constitutional controversies between the Congress and the president, the protection of constitutionally assigned prerogatives—even if driven somewhat by partisan considerations—does not exclude the possibility that principle, too, plays a role.

Possibilities for reform

As Judge Richard Posner correctly observes, "Norms, like laws, can be bad ...." Even if they happen to be "efficient within the group in which they are binding, they may be dysfunctional for society as a whole . . . ."[24] Thus, what norms are operative in the confirmation process and whether those norms are good ones are separate questions. Despite the difficulty one has pronouncing the process *unconstitutional*, the blue slip is clearly at odds with the advertised benefits of dividing responsibility for nomination and confirmation between the president and the Senate. Moreover, recent evidence suggests that, like the hold, changes in the Senate itself have allowed the blue slip to evolve into an offensive, not a defensive, weapon; and possible internal norms that once checked abuses have degraded.[25]

The question then arises, "Can the norm be altered?" Could the blue slip process be scrapped? Or at least replaced with something else? The answer is yes, but the alteration of or destruction of norms, or a norm-enforcement mechanism—particularly one with deep historic roots—can be quite difficult. Professor Gerhardt has argued that uncertainty surrounding the scope of a norm ("norm ambiguation") and the willingness of political actors actively to seek the creation of new norms ("norm entrepreneurship") may "create . . . context[s] in which the development of a new norm is possible."[26]

JAY MALLIN



Senators Orrin Hatch and Patrick Leahy

The early Georgia senators, for example acted as norm entrepreneurs by creating the advice norm that resulted in Washington's withdrawal of his nominee for the post in Savannah. Similarly, President Carter's norm entrepreneurship demonstrated by the creation of nominating committees to fill judicial vacancies temporarily resulted in a period of norm ambiguation, which Senator Kennedy then tried to exploit by modifying the existing blue slip procedure. And, before the Jeffords defection, Senate Republicans attempted to engage in norm entrepreneurship by requiring both senators to withhold blue slips to scuttle a nomination, after years of permitting only one senator to halt a nominee.

Keeping in mind the difficulties inherent in changing a norm or creating a new one, there are some indications that reform may be possible now that power in the Senate has changed hands. First, the Senate itself will soon experience significant personnel changes; specifically, the retirements of Strom Thurmond and Jesse Helms. Senator Thurmond was a vociferous supporter of the blue slip; Senator Helms often took advantage of the procedure to stop unwanted judicial nominations from seeing the light of day. Recall that Slotnick, in his survey of senators' attitudes towards the blue slip, found that seniority and majority/minority status were often significant factors in a senator's favoring the retention of the procedure. The older a senator, the more likely he was to support the blue slip; support among minority senators for the procedure was nearly unanimous. Now, however, some of the

24. Posner, FRONTIERS OF LEGAL THEORY 289, 293 (2001).

25. For more on these changes in the Senate itself, see Denning, *Reforming the New Confirmation Process*, *supra* n. 7, at 14 - 25.

26. *Supra* n. 18, at 1696, 1710-14.

blue slip's most ardent proponents have retired, or will retire soon. Unless other, younger senators approach the issue with the passion of the older senators, that alone may make it easier to effect change.

Further contributing to the possible destabilization of the norm and its enforcement mechanism may be the unfavorable press coverage the blue slip has recently received. Reaction to the blue slip by national and regional commentators was universally negative. The idea that a single senator could, because of mere partisan pique, disqualify an otherwise qualified nominee from a judicial position without a good reason strikes most as absurdly unfair. The public reaction following revelations of other individual abuses of power in the Senate, like the filibuster or the hold, was similar.

The return of the Democrats to power in the Senate may also affect the future of the blue slip. After years of complaining that scores of Clinton judges were held hostage to members' whims, Democrats will be under pressure not to pay Republicans back, lest they look like rank hypocrites. But what on the surface appears to be a frustrating restraint on a power that Republicans wielded lustily against Democratic judicial nominees may actually be a golden opportunity for Democrats to serve as norm entrepreneurs in changing the blue slip process.

Because of public pressure not to appear to be giving as good as they got at the hands of Republicans, Democrats may be inhibited in the full exercise of their blue slip power. If so, then perhaps they are in the best position to effect reform. Reforming the blue slip process would enable Democrats to respond to negative public opinion about the blue slip procedure, thus allowing them to claim the progressive, reformist mantel and mark opponents as hidebound protectors of undemocratic privilege, and possibly ease the way for the judicial nominations of a future Democratic president, even if reform inured to the immediate benefit of President Bush and his nominees. (Democrats could always muster support to defeat a truly unacceptable nomination, but having Bush's nominees reap the short-term benefits means that Republicans in the Senate may be more likely to go along.)

Assuming that the possibility of reforming the blue slip process exists, what types of reforms should be attempted? One possibility is that the Senate could "end it, not mend it"; but given senators' perceptions that they have a constitutional role to play in the giving of advice (which has been reinforced through the years), total abandonment is unlikely.

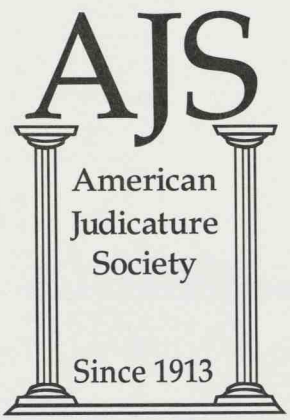
One reform that would help to make the blue slip more consistent with the Constitution's division of power between the president and the Senate—a division that was expected to ensure accountability and transparency in the process —would be to memorialize the custom in a Senate, or at least a Judiciary Committee, rule. Apparently some rule did exist at one time. At a minimum, such a rule should specify that the withholding of a blue slip will be made public by the chair of the Judiciary Committee, even if the chair is the one doing the withholding. Second, senators should be required to communicate their objections to the chair or to the White House. Further, consistent with past practice, the withholding of a blue slip should be a signal that the administration needs to confer with a senator, and not an automatic death sentence for the nominee, especially if the senator is in the minority party. Therefore, some time limit on how long a blue slip could be withheld should be considered. After a reasonable period of time to resolve differences with the White House, a senator should be required to make her case to her colleagues, indicate her objections to the nominee, ask for their support, and have the Senate decide, as a body, whether or not it wishes to go along.

****

Will Democrats seize the moment and reform the blue slip? Initial indications, alas, are not encouraging. As of late March 2002, the Bush administration had 56 nominations pending. While 42 new judges have been confirmed, 96 judicial vacancies remain unfilled. According to the Department of Justice's website, Democratic senators have not returned blue slips for nominees to the Fourth and Ninth Circuits.[27] Moreover, lingering bitterness over the treatment of President Clinton's nominees to the Sixth Circuit—now operating at nearly half strength—has created a stalemate between the White House and Michigan's two Democratic senators, Carl Levin and Debbie Stabenow. They have refused to consent to four Sixth Circuit nominations from Michigan, and have threatened to put a hold on the rest, until the matter of two Clinton nominees who never received hearings is resolved.

While Democrats have reason to hold a grudge against Republican treatment of Clinton nominees, they are now in control of the Senate and thus have the opportunity to restore some sanity to a process that has become positively toxic over the last several years. If they do not wisely use their power, they will not only become part of the problem, but they will also be ensuring that future Democratic presidents will, as President Clinton was, be forced to seek advice and consent from angry Republicans eager for payback. In the end, overworked judges and litigants forced to endure unconscionable delays will pay the price for partisan intransigence.

27. *See* http://www.usdoj.gov/olp/blueslips1.htm (last visited Jan. 14, 2002).



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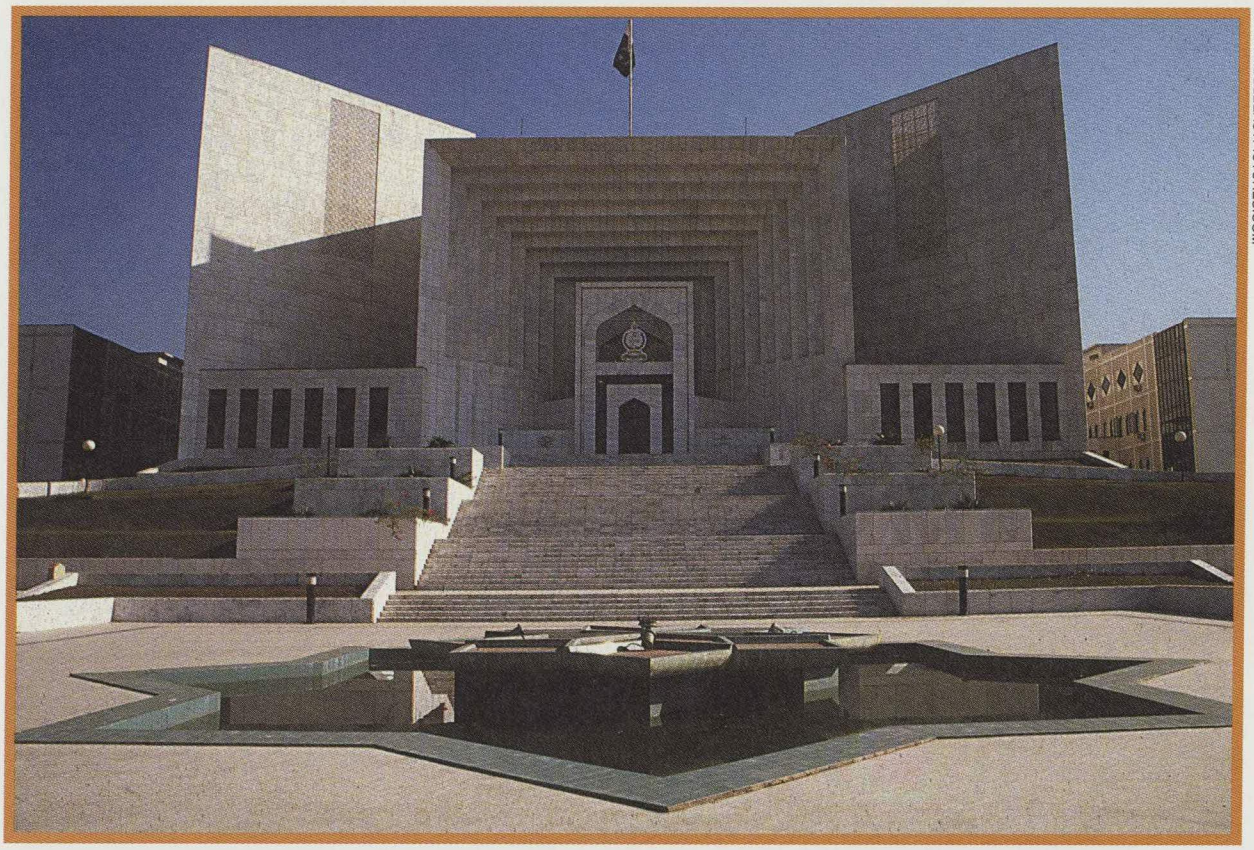
Unsteadily to Center Stage: An Overview of Pakistan's Justice

The criminal justice apparatus of Pakistan is a rich and intricate weave of legal fabric comprised of Western, Islamic, and customary law.

BY JOHN T. PHILIPSBORN



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The Pakistan Supreme Court in Islamabad.

As a practicing criminal defense lawyer, I approached an invitation to research and lecture on the law in Pakistan as an opportunity to visit a place that was, at the beginning of 2001, offstage. It was a country where, although U.S. diplomats were in residence, there were relatively few Westerners. While far from a "backwater," Pakistan was certainly no one's idea of a geopolitical linchpin.

But the cataclysmic events of September 2001 and subsequent developments, have placed Pakistan firmly on center stage. Virtually overnight, the West "discovered" the complex power dynamics in a region that is home to Afghanistan and Pakistan, and into which Islam is intertwined as both religion and culture. Unfolding events have underscored the salient fact that only some of Islam's more than one billion adherents worldwide are in the Middle East. Indeed, the portion of the Indian subcontinent we refer to as Pakistan bears the

***JOHN T. PHILIPSBORN** is a San Francisco-based criminal defense lawyer. This article is based on research and lecturing during his second Fulbright Scholarship, which took him to Pakistan during 2001.*

The author wishes to acknowledge many members of the Pakistani legal system who generously gave of their time, and his colleague Kurt Lipschutz for editorial assistance.

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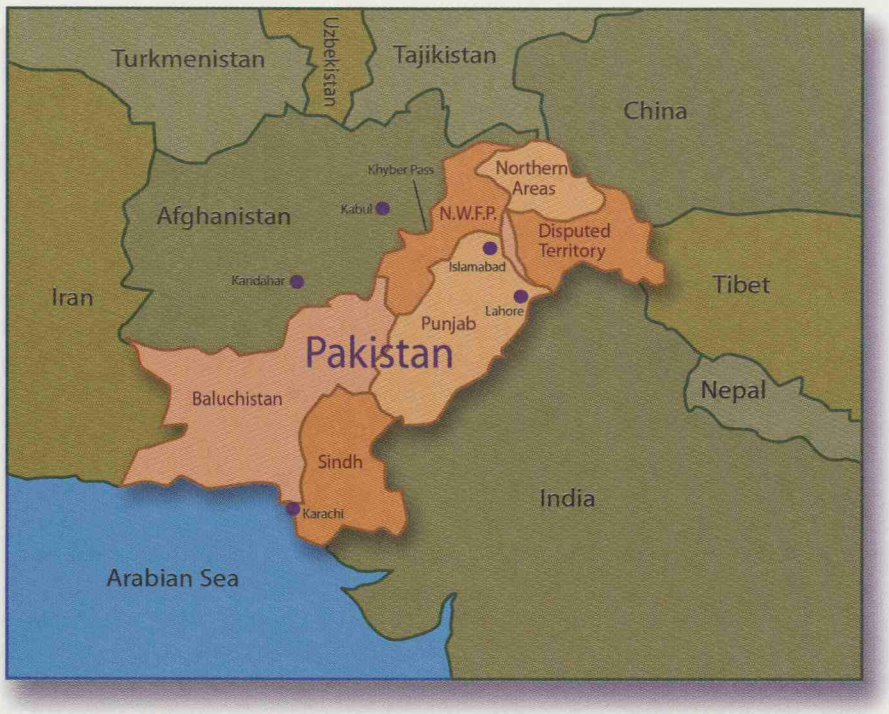


full name of the Islamic Republic of Pakistan.

This article focuses on one small part of the mix of cultures found in Pakistan, specifically its criminal justice apparatus, itself a rich and intricate (if at times discordant) weave of legal fabric comprised of Western, Islamic, and customary law. If nothing else, the objective is to dispel images of Pakistan as a lawless place. Pakistan numbers among its extraordinary personages members of its legal profession who have distinguished themselves by their courage and determination in seeking to ensure adherence to the rule of law. However, it must be acknowledged that during Pakistan's relatively short national history, governmental upheavals (among other things) have impeded progress in the development and implementation of the law and institutions related to it.

Background

The imprint of Islam in the Indian subcontinent was hundreds of years old when Pakistan came into existence in 1947. Historically, what today is the combination of India, Pakistan, and Afghanistan was a vast region in which a series of local Muslim leaders had established the indelible presence of Islam alongside other longstanding religions and cultures. During the rule of the Mughal emperors from the early 1500s until the British became a significant military and political force in the mid-1800s, Islamic law played an important role in sizeable areas of the subcontinent.

As many have pointed out, the Partition of India and Pakistan by the stroke of a British lawyer's pen was never aimed at geographically separating well-defined Muslim territories from Hindu or other religious and cultural enclaves. When Pakistan came into existence, it housed a number of ethnic and religious groups in addition to Hindus and the majority Muslims. The creation of Pakistan is sometimes summarized as the process by which the Muslims of India were given a specific land base in which the rule of Islam was to be preeminent. The reality is more complex and the subcontinent remains enormously diverse.

One of the monumental figures in the All-India Muslim League, a key negotiator with the British on the Partition, and the president of the Pakistan Constituent Assembly in 1947-1948, was the man often referred to as Pakistan's "founder," its first president, Muhammad Ali Jinnah. Jinnah embodies one of the fascinating aspects of Pakistan's legal system—the combination of Muslim and British-based legal traditions. Among other accomplishments, he qualified as a barrister at Lincoln's Inn in London. He personifies an

important aspect of the law in Pakistan, given his knowledge and interest in the combination of local traditions, Islam, and Western political and legal institutions.

Jinnah's views and legacy remain emblematic of the debate about the extent to which Islam should be the driving force behind all aspects of government in Pakistan. There are those who view Jinnah as a man whose politics, and background in the West, combined with his relationship with Islam to seek to develop a nation balanced between the basic principles of Islam and modern secular governmental institutions. Others, however, have seen him as an exponent of the preeminent role Islam should play in the subcontinent. These competing views of Jinnah lead to this observation—the impact of Islam has varied not only in Pakistan's government and society, but also in the law.[1]

While it was founded to be an Islamic state, Pakistan's series of constitutions have embodied many "Western" legal concepts. After the transformation of East Pakistan into the separate country of Bangladesh in 1971, a successor constitution, this one recognized as the Constitution of the Islamic Republic of Pakistan, was unanimously approved by elected representatives in 1973. This constitution remains the bulk of the framework of the law in Pakistan. Thus, after debates on the direction of its legal structure, Pakistan has stayed with a constitutional basis for government, providing for executive, legislative, and judicial branches; the separation of powers; and the protection of personal rights under the law. The structure also provides for representative government.

But this structure has episodically been deemed too secular, particularly in times of national turmoil. Periodically, the suspension of constitutionally formed civilian governments, and the establishment of martial or emergency laws to legitimize changes in direction, have been justified in part by the need to return to the tenets of Islam. During one of the coups initiated by members of the military, this one by General Zia ul Haq in 1977, the constitution was amended to introduce a then-new hierarchy of Islamic courts, including the Federal Shari'a Court, and a Supreme Shari'a Appellate Bench, which exist today. These courts were created to function at the same level as the highest level secular courts on the federal and provincial levels, respectively.

The existence of an Islamic court system on a parallel level with the secular courts is ostensibly to remind the secular courts and other institutions of government of the centrality of Islam. There also exists an Office of the Ombudsman for Islamic Matters. Commentators have noted that in times of crisis, some Pakistani leaders have emphasized Islamization as a way to pull the people, and significant political parties, together. While after a high point, the movement to Islamicize subsided, it has re-emerged at various times, including during the tenure of Prime Minister Nawaz Sharif, which ended in the later 1990s.

One relatively recent manifestation of Islamization was a 1999 ruling by the Shari'a Appellate Bench of the Supreme Court (after the coup that brought then-General now-President Pervez Musharraf into power). Echoing a similar one that had reverberated through international finance circles in 1991, it held that interest on bank loans, or loans generally, is contrary to the law of Islam and therefore illegal (and that typical modern banking loan practices are not in keeping with the laws of Pakistan)—a significant development, particularly in view of the country's then (and current) major foreign debt, and the existence of internationally common banking practices in the country.

Thus, students of the criminal justice system must contend with a combination of regional customs, customary law (some of it codified), the British legal heritage, and Islamic legal principles. Articles 4 and 9 of the Constitution of Pakistan establish that "to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen...," and that "no person shall be deprived of life and liberty save in accordance with law."[2] Achievement of these protections is an ongoing project.

Pakistan and its subdivisions

Contemporary Pakistan is roughly twice the size of California, with an area greater than 800,000 square miles.[3] In the mid-1990s its population was an estimated 128,000,000, with a growth rate of roughly three percent a year.[4] There are crucial regional distinctions not only in ethnic make-up and geography but in manner of governance as well. Its provinces include: Punjab, often described as the dominant province in modern Pakistan; Baluchistan, or Balochistan, the longest of the provinces, which abuts Iran and Afghanistan, as well as the Gulf of Oman and the Arabian Sea; Sind or Sindh, with its well-known port of Karachi, the largest of Pakistan's major cities; the North West Frontier Province or NWFP, part of which abuts Afghanistan, and in the extreme north (Northern Areas) Tajikistan and China; and Kashmir, the 'disputed territory' claimed by both India and Pakistan. The areas under Pakistani governmental administration are Sindh, Baluchistan, Punjab, and NWFP.

More than nine languages are spoken, and many Pakistanis speak several. The major languages are Punjabi, Pashto, Sindhi, and Urdu. Regional and local languages also exist. The official language of the legal profession is English, though a visitor to the sessions (criminal trial) and high (appellate) courts is often con-

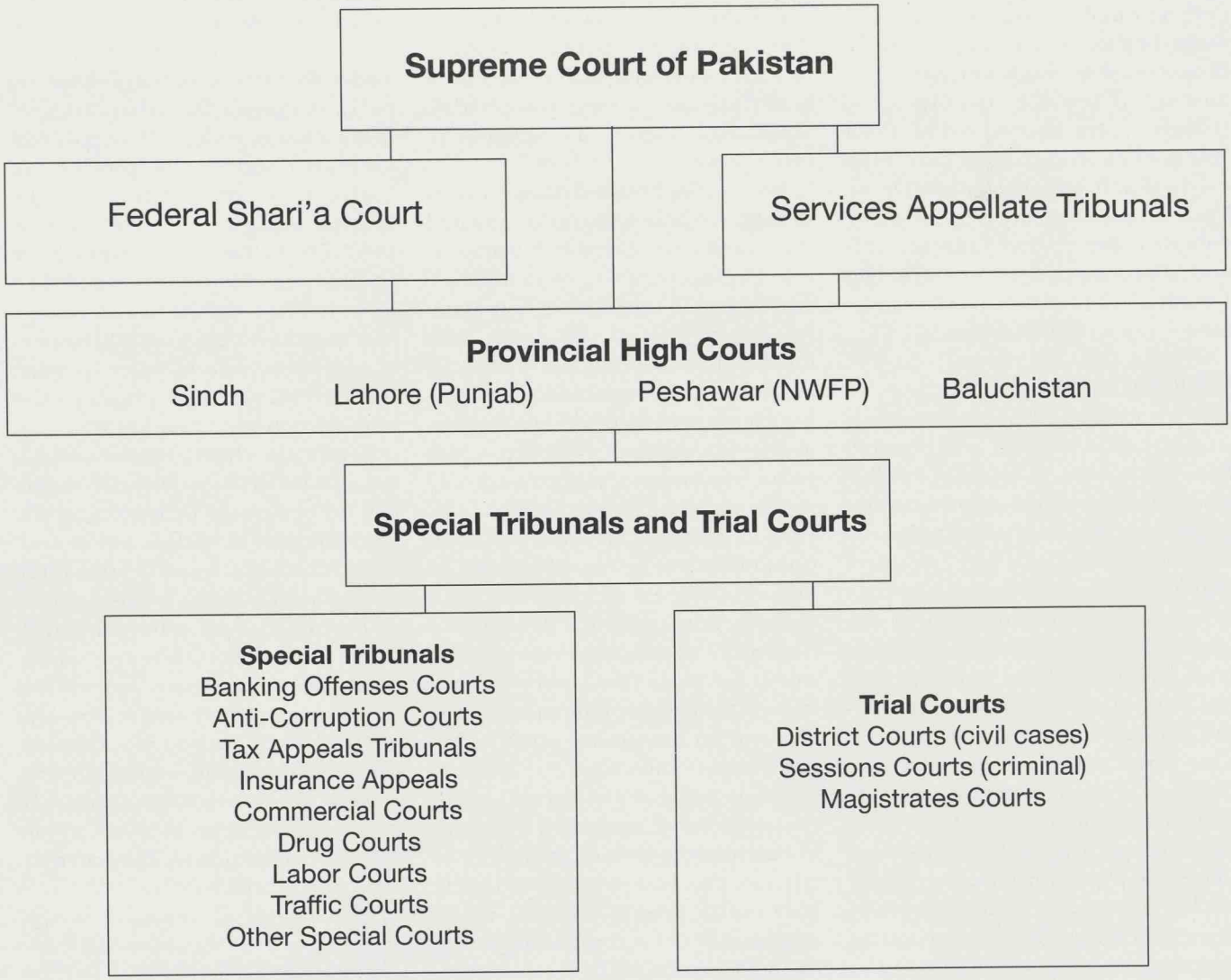
1. Talbot, PAKISTAN: A MODERN HISTORY (Lahore: Vanguard Books, 1999); *see also* An-Na'im, *Islam and Human Rights: Beyond the Universality Debate*, 94 AM. SOC'Y INT'L L. PROC. 95 (2000).

2. Many scholars on Islamic law have pointed out that the traditions of the Prophet recognize fundamental concepts of justice and equality. *See, for example*, Hassan, THE ISLAMIC REPUBLIC: POLITICS, LAW AND ECONOMY, 106-121 (1984). Farooq Hassan has qualified as a lawyer in Pakistan, the U.S., and the U.K.

3. In 1971, East Bengal (Bangladesh), an area separated from the "motherland" of greater Pakistan by much of the width of modern India, achieved independence following years of clashes.

4. Talbot, *supra* n. 1, at 23.

The Court System in Pakistan



fronted with a mixture of local languages and English. Reported decisions are in English.

The seat of Pakistan's federal government is in Islamabad, site of the National Assembly and Supreme Court (though under military rule the National Assembly does not meet, nor do the Provincial assemblies). There are also governments in each province, consisting of a mix of elected representative assemblies (though, again, not during national military governments) and an administrative governmental system operated through appointed administrators, about which former Pakistani Brigadier Mohammad Yasmin has observed:

> [The district administration systems] are not new but possibly the oldest and most enduring systems that have been in use for centuries...Pakistan inherited them from the British, and strangely enough did little to modify them to suit the needs of an independent country with its aspirations shaped by the spirit of freedom.[5]

Today, in addition to the commissioner, military commanders have power over local governance. As a former deputy commissioner in the NWFP (whose graduate education was in the U.S.) told me, "to many ordinary people in rural areas the local Deputy Commissioner *is* the government. He has the power to collect revenue and determine property rights. He travels with police escorts, and can call out the power of the police and local militia to deal with disputes or detain individuals. He is readily identifiable as a 'head man,' where that concept has been used for centuries. He is, in essence, a potentially benevolent, or corrupt, government envoy."

Each of the four provinces has a court system, itself headed by a high

5. Yasin, District and Police Systems in Pakistan i-ii. (Lahore: Vanguard Books, 1999).

court. Thus, there are high courts (with benches numbering as many as 50 members) in Lahore (government center of the Punjab); Sindh (covering Karachi); Balochistan; and Peshawar in the North West Frontier. According to the law, judges serve on these courts between the ages of 40 and 62. They are usually male, though women have served on lower courts. The high courts have both original and appellate jurisdiction. Trial courts are divided into the courts of the district judges (civil) and the courts of the sessions judges (criminal trial courts) and magistrate judges (lower criminal courts).

Criminal justice system

The everyday reality in Pakistan's streets, police stations, and criminal courts appears to be best understood in light of the enormous impact of the British tenure in the subcontinent. It was the writer's experience in interactions with a spectrum of those involved in the criminal justice system—from high level members of the judiciary and law policy makers, through the police and bar, to the accused and persons convicted of crimes—that the 'flow' of the system can be grasped in a basic way if one is aware of British criminal procedure. Significant players in Pakistani criminal justice circles evaluate the effectiveness of their own system by comparison to Western, and specifically common law-rooted, criminal justice systems. Even academics, and lawyers, known for their Islamic bent willingly engage in such comparisons.

What we consider the "modern" governmental design of separation of powers was known to the Mughal emperors in the 1500s. As powerful dynasties consolidated power on a subcontinent characterized by a large number of relatively autonomous princely states, methods of governance were developed to provide for the collection of revenues, the development of infrastructure, and the maintenance of order.

One of the most noteworthy of the Mughal emperors had established a governmental architecture that segregated the judiciary (in the form of respected persons whose judgment would be accepted) from policy makers and bureaucrats. Thus, when the British first appeared in the mid-1700s in the guise of the East India Company, they dealt with a variety of local rulers who had a concept of governmental administration that separated administrative and adjudicative powers.

Initially, the British worked with this structure When British governmental structures were formally introduced into the subcontinent, contemporary innovations in the organization of police forces and courts came with them.[6] Then-modern ways of organizing police, police procedure, jails, police courts, and the like were brought to the subcontinent even before the police function was "professionalized" in the same way in large areas of the United States.[7] British Provincial Commissioners instituted the use of fingerprinting for identification. One of them, Edward Henry, developed a fingerprint classification system that is still in use today (the Henry system). In sum, the impact of the colonial government on the current criminal justice system is undeniable.

The British roots of current criminal procedure have caused a number of Pakistanis to lament the failure of criminal procedure reform—particularly police reform—as well as the perpetuation of authoritarian uses of the police and army by the executive. M.A.K. Chaudhry, who has served on several police reform commissions, has observed that:

> Police in India, as conceived by the British, was inherently a security force for the security of the government rather than the people. Fundamentally it was an instrument of policy and not of law as it ought to have been. That role has continued for the last one hundred and thirty five years independence notwithstanding. The police in Pakistan is simply stagnant.[8]

The problem is not only the need for a change in mentality about the criminal justice system, it is also a lack of reform (and modernization) of the procedural rules. Here, Chaudry observes: "Successive governments in Pakistan have been quick to appoint Police Commissions, but notoriously lax in implementing their recommendations." As another observer, certainly familiar with criminal justice issues from his lengthy services with the police, currently the head of training for the police in Punjab, Dr. Azhar Nadeem, wrote a few years ago: "The police in the Punjab and all other provinces of Pakistan are still governed by [the British designed Police] Act of 1861."[9] As he and others have pointed out, procedures established when horses were the primary mode of transport are no match for an era of airplanes, automobiles, pagers, computers, and cell phones—the tools of modern urban life.

In sum, the colonial police and justice systems were established to maintain order—not to help promote the establishment of what is now known as a civil society. In early 2001 there was again an impetus towards reform of the police and criminal procedure. Once again, however, it appears that projects many have worked on for years (such as the development of useful crime laboratories, police training and education programs, and structural reform) will take a back seat given world events and developments on Pakistan's Afghan and Indian borders.

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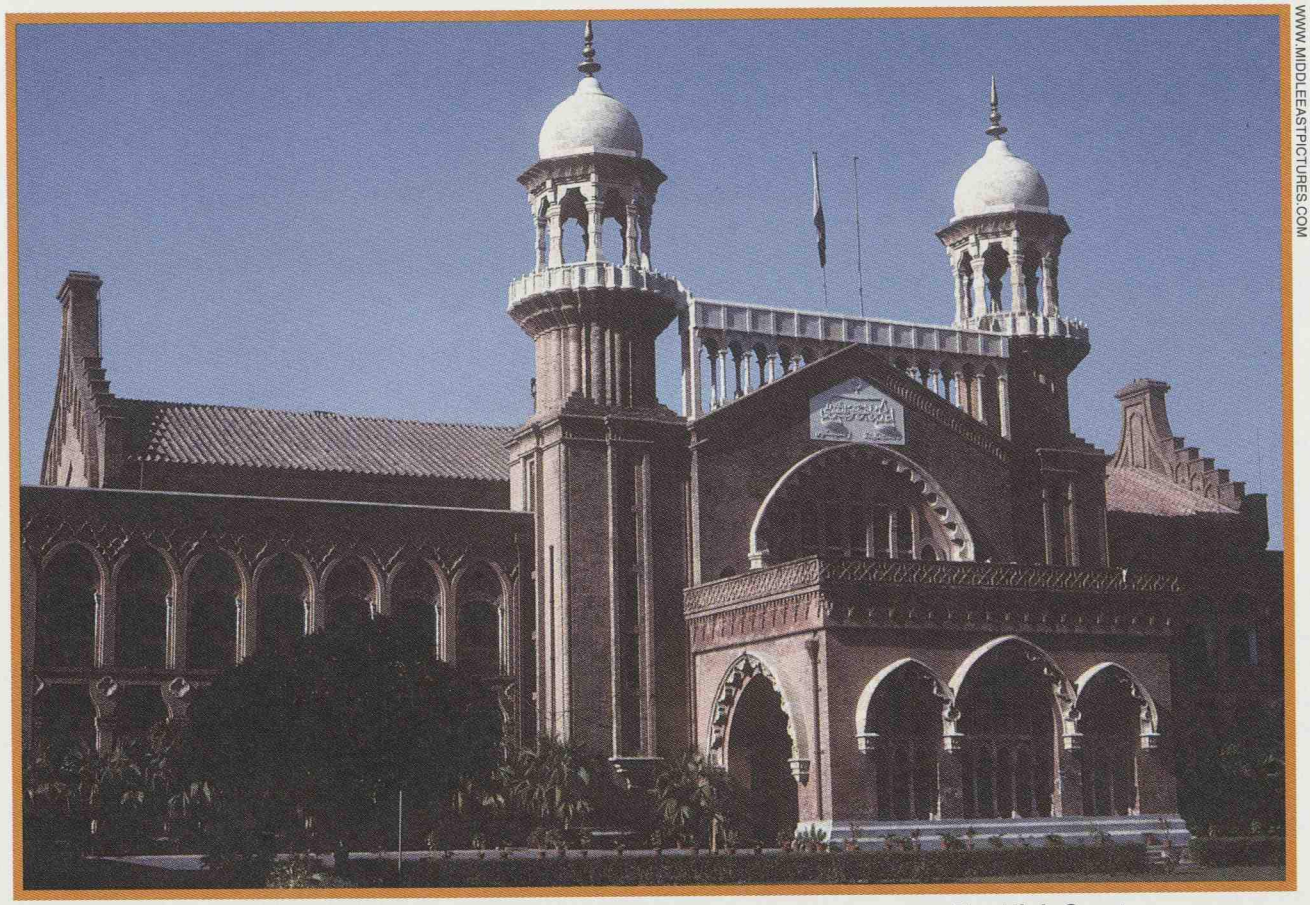
6. It was a historical coincidence that major criminal justice reforms, particularly in the police forces, took place in Britain during its colonial period in the Indian subcontinent.

7. *See, for example,* Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY (NY: Basic Books, 1993).

8. Chaudhry, POLICING IN PAKISTAN iv. (Lahore: Vanguard Books, 1997).

9. Nadeem, THE PUNJAB POLICE IN COMPARATIVE PERSPECTIVE 23. (Lahore: Mehdi Publishers, 1989). Dr. Nadeem is one of several unusual high-ranking police officials one can find in Pakistan. Holding a doctorate in economics, and a masters in criminology, he also possesses a law degree. Some of his studies were conducted in Great Britain. Awarded a major decoration for bravery in his police work, Dr. Nadeem is attempting to develop modernized training for police, and enlisted the writer to produce a comparative interrogation procedure training video for police. He is an example of a police officer with a broad knowledge of various legal systems who operates given the constraints imposed on him. Current observations about law enforcement can be found in his new book PAKISTAN: THE POLITICAL ECONOMY OF LAWLESSNESS (Oxford University Press) due out in April 2002.

10. The right to a public trial varies, depending on the type of tribunal and offense at issue.



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The High Court in Lahore.

The courts

The basic design of the criminal court system owes much to British procedure—though in certain rural areas, traditional councils (*jirgas*) administer local justice. Certain minor offenses are "processed" and adjudicated by magistrates. Trials of more serious offenses occur before Sessions Court judges. The right to counsel attaches principally at the adjudicative phase. While there is no right to a jury trial in Pakistan, there is a limited right to public, contested trials, requiring the presence of witnesses, and providing the right of cross-examination.[10] Appeal is available to the defense and prosecution, depending on the issues, and, significantly, permits the prosecution the right of appeal of a trial court level finding of insufficiency of the evidence at trial.[11] The court system includes many discrete specialized courts.

There is some speculation about the source of the multiplication of courts, which marks a radical departure from local customary law and the British legacy. One hypothesis is that delays in the process forced the periodic creation of additional courts to deal with the most pressing law enforcement concerns at any given time.

The current Minister of Law in Punjab, Dr. Khalid Ranjha, has pointed out to the bar that lawyers should take measures to reduce delay and to increase the public's confidence in the court system. (He arranged for the writer to join him in discussing the impact of lawyer-caused delays in a joint talk to a regional bar association.) It is the prerogative of the bar to regulate the scheduling of proceedings, and courts have been loath to change this practice. Thus, it is not unusual to hear a party to a litigation lament that a given case has gone on for so many years that some of the court files and police documents have been lost. Trials are rarely conducted in a rapid succession of daily sessions. The presentation of arguments, or examinations of a witness, may be spread over a number of days, weeks, or months.

The writer accompanied several prominent criminal defense lawyers to court appearances in Lahore and rarely was trial court business pushed towards a conclusion in one session. Thus, delay in decision making, and a lack of finality, accounts for many complaints. Particularly in civil litigation, there has been a flirtation with docket reduction systems. Some of the pilot programs involve plans assisted by U.S.-based consultants—though these received mixed reception even prior to September 2001.[12] Similar programs aimed at delay reduction in criminal cases are at this point only matters of discussion.

11. Examples of the prosecution's right of appeal in current cases are the challenge of the acquittal of six co-defendants of former Prime Minister Nawaz Sharif, as well as the State's request that on appeal Mr. Sharif's life sentence be converted to a death sentence.

Effects of reforms

Delay, however, may have only been part of the reason for the ongoing development of specialized courts, or court-related bureaucracies. Often, a new policy or emphasis announced by the government will be underscored by the creation of courts to "deal with the problem." For example, not long before the monumental events of September 2001, Pakistan had launched into another round of major anti-corruption reforms, resulting in the formation of a National Accountability Bureau (NAB), and the creation of additional anti-corruption procedures and courts. The NAB has its own force of prosecutors, investigators, and bureaucrats, and is touted as embodying a "new system" that will deal with the many major corruption investigations and prosecutions underway—including those involving major former political and military figures. There are many other areas of specialized judicial institutions, among them: special anti-terrorism courts (anti-terrorism prosecutors and investigators); anti-narcotic courts; traffic courts; banking offense courts; labor courts; income tax tribunals; insurance tribunals, etc.

The implications of periodic reforms of both the letter of the law, and procedure, engender spirited debate within the legal community in Pakistan. Many lawyers who have found themselves at odds with the government have challenged the very process by which legal reforms take shape. Often such reforms occur when the basic lawmaking design (legislation by lawmakers) is circumvented by the executive branch. This was the case, for example, when one of the significant reforms of criminal law and procedure occurred in 1990, during an attempt to further "Islamicize" the process. This reform produced the Second Amended Criminal Law Ordinance, commonly known as the Quisas and Diyat Ordinance. The Ordinance was finally formally enacted in 1997.

The very existence of the Ordinance (which amounts to an entire body of specific substantive laws and procedural rules) has been criticized by the Human Rights Commission of Pakistan, in part because it came to pass under a constitutional provision that allows the executive to make law when the National Assembly is not in session.[13] Although a law formulated under those circumstances is supposed to be temporary, in view of its purported injection of Islamic values into Pakistan's legal fabric there has been marked reluctance to uphold challenges to the Ordinance.

While controversial, the 1990-1997 reforms are not as troubling to international human rights observers as the Hudood Ordinance introduced by General Haq in 1979. For these purposes, Hudood essentially means a command of Allah regarding what should be deemed either lawful or unlawful.[14] One of the implications of the Hudood Ordinance was the reform of rape laws. Though enforcement of anti-rape laws was a matter of human rights violation complaints prior to 1979, after the Islamization of the law certain categories of accused rapists would be dealt with under what lawyers in Pakistan will shorthand to outsiders as "Muslim interpretation of procedure." Thus, proof of the crime may depend either on the existence of a full confession, or of a suitable number of adult, male, pious Muslim witnesses. The definition of the acts amounting to rape are very complex under the Ordinance.[15]

While international human rights lawyers criticize specific Islamic legal systems for the spectrum of traditional punishments (stoning, amputations, executions), Pakistani lawyers note that such punishments are not often used—though both the police and press report the imposition of what are described as "locally customary" punishments of that sort in certain rural areas. Many Pakistani lawyers who spoke with the writer focused their domestic violence-related criticisms on the system's failure to clearly define as crimes a spectrum of domestic violence, intergender violence, and harm aimed at children. This failure has had wide-ranging social implications that have been written about at length.[16] The upshot is that what might elsewhere be considered crimes against a woman or a child may not be viewed that way by the police or even by members of the judiciary—and indeed, may be deemed more of a civil than a criminal matter.

It must also be noted that there are regional differences within Pakistan in the way justice is dispensed, some of them owing to local traditions and ethnicity. For example, in practice, criminal justice in some of the North West Frontier Province areas can be roughly analogized to that in certain U.S. Trust Territories or American Indian reservations. Specialized regional law enforcement agencies are responsible for the maintenance of order. And the way law enforcement officers behave, enforce the law, as well as the way courts conduct themselves must be understood in that context. In this vein, based on the writer's experience it appears fair to note that urban lawyers and judges tended to favor criminal procedure reform that would standardize practices, and encourage law enforcement agency reform, as well as blunt some of the shift in power between the executive (which has tended to consolidate power) and the judiciary.

Legal profession

Urban lawyers from Pakistan and the United States would recognize one another talking to colleagues and clients on cell phones, checking

12. Two such projects, spearheaded by consultants from the U.S. (including participation by some U.S. judges) were in progress, though partially shelved during the writer's visits in Lahore. Pakistani colleagues pointed out that suspicion of the U.S.-based projects exists in some judicial quarters, and thus enthusiasm for such ventures is highly dependent on the outlook of current presiding judges on the U.S. Other court reform projects involving European groups have also reported mixed results.

13. Human Rights Commission of Pakistan, STATE OF HUMAN RIGHTS IN 1997, 34.

14. Lippman, McConville & Yerushalmi, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 38. (NY: Praeger & Sons, 1988)).

15. *See, Humans Rights Watch: The State Response to Violence Against Women,* (1999 Human Rights Watch Country Report).

16. For example, Jahangir and Doucet, CHILDREN OF A LESSER GOD: CHILD PRISONERS OF PAKISTAN (Lahore: Vanguard Books, 1995); also reports of the United Nations Commission on Human Rights.

court decisions on-line, monitoring the fax machine, and the like. The level of technological sophistication in office settings, however, varies widely in Pakistan.

While law firms involved in business and commercial law are much smaller than those found in the British Isles, to say nothing of the United States, criminal defense lawyers and prosecutors would easily recognize many of the surroundings of their Pakistani colleagues. One distinguishing feature for a U.S. lawyer would be the series of booths or benches set up outside a Pakistani criminal court to accommodate consultations between clients and lawyers, with signs announcing, describing, and advertising the legal services of the booth holder.

Modern investigative techniques are not readily available either to the prosecution or defense. Thus, while many Pakistani lawyers are well aware of advanced investigative techniques used in white collar and street crime cases in other countries, relevant infrastructure is generally lacking—both in government and the private sector.[17] An absence of resources impacts the level of effectiveness of public prosecutors and the defense bar. Moreover, the prosecution is relatively poorly funded, particularly at the provincial level, and the financial attraction of private practice is undeniable.

In addition, respect for the rule of law has been variable, a phenomenon that affects the system as a whole. For example, when Pakistan's current president, General Pervez Musharraf, issued an executive "request" early in his tenure that members of the supreme court swear allegiance to his regime, the then-chief justice and five associate justices refused to do so—and were sacked, as were several judges in lower courts who refused similar requests. Such threats to the independence of the judiciary have been episodic, and undoubtedly have had reverberations. Yet, after those developments, the reconstituted Supreme Court of Pakistan rendered a significant setback to the Musharraf government in early 2001 when it nullified portions of the National Accountability law as unconstitutional—relying in its verdict (or ruling) on many precedents, including decisions of the U.S. Supreme Court. This verdict struck down a portion of the government's ostensible anti-corruption procedures, and was applauded by legal scholars as demonstrating the court's independence.

INFLUENTIAL MEMBERS OF THE LEGAL COMMUNITY HAVE SERVED TO MODERATE THE IMPACT OF SELF-DEFINED RELIGIOUS FUNDAMENTALISM.

The struggle for the independence of the judiciary comes at a price. For the bar, taking up certain causes has resulted in arrest and incarceration, or in violence inflicted on them by lay persons. That may explain why some of the heroes of the international human rights movements are members of the Pakistani legal community, such as Ashma Jahangir, who has headed the Human Rights Commission of Pakistan, and more recently has been involved in high profile human rights-related work with the United Nations.

Legal education

Legal education is provided by a combination of public (meaning state-funded) universities and a cadre of increasingly significant private schools. Legal education in the Punjab goes back to well before Partition, as University Law College was founded in 1870. The newer schools such as Punjab Law College, Pakistan College of Law, and Quaid-e Azam Law College all have a healthy number of students.[18] A visitor to these schools notes attention to the development of environmental law programs and other specialized avenues of study. A first year Pakistani law student takes required courses and may encounter: English jurisprudence; the law of contracts (including learning the British-created Contract Act of 1872); Islamic jurisprudence; the law of tort and easement; constitutional law (studying principles of the British system and the U.S. Constitution); criminal law; the Constitution of Pakistan; mercantile law; Islamic personal law; criminal procedure and medical jurisprudence; civil procedure; evidence; and legal ethics. The writer's experience was that roughly a third of the students were women.

Because many do not take a basic university degree before going to law school, the education and background of the students is extremely variable. For example, when the writer lectured on developments in the forensic sciences, students ranged from the well informed to those unfamiliar with the meaning of DNA. However, a significant proportion of law school faculty and many practitioners have obtained post-graduate degrees from universities either in England or the United States. Many law school faculty members, such as Dean

17. For example, the writer joined a long list of those asked to visit, and write an evaluation of, the Police Crime Laboratory in the Punjab. The request came from another strong voice for systemic reform, Deputy Inspector General (DIG) of Police, Crimes Section, Irfan Mahmud Khan. DIG Kahn candidly discusses the needs he sees with a frankness rare in U.S.-based police administrators at his level. He has been charged with implementing a pilot project for the computerization of police records, knowing his police force is well behind the times in not having access to such technology. This is not only a police, but a human rights, problem. The jail and prison system often cannot fully account for inmates, particularly women and children, who languish namelessly in custody.

18. Most of the schools that the writer visited, and lectured in, were in the Punjab.

Sardar Mokal of the Punjab University Law College, have served as judges or in other important positions. Dean Mokal has been both Director General of the Punjab Provincial Assembly, and a member of Pakistan's Law Commission.

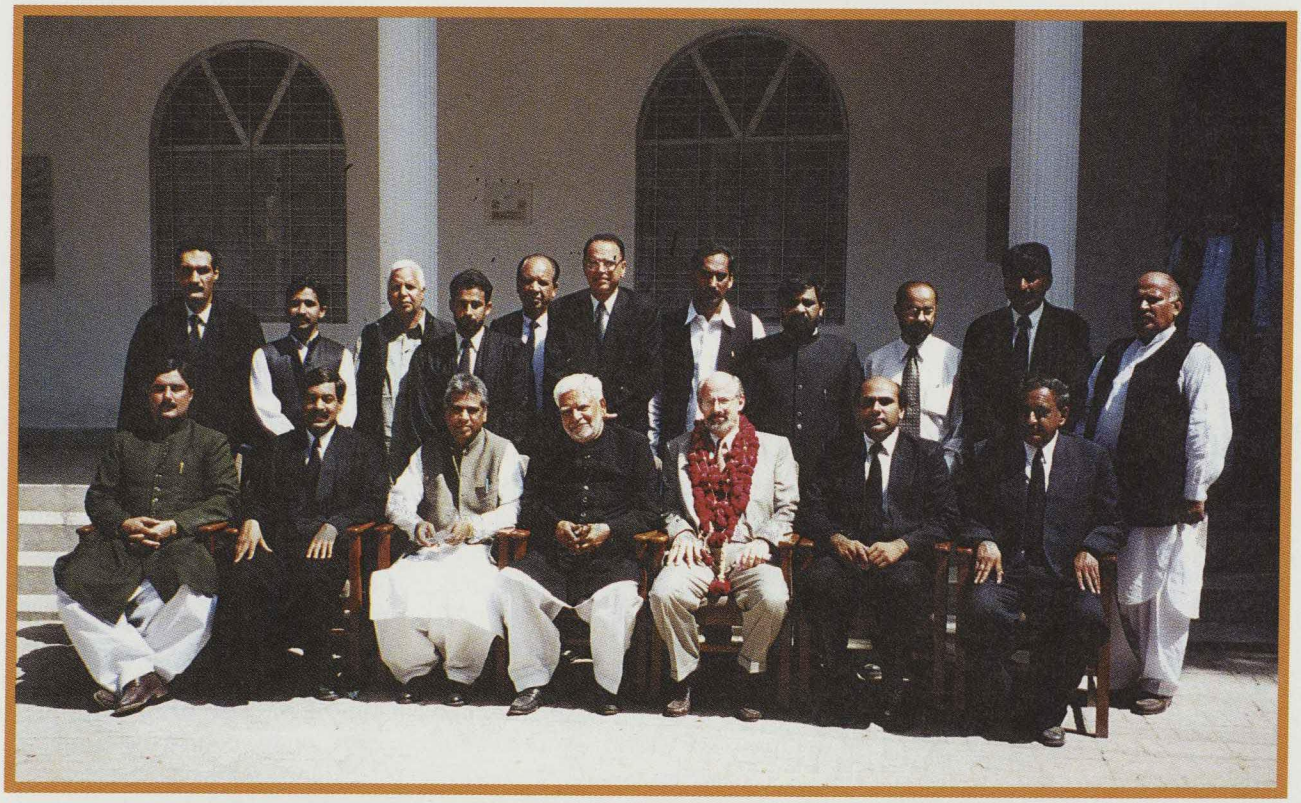
In closing

A few general observations: First, influential members of the legal community have served to moderate the impact of self-defined religious fundamentalism, while continuing to underscore the serious implications of martial law, and the episodic takeovers of a constitutionally based civilian government by the military. Second, there are admirable and disparate groups within Pakistan's criminal justice system who seek improvement, including greater access to justice for the poor, equality for women, strong advocacy for children, and higher quality of services for (and from) the prosecution and defense.

Bearing this state of affairs in mind, the economic realities of the country's large military, and developing infrastructure, has impacted the development of the legal system in many ways, particularly technologically. Faced with major problems of white collar crime, drug trafficking, and free access to arms, and a population increasingly technologically adept, the law enforcement apparatus (in the fullest sense of the phrase) has lagged behind.[19] Though recently the verdicts of the Lahore High Court (and some others) can be found on-line, computer technology is by no means omnipresent in the Pakistani legal profession. For instance, some in Pakistan find themselves attending *jirgas* along the Afghanistan border, sitting in traditional meeting rooms in a grouping that could have taken place 200 years ago—thus they deal with widespread legal traditions.

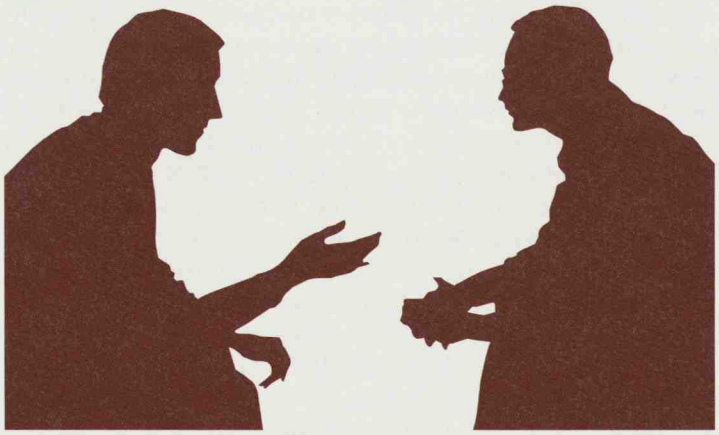
Even in view of the range of judicial procedures and practices, the contemporary world is much in evidence. As noted, many participants in the legal system have traveled and studied widely. Notwithstanding lively discussions about foreign policy, and criticisms of the role played by the United States in the region, a visiting U.S. lawyer was treated with warmth, shown great hospitality, and found a willingness to exchange ideas on how to implement the rule of law. ⚖

19. The now well-known journalist Ahmed Rashid has covered many aspects of crime amid the rise of fundamentalism in his book TALIBAN (New Haven: Yale University Press, 2001).



Attendees of a meeting of the Sargodha Bar Association in Lahore in April 2001. Punjab Law Minister Khalid Ranjha is is the front row, third from the left.

"Speaking rights"



Evaluating juror discussions during civil trials

Permitting jurors to discuss evidence during civil trials may facilitate understanding and provide an outlet for their thoughts and questions, and does not appear to lead to prejudgment or prejudice.

by Paula L. Hannaford-Agor, Valerie P. Hans, and G. Thomas Munsterman

The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right to trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

—Justice Louis Brandeis in *Ex Parte Peterson* (1920)

Justice Brandeis encouraged periodic reexamination and reform of the American jury to keep the institution vital and effective. In recent years, courts and legislatures have acted on his words with a fury, introducing an array of reforms that are impressive both in number and scope. But only a handful of courts have introduced reforms as comprehensive and far-reaching as those enacted by the Arizona Supreme Court in 1995. The Arizona Supreme Court endorsed the objective that jury trials "allow for a more democratic juror experience" and "that are more educational and less adversarial"[1] and urged judges and trial attorneys to be "open to doing some old things in new ways, to be more receptive to the jurors' needs to learn better and to actively participate to a greater degree in the fact-finding process."[2] Acting on 55 recommendations of its Committee on the More Effective Use of Juries,

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the court enacted rules giving jurors the right to take notes and to submit questions to witnesses, and encouraged judges to employ a number of other techniques to improve juror performance and satisfaction in both civil and criminal trials.

Most of the techniques were adopted with few objections from judges and lawyers. Many judges throughout the state had used various forms of them for years with no adverse consequences. Indeed, some of these techniques were so straightforward that judges and lawyers found it difficult to imagine why anyone would object to them.

But one reform—permitting jurors in civil cases to discuss the evidence among themselves before final deliberations—proved to be more controversial. No jurisdiction explicitly permitted this practice and, in fact, a significant body of case law condemned it as prejudicial to the rights of criminal defendants.[3] Very little empirical research had been done examining the potential impact of the change, and none of it in the context of actual jury trials. Upon hearing of the rule change, a number of judges, lawyers, and commentators privately wondered whether the dry, hot Arizona weather had finally gotten the best of the Arizona judiciary.

Fortunately, the court also incorporated an evaluation of the juror discussions reform as part of its implementation plan. The National Center for State Courts conducted the evaluation. This article summarizes the results and the implications for other jurisdictions.

The pros and cons

Case law dating as far back as the 1800s gave the decision to permit jurors to take notes or to submit questions to witnesses to "the sound discretion of the trial judge." In recent years, empirical studies have documented that these and other techniques can significantly increase juror comprehension and recall without jeopardizing the rights of litigants. But this was not the case for permitting jurors to discuss the evidence before final deliberations. Appellate courts had uniformly condemned juror discussions, citing concerns that discussions would encourage jurors to prejudge the evidence and that the act of discussing the case would tend to fix jurors' opinions permanently.[4] Some social scientists concurred, arguing that juror discussions would heighten the effect of shared biases. The result, said opponents of juror discussions, would be a violation of defendants' rights to an impartial jury under the Sixth and Seventh Amendments and due process rights under the Fifth and Fourteenth Amendments.

Proponents countered that permitting jurors to discuss the evidence during trial would be beneficial to jury decision making.[5] Juror discussions would improve comprehension, permit jurors to ask questions and share impressions on a more timely basis, test individual jurors' tentative and preliminary judgments against the group's knowledge, and reduce the formation of divisive cliques and forbidden conversations among jurors. In combination with other reforms, juror discussions would bring the experience of being a juror in Arizona much closer to the ideal of the educational model of jury trials envisioned by the Arizona judiciary rather than the passive model that is traditionally employed. And as a purely pragmatic matter, permitting jurors to discuss the evidence during trial would provide an outlet to replace illicit discussions that jurors might be tempted to have among themselves and with family and friends.

A field experiment

Theoretical arguments had been made both in support and against the reform, but no empirical study had been conducted. To fill this void, the National Center for State Courts, in cooperation with the Arizona Supreme Court and with funding by the State Justice Institute, initiated a field experiment with the superior courts in Maricopa, Pima, Mohave, and Yavapai counties.

From June 15, 1997 through January 30, 1998, all civil jury trials in those four courts were randomly assigned to either a "Trial Discussions" or "No Discussions" condition in which jurors were instructed at the beginning of the trial that they could, or could not, discuss the evidence before final deliberations.[6] Juries that were permitted to discuss the evidence before final deliberations were subject to two important conditions: (1) jurors could only discuss the evidence in the jury room and (2) only when all of the jurors were present. (See "Instructions given to jurors who were permitted to discuss the evidence before final deliberations", page 243) At the end of each trial, the judge, jurors, attorneys, and litigants filled out questionnaires asking their opinions about the case, including assessments about the evidence, jury comprehension, the decision-making process, and interpersonal dynamics. They also gave their views about trial discussions.

By the end of the six-month evaluation period, the NCSC had collected information and usable questionnaires from 161 civil jury trials, accounting for approximately 80 percent of the civil jury trials held in Arizona during that period. Seventy-six of the trials in the study were assigned to the No Discussions condition and 85 to the Trial Discussions condition.

In most respects, the two groups of cases were comparable. There were two significant differences between the Trial Discussions and No Discus-

1. JURORS: THE POWER OF 12, REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES 3. (Nov. 1994).

2. *Id.*

3. For a detailed discussion of the case law, see Hans, Hannaford & Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J. L. REF. 349, 352-60 (1999).

4. For a detailed discussion of the case law, see *id.*

5. *See, e.g., supra* n. 1, at 96-99; Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L. REV. 1229, 1262-68 (1993); U.S. v. Wexler, 657 F. Supp. 966 (E.D. Pa. 1985) (*overturned on other grounds*, U.S. v. Wexler, 838 F.2d 88 (3d Cir. 1988)); Munsterman et al., eds., JURY TRIAL INNOVATIONS 138-40 (National Center for State Courts, 1997).

6. For a detailed description of the methodology, see Hannaford, Hans & Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 363-66 (2000).

sions cases. By chance, the No Discussions cases were slightly more complex. And, in the Pima County cases, judges reported that the trial evidence favored the plaintiff in the Trial Discussions cases significantly more often than in the No Discussions cases. Both of these differences were taken into account in the analyses of the data.

Not all jurors talk

The fact that Trial Discussions juries were permitted to discuss the evidence during trial did not necessarily mean that jurors did so. A substantial portion (31 percent) of the juries reported that they didn't have any discussions before deliberations. During interviews with jurors in a pretrial pilot test, several jurors explained that the constraints on juror discussions (e.g., only in the jury room, only in the presence of all jurors) prevented them from discussing the evidence as often as they would have liked. Jurors in short, uncomplicated trials were less likely to discuss the evidence during the trial, probably because they had fewer opportunities to talk before final deliberations began. More complex cases tended to be lengthier, so jurors may have found more opportunities to engage in discussions as well as more topics to discuss.

Individual differences among jurors also explain the reluctance of some jurors to discuss the evidence before final deliberations. On average, jurors who were permitted to discuss the evidence but did not do so reported that they were less comfortable with discussing the evidence. Demographics may have also played a part. Jurors who chose not to discuss the evidence tended on average to be older, less educated, and to have lower annual household income than jurors who engaged in discussions. Finally, some jurors just didn't believe the judge's instruction that they *could* discuss the evidence. As one juror explained, "I was shocked.... I thought, did I hear her right? I still didn't believe it. Even when we got to the room, I still wasn't sure."

Despite the reluctance of some jurors to discuss the evidence during trial, we found that jurors in both the Trial Discussions and No Discussions conditions admitted to discussing the case informally with other jurors and with family and friends to a much greater degree than previous estimates. Fourteen percent of jurors assigned to the No Discussions group reported that they violated the admonition to refrain from discussing the case with other jurors. Another 14 percent reported they discussed the case with family or friends during the trial, although only 4 percent of jurors reported that they violated both the admonition concerning discussions with other jurors and discussions with family and friends.

In contrast, 31 percent of jurors in the Trial Discussions groups admitted they had informal discussions with other jurors and 11 percent admitted they discussed the case with family or friends (6 percent violated both admonitions). Being allowed to discuss the evidence seems to break down jurors' inhibitions about engaging in informal discussions with other jurors, although it is possible that some jurors may have reported that they engaged in informal discussions if some jurors were not present for discussions. Jurors who were able to speak to other jurors about the case during trial were marginally less likely to talk about the evidence with family and friends than jurors who were given the traditional prohibition against talking with other jurors during trial, which suggests that being allowed to discuss the evidence provides an outlet that reduces the need to discuss the case with family and friends.

Levels of support

One focus of the evaluation was the level of support for permitting juror discussions by judges, jurors, lawyers, and litigants. In this regard, the Arizona Supreme Court understood that the perception of fairness is often as important—and sometimes even more important—than the reality of fairness. Even if the evaluation showed no prejudice from juror discussions, it would still be worrisome if judges, jurors, lawyers, and litigants continued to believe that these discussions encouraged jurors to prejudge the evidence or otherwise undermined the parties' rights to a fair trial.[7]

To examine this issue, each of the questionnaires asked about the respondents' support for the reform and views about its advantages and disadvantages. Lawyers, litigants, and jurors who were permitted to discuss the evidence during trial were also asked how comfortable they felt about juror discussions. Jurors who were not permitted to discuss the evidence during trial were asked whether they would have liked to discuss the evidence.

Overall, judges and jurors were more positive about the reform than lawyers and litigants. See Figure 1. A total of 40 judges participated in the study. Of those, 73 percent supported the reform, 13 percent were neutral, and 15 percent opposed the reform. This level of support correlated strongly with judges' beliefs that juror discussions improve comprehension (78 percent) and that discussions do not encourage premature judgments about the evidence (70 percent).

Jurors were also very supportive of trial discussions. A total of 471 jurors were assigned to the Trial Discussions condition and engaged in at least one discussion before final deliberations. These jurors overwhelmingly supported the reform (77 percent) and agreed that discussions improved juror comprehension of the evidence (81 percent). Specifically, they said that during the trial discussions, the trial evidence was remembered accurately (85 percent), and that the discussions helped them understand the evidence in the case (79 percent). They also agreed overwhelmingly that all jurors' points of view were considered in the trial discussions (87 percent) and reported feeling very comfortable during the discussions (83 percent). Only a minority agreed that discussions encouraged prema-

7. *Id.* at 366.

ture decision making.

Overall, the jurors who actually engaged in discussions were more supportive of the reform than those who did not. See Figure 2. One possible explanation is that the experience of engaging in discussions reduces concerns about the reform. Another possibility is that jurors who had more serious concerns about the reform were less likely to engage in discussions.

Lawyers and litigants were less enthusiastic about the reform. Fifty-one percent of lawyers and 47 percent of litigants supported the reform. The majority (51 percent of lawyers and 61 percent of litigants) agreed that juror discussions improve juror comprehension, but also agreed that they encourage premature decision making (55 percent of lawyers and 52 percent of litigants). Those who opposed the reform did not do so in predictable ways. For example, there was no observable difference between plaintiff and defense lawyers' views about the reform, even though one of the biggest objections to juror discussions is the belief that they would be prejudicial to the defendant.

The primary difference between lawyers who supported the reform and those who opposed it was the length of time they had practiced law. Lawyers who had tried more than 100 jury trials were the most negative, with approximately two-thirds of that group opposing the rule. For litigants, the primary difference was whether the jury in their trial was permitted to discuss the evidence. Litigants whose cases were randomly assigned to permit juror discussions were more likely than litigants in the control group to support the reform.

No evidence of prejudgment

The most frequent objection to juror discussions during trial is that jurors will reach conclusions about the merits of the case before hearing all of the evidence. Our post-trial questionnaire methodology was limited in that we were not able to keep track of jurors' ongoing opinion formation. That said, we found no clear evidence that jurors who are permitted to discuss the evidence with one another

Figure 1. Opinions about trial discussions

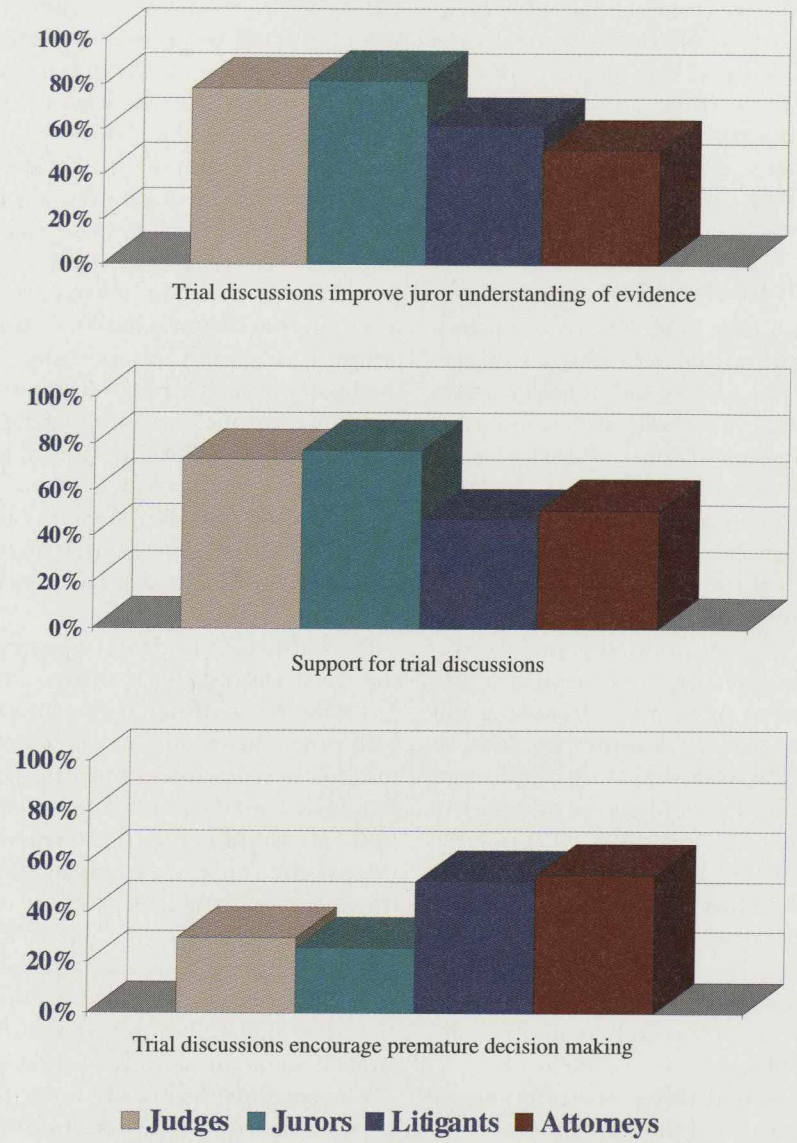

Figure 2. Jurors' opinions about trial discussions

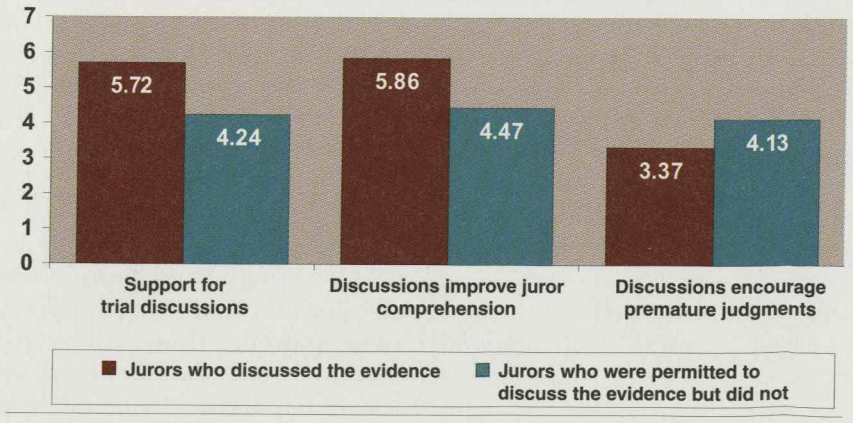

Table 1. "When did you start leaning to one side or the other?"

Began to lean during...	Trial discussions %	No discussions %
Plaintiff's opening	5.3	4.1
Defendant's opening	4.4	4.6
Plaintiff's evidence	22.8	24.8
Defendant's evidence	18.5	18.9
Plaintiff's closing	4.6	3.8
Defendant's closing	9.5	8.8
Judge's instructions	7.0	6.7
Jury discussions	7.0	5.7
Jury deliberations	20.9	22.7
	n=681	n=613

Table 2. "When did you change the direction in which you were leaning?"

Changed during...	Trial discussions %	No discussions %
Never changed	2.4	4.0
Plaintiff's opening	4.4	4.6
Defendant's opening	9.9	14.8
Plaintiff's evidence	15.1	17.9
Defendant's evidence	10.7	8.3
Plaintiff's closing	10.7	10.0
Defendant's closing	4.6	6.5
Judge's instructions	8.1	5.2
Jury discussions	21.4	21.9
Jury deliberations	39.3	38.4
	n=700	n=630

before final deliberations reach conclusions about the evidence earlier than jurors who are prohibited from discussing the evidence.

To measure the timing of juror opinion formation, we included three questions in the juror questionnaires.

- When would you say that you started leaning toward one side or the other in this case?
- Did you find yourself changing your mind about the direction you were leaning during any ... of the stages of the trial?
- When would you say that you made up your mind about which side should win the lawsuit?

For each question, jurors were asked to indicate at which stage of trial they began leaning, changing their minds, or making up their minds about the evidence. The stages listed as options were the plaintiff and defendant opening statements; the plaintiff and defendant evidence; the plaintiff and defendant closing arguments; the judge's final jury instructions; discussions with jurors during trial; and the jury's final deliberations.

As Tables 1 and 2 illustrate, there was no observable difference in the timing of opinion formation by jurors between the Trial Discussions and No Discussions groups. Jurors who engaged in discussions reported that discussing the evidence was only moderately helpful (4.7 on a scale of 1 to 7) in deciding who should win the case. Contrary to fears that trial discussions might solidify early opinions, jurors assigned to the Trial Discussions group reported that they changed their minds just as often as those assigned to the No Discussions group.

There was, however, a great deal of variation in the timing of juror opinion formation, much of which could be explained by factors other than whether jurors discussed the evidence among themselves. A juror's education was related to when jurors said they began leaning and how often they changed their minds, but not to when they made up their minds.[8] Jurors with more education tended to begin leaning earlier, but changed their minds more frequently, than jurors with less education. It is possible that more educated jurors are better equipped to make critical assessments about the evidence. Or it may be that jurors with higher education levels are more confident in their preliminary assessments about the evidence, and thus more likely to reveal early opinion formation.

Case complexity and the strength of the evidence were two additional factors. The less complex the case, the earlier jurors began leaning and making up their minds and the less often they changed their minds.[9] Cases in which the evidence was very close—that is, the evidence didn't strongly favor one party or the other—was another factor that tended to delay juror opinion formation. Moreover, when the evidence was more evenly balanced, jurors tended to rely more heavily on each other to reach their final conclusions about the case.

What effect did these factors have on the juries' ultimate verdicts? Jurors who voted for the defendant were significantly more likely to begin leaning and to make up their minds earlier than jurors who voted for the plaintiff.[10] In civil cases, the plaintiff has the burden of proving his or her case by a preponderance of the evidence. So the tendency to form opinions earlier may reflect the order of evidence presentation rather than prejudicial prejudgment. If the plaintiff fails to present a persuasive case, it seems logical that jurors would begin leaning and making up their minds without the need to hear a vigorous rebuttal from the de-

8. Hannaford, Hans, Mott, & Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 638-41 (2000).
9. *Id.* at 641-42.
10. *Id.* at 642-45.

fense. Conversely, if the plaintiff meets the burden of persuasion, a prudent juror will wait for the defendant's evidence before making final judgments on the merits.

Juror comprehension

The methodology used in this study was designed only to measure jurors' own assessments of comprehension, but not actual comprehension of evidence and testimony. Jurors who engaged in discussions reported that they found these discussions very helpful for resolving confusion about the testimony and evidence presented during trial. This is an encouraging result, but it does not necessarily mean that trial discussions actually improved comprehension.

Ratings of jury verdicts by legal experts provide an indirect method of assessing the impact of jury reforms. If comprehension problems are so serious that they cause jurors to arrive at mistaken verdicts, and jury reforms improve comprehension and lead to more accurate verdicts, then we would expect legal experts to rate the jury verdicts of Trial Discussions juries more positively. The judge-jury agreement rate—that is, the rate of agreement between the judge's assessment of the evidence and the jury's verdict—is one measure that social scientists have used to assess judicial opinions about jury verdicts.[11]

The judges' questionnaires asked judges to describe the extent to which the evidence presented at trial favored the plaintiff or defendant (1=evidence strongly favors the plaintiff, 7=evidence strongly favors the defendant). Jury verdicts closely tracked judicial assessments of the evidence. In the Trial Discussions group, the jury's verdict converged with the judge's assessment of evidence in 82 percent of the cases compared to 86 percent of the cases in the No Discussions group, which was not statistically different. Thus, at least according to the judges' assessments, there was no evidence in this study that juror discussions either improved or reduced the accuracy of jury verdicts.

Conflict and unanimity

Both opponents and proponents of juror discussions believe that the opportunity to discuss the evidence before final deliberations will affect the interpersonal dynamics of the jury, mainly by increasing overall cohesiveness. Opponents view this as a disadvantage in that shared biases will develop, potentially keeping jurors from considering evidence that contradicts those biases. Proponents of the reform, in contrast, view cohesiveness as a beneficial trait that may reduce the number of divisive cliques.

Surprisingly, we saw no evidence of greater cohesiveness among jurors who discussed the evidence during the trial. In fact, jurors who discussed the evidence reported slightly more conflict among jurors than jurors that did not discuss the evidence. The average level of conflict in the Trial Discussions juries was 2.1 (on a scale of 1 to 7) compared to 1.9 in the No Discussions juries.

Arizona does not require that civil juries be unanimous; instead, three-fourths of the jurors must agree on the verdict. The increased conflict reported by Trial Discussions juries was manifested in a significantly greater proportion of non-unanimous verdicts. Only 29 percent of the juries that engaged in trial discussions rendered a unanimous verdict, compared to 38 percent of juries that were permitted to discuss the evidence but did not, and 49 percent of juries that were not permitted to discuss the evidence.

Did the opportunity to discuss the evidence actually cause greater conflict among the jurors? That is one possibility, but the data suggest that the level of conflict may be related to some other characteristic of the jury or of the case. For example, the extent to which one or two jurors dominated discussions and deliberations was significantly related to the level of conflict reported. Also related was the extent to which all of the jurors' views were considered during discussions and deliberations. Neither of these variables was related to whether jurors engaged in discussions during trial.

Case complexity and strength of the evidence were additional factors. The more complex the case and the more closely balanced the evidence, the more conflict the jurors reported. When controlling for all of these variables simultaneously, we found that case complexity, strength of the evidence, domination by one or two jurors, and consideration of all jurors views' were significant causes of conflict among jurors, but the opportunity to engage in trial discussions was not.

What we don't know

The Arizona experiment provides a great deal of information about the effects of the reform and confirms a number of long-held beliefs about jury decision making. However, several questions remain to be answered, one of the most important of which is whether the introduction of a unanimity requirement for verdicts would alter the study findings. Only 40 percent of the verdicts in the study reflected the unanimous consensus of the jury. If required to deliberate until a unanimous verdict had been reached, would Trial Discussions juries report even greater levels of conflict and decreased satisfaction? Conversely, would jurors deliberating under unanimity requirements be more solicitous of their colleagues, knowing that consensus might be achieved more likely through persuasive dialogue than through heated debate?[12] If unanimity were required in Arizona, would the study findings have reflected greater judge-jury agreement rates or other indicia of improved jury comprehension that was not detectable in these data?

These questions are important for two reasons. First, many of the states considering the reform currently have unanimity requirements for civil verdicts. Although non-unanimous verdicts are relatively common in civil jury trials, at least 20 states require

11. *See generally* Kalven. & Zeisel, THE AMERICAN JURY 55-65 (1966).

12. *See* Hans & Vidmar, JUDGING THE JURY (1986).

unanimity and 3 additional states permit non-unanimous verdicts only after the jury has deliberated for a substantial period of time.[13] Second, and perhaps more critical, is the impact that unanimity requirements might have if the reform were extended to criminal trials. Only two states permit majority verdicts in felony trials.

Instruction given to jurors who were permitted to discuss the evidence before final deliberations

"You jurors may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present. Despite what you have heard about or experienced in other trials, where jurors cannot discuss the evidence among themselves during the trial, that rule has been changed in Arizona to permit jurors to talk with each other about the evidence during trials in civil cases like this one.

"The kinds of things you may discuss include the witnesses, their testimony and exhibits. However, you must be very careful not to discuss or make up your minds about the final outcome, or who should win the case, until you have heard everything—all the evidence, the final instructions of law and the attorneys' arguments—and your deliberations have begun. Obviously, it would be unfair and unwise to decide the case until you have heard everything."

The impact of unanimity requirements is neither the only, nor necessarily the most critical, issue complicating the question of expanding juror discussions to criminal trials. Several additional factors also weigh heavily. For example, would differences in the burdens of proof between civil and criminal trials affect the impact of trial discussions? In civil trials, the plaintiff generally must prove his or her case by a preponderance of the evidence whereas the prosecution in criminal trials must establish the guilt of the defendant beyond a reasonable doubt. What effect would trial discussions have on conviction rates, which currently average around 80 percent in criminal jury trials?

Second, would the increased salience of criminal trials for jurors affect how the reform might work? In civil cases, the plaintiff generally seeks compensation for a past injury. Only rarely is the issue of public safety raised during civil trials, usually in conjunction with a demand for punitive damages. In criminal trials, public safety is almost always an issue. Would trial discussions about this issue tend to encourage prejudgment or fix jurors opinions in ways that do not occur in civil trials?

A related concern is the composition of juries. Over the past 30 years, the pools from which civil juries are selected have become much more representative and inclusive of their communities. Ideally, juries are composed of people who are capable of seeing both sides of a dispute. They can imagine themselves injured through the negligence of another as well as injuring others through their own negligence, and thus can make judgments about the liability of the parties. In criminal trials, however, jurors may identify more routinely with crime victims or prosecution witnesses than with the defendant. Would juror discussions during criminal trials provide jurors with an opportunity to compare differing viewpoints? Or would they instead serve to strengthen shared biases held by the individual jurors?

Finally, the Arizona study does not provide much insight about the substantive dynamics of juror discussions. What do jurors talk about during these discussions? Do they understand the distinction between discussing the evidence and making conclusions about the ultimate issues to be decided during deliberations? Even if they do understand this distinction, do they abide by judicial admonitions to keep an open mind until after all the evidence has been presented? This study was not designed to explore these questions, but fortunately a second study has just been completed in the Pima County Superior Court, in which researchers videotaped 50 civil jury trials, including jury discussions and jury deliberations in their entirety.[14] This study will undoubtedly shed a great deal of light on the content of trial discussions and their effect on the dynamics of jury decision making.

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The adage that nothing is ever as good or as bad as you thought it would be seems an appropriate summation of the effects of this particular reform technique. Discussions about the evidence during civil jury trials did not appear to lead to prejudgment or prejudice, at least to the extent we were able to measure in our study. Nor did we detect dramatic improvements in jury decision making across cases that affected jury verdicts. Nevertheless, if the jurors' own reports are to be believed, this technique may be quite helpful to jurors both for understanding the evidence and as an appropriate outlet for jurors' thoughts and questions that might otherwise be discussed with family or friends. ⚖

13. *See* U.S. Department of Justice, STATE COURT ORGANIZATION 1998 (Rottman et al.), Table 42 (2000).

14. Shari S. Diamond (American Bar Foundation and Northwestern University Law School) and Neil Vidmar (Duke University School of Law) conducted the research under a State Justice Institute grant to the Arizona Superior Court in Pima County with support by the American Bar Foundation, the Duke University School of Law, and the National Science Foundation. Hon. Michael J. Brown chairs the Advisory Committee and Paula Nailon, J.D., is the Project Director. The final report for this study is located at http://www.law.northwestern.edu/diamond/papers/arizona_civil_discussions.pdf and http://www.law.duke.edu/curriculum/courseHomepages/460_02/ArizonaCivilDiscussions.pdf.

Applying *DAUBERT*

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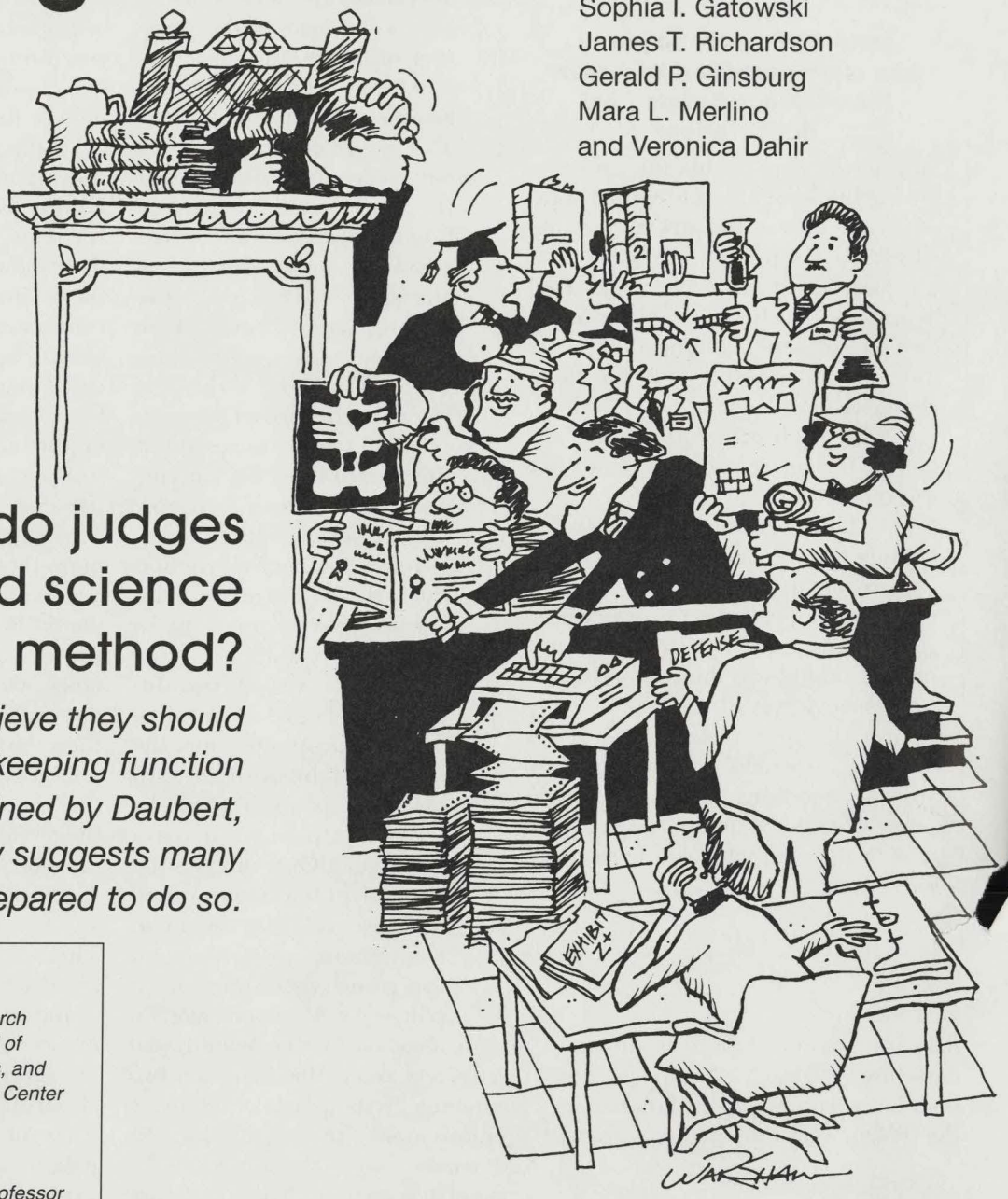

How well do judges understand science and scientific method?

While judges believe they should exercise a gatekeeping function as defined by Daubert, a recent survey suggests many may be ill-prepared to do so.

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In the current post-*Daubert*[1] legal framework, judges have been given increasing power, discretion, and responsibility to examine the methods, techniques, and underlying logic of science before making admissibility rulings. Yet judges are not trained scientists. They inevitably lack the training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims. Nevertheless, the law imposes on most trial judges the duty, with respect to scientific evidence, to become evidentiary "gatekeepers." As a consequence,

A detailed presentation of the results of this research appear in: Gatowski, Dobbin, Richardson, Ginsburg, Merlino, and Dahir. *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW AND HUM. BEHAV. 433-458 (2001).

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 113 S. Ct 2786 (1993). Also see *Kumho Tire v. Patrick Carmichael*, 119 S. Ct. 1167 (1999) for a key decision on admissibility of expert evidence.

considerable debate has focused on the extent to which judges understand and can properly apply the guidelines when assessing the validity and reliability of proffered scientific evidence.

This article provides a brief overview of selected results from a national survey of state trial court judges (N=400). Although the survey gathered information about a wide range of topics related to *Daubert* and scientific evidence, this article provides a summary of judges' opinions about the utility of the *Daubert* criteria as decision-making guidelines and the degree to which the judges surveyed understand the scientific meaning of the *Daubert* criteria.[2]

The survey sought to assess judges' knowledge and understanding of science and scientific method, as well as their understanding of the scientific meaning of the *Daubert* criteria and how to apply them.[3] The survey also gathered information about judges' experiences in dealing with various types of scientific evidence and expert testimony and the strategies they use to manage scientific evidence.[4]

The sample consisted of judges from all 50 states and the District of Columbia obtained using the 1997-1998 edition of *The American Bench.* To be included, a judge had to be either sitting on the bench of the state trial court of general jurisdiction or on the bench of a court of special jurisdiction with dockets likely to contain the types of evidence of interest to this research. Judges were stratified first by federal circuit and then by state. Proportionate stratified random sampling with a constant sampling fraction was used to obtain a sample that was representative of both the geographical distribution of judges and the number of judges using the admission criteria in each state.

Draft surveys were pre-tested on focus groups of judges attending classes at the National Judicial College and the Judicial Studies Program at the University of Nevada, Reno, and modified accordingly. The final survey consisted of two parts: a structured telephone interview and a mail-out questionnaire. Part One of the survey covered topics such as the standard of admissibility used in the state; the utility and application of the admissibility criteria specifically outlined in *Daubert*; general opinions on issues surrounding the *Daubert* decision (e.g., judgments as to the decision's value and intent, appropriateness of the gatekeeper role, potential differential application of criteria to different domains of knowledge); opinions on general aspects of the legal system (e.g., judgments regarding the over- or under-reliance on experts in the courtroom and whether jurors can understand complex scientific evidence); judicial designations of particular types of evidence as science or as technical or specialized knowledge; and respondents' educational background and other demographic characteristics.

At the end of Part One of the interview, judges were given the option of completing Part Two on the telephone or having it mailed to them. The general topic areas of Part Two were: (1) judges' level of experience with scientific evidence (DNA, epidemiology, specific types of psychological evidence, including psychological syndromes and profiles); and (2) judges' techniques for managing scientific evidence proffered in their courtrooms. Interviews were conducted by trained graduate and undergraduate student interviewers and all interviews were supervised. On average, it took 55 minutes to complete Part One of the telephone interview.

An empirical code book was developed for all survey questions and coders were trained on appropriate coding techniques. Approximately 25 percent of the surveys coded were check-coded (inter-coder reliability =.84). In order to determine judges' understanding of the *Daubert* criteria, judges were asked to provide an example of how they would use a particular criterion to evaluate the scientific merits of proffered evidence. Definitions of the *Daubert* criteria were not provided unless a judge explicitly asked for a definition. If asked, definitions provided were scientifically correct and standardized, and interviewers recorded that a definition had been given. For a response to be coded as "judge understands concept," the judge had to specifically include reference to the central scientific meaning of the *Daubert* criterion. If coders could not ascertain with any certainty that the judge understood the scientific meaning of the criterion, the response was coded as "questionable."[5]

Results

A total of 400 judges completed Part One of the survey (the telephone interview), a response rate of 71 percent. A total of 325 judges completed Part Two (choice of telephone or mail-out questionnaire), a response rate of 81 percent. Half of the judges surveyed indicated that their state followed *Daubert* and the Federal Rules of Evidence. The remainder indicated that their state followed *Frye* or some hybrid such as California's *Kelly-Frye* standard. Half of the judges surveyed had more than 10 years on the bench, 31 percent reported 5-10 years on the bench, and 19 percent had less than 5 years on the bench.

The "gatekeeper" role. The majority of the 400 judges surveyed (91 percent) reported that the role of

2. The results of this research appear in: Gatowski, Dobbin, Richardson, Ginsburg, Merlino, and Dahir. *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW AND HUM. BEHAV. 433-458 (2001).

3. This research was done to develop baseline information for development of a judicial education curriculum, *A Judge's Deskbook on the Basic Philosophies and Methods of Science*, written by the first two authors (see www.unr.edu/bench). The research and *Deskbook* development were funded by a grant from the State Justice Institute (SJI-97-02B-D-030). Additional funding was provided by: The Federal Judicial Center; The National Judicial College; The Grant Sawyer Center for Justice Studies at the University of Nevada; The Judicial Studies Program at the University of Nevada; The Permanency Planning for Children Department of the National Council of Juvenile and Family Court Judges through the U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

4. For a full discussion of the methodology used in this survey see Gatowski et al., *supra* n. 2. *See also* Dobbin, Gatowski, Ginsburg, Merlino, Dahir, and Richardson, *Surveying Difficult Populations: Lessons Learned From a National Survey of State Trial Judges*, Forthcoming, 22 JUST.SYS. J. (2001).

5. For example, with respect to the *Daubert* criterion of falsifiability, merely mentioning a "test of a theory" would be coded as "judge's understanding questionable." Reference to the "ability to prove a theory or hypothesis wrong," the "testability of a theory," or proof/disproof would be coded as "judge understands concept."

"gatekeeper" was an appropriate one for a judge. This was true regardless of the admissibility standard followed in the judge-respondents' state. Two-thirds of the judges (62 percent) talked about themselves as having an "active" role in the admissibility process, noting that it was an important "function" for the judiciary (e.g.,"a necessary role"; it's "what judges do"). Those judges who felt the gatekeeping role was inappropriate (9 percent) expressed concern that the "lack of scientific training" made the performance of such a role "difficult" for judges. A number of these judges also described the gatekeeping role under *Daubert* as "usurping the jury's role" and "taking away the jury's power."

Judicial experience with expert evidence. On Part Two of the survey judges were asked whether cases on their docket involving difficult or complicated scientific evidence had become more frequent, less frequent, or remained about the same during their experience on the bench. Half of the judges who responded (52 percent) reported that the frequency of cases with difficult scientific evidence has "remained about the same." Thirty percent believed that cases involving difficult scientific evidence had become "more frequent," and only 6 percent believed that they saw such evidence "less frequently." Eleven percent of the judges "could not determine" whether the proportion of cases involving difficult or complicated scientific evidence had increased, decreased, or remained about the same.

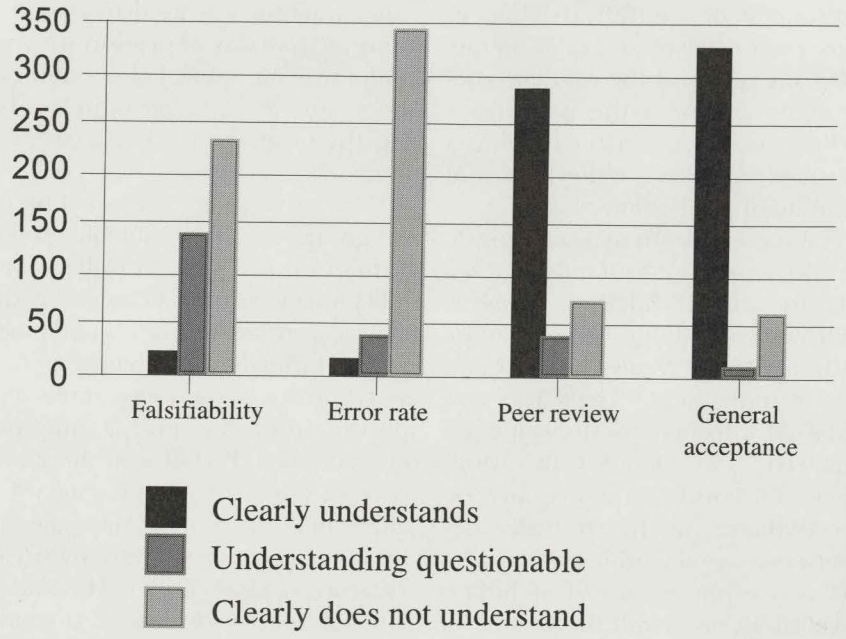
Judges were also asked to comment on their experience with some specific forms of expert evidence. Most judges reported at least some experience with psychological evidence (80 percent); 22 percent noted that they had a great deal of experience with the proffer of psychological evidence in their courtroom. Experience with DNA evidence was also common among the judges surveyed, with almost two-thirds (65 percent) stating that they had at least some experience with such evidence in their courtroom. In contrast, most judges reported having no experience with epidemiological evidence (73 percent).

In order to obtain a measure of consensus about problems related to expert testimony, judges were asked to report the frequency with which they had *actually* experienced problems associated with expert witnesses and expert testimony.[6] Specifically, they were presented with a list of general problems and asked to rate, on a scale of 1 (very infrequently) to 5 (very frequently), the frequency with which they had *observed* them in their courtroom. The top four most frequently identified problems, in order of frequency, were: (1) "Extensive disagreement among experts;" (2) "Experts abandon objectivity and become advocates for the side that hired them;" (3) "Excessive expense of party-hired experts;" and (4) "Delay in trial schedule caused by unavailability of expert(s)." The least commonly identified problems were: (1) "Expert poorly prepared to testify;" (2) "Expert testimony not comprehensible to the trier of fact;" (3) "Disparity in level of competence of opposing experts;" and (4) "Failure of parties to provide discoverable information concerning retained experts."

Understanding the guidelines

Falsifiability. Irrespective of the admissibility standard followed in their state, the majority of the 400 judges surveyed (88 percent) believed falsifiability to be a useful guideline for determining the merits of proffered scientific evidence. While judges found falsifiability to be useful when determining the merits of proffered scientific evidence, they did not fully understand its scientific meaning. As a result, judges were unsure how to properly apply the criterion of falsifiability as an admissibility guideline. Indeed, when asked how they would apply the guideline of falsifiability when making a determination about the admissibility of proffered scientific evidence, the majority of judges expressed some hesitancy or uncertainty. Only 6 percent of the re-

Figure 1. Understanding of Daubert guidelines



6. These questions were a replication of earlier work conducted by the Federal Judicial Center studying the federal bench's experience with expert testimony and evidence.

sponses demonstrated a clear understanding of the scientific meaning of falsifiability (see Figure 1).

Error rates. Overall, the majority of judges (91 percent) indicated that a consideration of error rate was useful when determining the merits of proffered scientific evidence, with over half of them (54 percent) reporting that it was "very useful." While the judges surveyed agreed about its utility, they did not fully understand the scientific meaning of "error rate," and often were unsure how to use the concept to assess the admissibility of proffered evidence. For most of the judges surveyed (86 percent), understanding of the scientific concept of error rate was questionable at best, with a clear understanding evident in only 4 percent of responses.[7]

Peer review. Irrespective of admissibility standard followed, most of the judges surveyed (92 percent) believed that the concept of peer review was useful for determining the admissibility of scientific evidence. Half of these judges (52 percent) indicated that the concept of peer review was a "very useful" guideline. In contrast to "falsifiability" and "error rate," the judges surveyed had little difficulty applying the concept of peer review to a determination of the admissibility of proffered evidence, with most of the judges (71 percent) revealing a clear understanding of the scientific peer review process.

General acceptance. The vast majority of judges (93 percent), regardless of the admissibility standard followed in their state, reported that general acceptance was a useful criterion for determining the merits of the proffered scientific evidence. Most of them (64 percent) indicated that it was a "very useful" guideline. The majority (82 percent) also demonstrated a clear understanding of the concept of general acceptance when asked to discuss how they would apply the guideline to determine the admissibility of proffered scientific evidence.

Only 6 percent of the responses demonstrated a clear understanding of the scientific meaning of falsifiability.

Ill-prepared

This survey provided a national assessment of the state judiciary's experiences with, and understanding of, science, scientific evidence, and admissibility criteria. Despite varying years on the bench and experience with specific types of scientific evidence and expert testimony, almost all of the 400 judges surveyed agreed that the role of "gatekeeper" is an appropriate one for the judiciary. Most reported that they assume an active role in the admissibility decision-making process regardless of the admissibility standard operating in their state. While judges were confident that they should exercise a gatekeeping function, results of the survey suggest that many may be ill-prepared to do so.

For example, the survey found that judges lacked the general scientific literacy required for the full application of the *Daubert* guidelines. The majority of judges interviewed were unable to provide responses that reflected a scientifically appropriate understanding of the *Daubert* guidelines, especially for the concepts of falsifiability and error rate. Yet, most judges confidently responded that these criteria are useful guides in the admissibility decision-making process. Indeed, many judges did not recognize their lack of understanding. As a consequence, it appears that many judges may not be fully prepared to deal with the amount, diversity, and complexity of the science presented in their courtrooms.

These results are troubling in light of the further finding that the majority of judges believe that the gatekeeping role as defined by *Daubert* is not only an appropriate one for the judiciary, but is also a fundamental "function," "what judges do," and a "necessary role." Given the active gatekeeping role that judges reported taking in admissibility decision making, even in non-*Daubert* states,[8] their lack of full understanding of some key *Daubert* guidelines, and the increasingly complex nature of the science that comes before the court, the results of this research clearly demonstrate the need for more science-based education to assist judges in fulfilling their roles as gatekeepers. If judges are to be informed decision makers and critical consumers of the science that comes before them, then they must have a higher level of understanding of the basic philosophies and methods of science. Without appropriate scientific education judges may be ill-prepared to assess the validity and reliability of claims made about proffered scientific evidence.

7. In order for a response to be coded as "judge understands concept" the response had to include reference to false positives and false negatives, or refer to a number or percent of instances in which a classification procedure was misapplied.

8. Few statistically significant differences were found throughout the survey between *Daubert* and non-*Daubert* states, see Gatowski et al.,*supra* n. 2.

How effective?

by Edith Greene

Stack and Sway: The New Science of Jury Consulting, by Neil J. Kressel and Dorit F. Kressel, Westview Press. 2001. 302 pages. $27.50.

This book, written by a psychology professor and a lawyer, delves into the practice of jury consulting and examines its effects on trial practice. It is well written and enjoyable, crafted around the authors' analyses of several well publicized cases (although strangely, only some of them involved consultants), their interviews with practicing consultants and researchers, and their review of some academic literature on the processes and products of juror and jury decision making. Among the chapter titles are: "Juries at work"; "The jury persuaders"; "News from the laboratory"; and "Saving the jury."

Although the authors' stated purpose is to "pull back the curtains" on this new phenomenon in American justice and *not* to launch an all-out attack, they make their inclinations known from the start (consider the title of the book). In the introductory chapter, for example, they promise to reveal the "tricks of the trade," and in so doing explore the "many ways in which trial consultants have infiltrated the courtroom" (p. 17). Although they cannot be certain of the true impact of consultants in court, their contention is that "trial consultants are surely changing the ways in which we seek justice in the United States" (p. 16).

In any exploration of this field, the real questions become apparent rather quickly: "How effective are trial consultants at 'stacking and swaying' juries?" and "To what extent are trial consultants changing the face of justice in the United States?" The answer, like the answer to most questions involving human behavior, its prediction, and its measurement is "It depends."

The effectiveness of a consultant is determined by many things, some of which are beyond the control of that consultant: the number of peremptory challenges allowed in a particular case; whether it is the judge or the attorneys who question prospective jurors during *voir dire*; the extent to which attorneys are allowed, during jury selection, to delve into matters beyond superficial demographic details of prospective panel members; whether the consultant has proposed a strategy or theme that meshes with jurors' intuitions about the evidence; whether attorneys actually put those strategies and themes into action during the trial; whether witnesses are willing and able to be "prepped" before they testify; and whether jurors are willing and able to discuss the case and their assessment of it with a consultant after the verdict. Any conclusion about the likely influence of a jury consultant on the practice of trials must be tempered by these considerations.

Compared to what?

But the situation is even more complicated. As the authors correctly point out, "it is difficult to assess the quality of the jury outcome because of the lack of an objective standard for comparison" (p. 54). (This is a common critique of jury analysis. In assessing the validity of any jury verdict, the question arises: "Compared to what?) The concern regarding trial consulting is a parallel one: How do we know what effect a trial consultant might have if we have nothing to measure that effect against?

To address the impact of jury consultants in court, one would ideally conduct an experiment in which two identically composed juries decided two identically tried cases, one that involved the services of a consultant and another that did not. By holding constant all aspects of the trial, including the identities of the players and the nature of the testimony, and by varying only the involvement of a trial consultant, one might be able to reach some conclusion about the consultant's impact. It's patently obvious that we can't do this experiment, and thus that we may really never know with any precision or certainty whether and to what extent trial consultants are changing the ways in which justice is done in our country.

Consulting services

Although the field of trial consulting began with social scientists assisting lawyers in jury selection, modern-day trial consultants offer a variety of services in addition to jury selection. They conduct pretrial research in order to develop strategies, themes, and stories that they hope will resonate with jurors and allow jurors to make sense of the evidence, assist in preparing witnesses to testify, teach attorneys about persuasive communication techniques, and conduct post-trial juror interviews. The authors spend a fair amount of time describing jury consultants as jury selectors (or more properly, as jury de-selectors, echoing the comments of one

consultant who suggested that "You can't stack a jury. You can only unstack."). They then acknowledge (correctly) that who ends up on the jury is often irrelevant to the disposition of the case and that consultants have begun to place more emphasis on providing services in realms other than jury selection.

The chapter that describes this work, entitled "Beyond jury selection," is the best of the book, perhaps because its coverage is less inflammatory, perhaps because trial consultants can contribute something in these areas that promote the fairer administration of justice (e.g., showing by way of opinion polling that a defendant would not receive a fair trial in a particular jurisdiction, determining the value that a jury would place on a plaintiff's injuries and thereby facilitating settlement negotiations). It's somehow comforting to contemplate the value of this industry and to acknowledge its potential to further, rather than to corrupt, justice. I applaud the authors for making this point clear to readers.

The jury system

A secondary (but unstated) objective of this book is to assess the functioning of the jury system in our country. I came to that understanding only near the end when I read a chapter (entitled "Blacks and whites in the jury box") in which the field of trial consulting was barely mentioned. An earlier chapter entitled "Juries at work" also presented a confusing juxtaposition of cases, one—the Louise Woodward "British nanny" case—in which the verdict options presented to the jury were much more important to their verdict than was the work of any consultant, and a second—the defamation case against the Reverend Al Sharpton and others stemming from the Tawana Brawley falsified rape incident—that had nothing whatsoever to do with consultants. The authors use these examples, and many others, to reach the conclusion that there are problems inherent in jury trials. I couldn't agree more, but found that their attention to this concern detracted from the real point of the book, namely to examine the field of trial consulting and its impact on courtroom justice.

Finally, near the end of the book, the issues of jury consulting and jury competence merge when the authors correctly note that "[t]rial consultants have been made the scapegoats for problems inherent in our jury system. Biased jurors, inept deliberations, and manipulative lawyering existed long before the consultants appeared on the scene. The consulting industry has exploited opportunities and irritated wounds. But the challenges faced by our jury system are bigger than those created by trial consultants" (p. 226). Again, I couldn't agree more.

And so, in the end, I wonder if the authors are barking up the wrong tree. Is the threat to the sanctity and effectiveness of the jury coming from consultants, or rather, from antiquated trial procedures that treat jurors as unthinking black boxes who mindlessly follow the dictates of robed judges uttering legalese? I contend that the latter is infinitely more concerning than the former. (For one thing, consultants are involved in a very small proportion of all jury trials and robed judges are present for all of them.)

Misplaced fear

For some time, psychologists and other students of behavior have known that people often fear the wrong things. (Even before the terrorist attacks of September 2001, 44 percent of the flying public professed to feeling fearful, yet mile for mile, Americans are 37 times more likely to die in an automobile accident than on a commercial flight. Since September 11, we have been riveted by the news of a half dozen anthrax poisonings while paying little attention to the 20,000 or so lives claimed by influenza or the 30,000 or so lives cut short by gunshots each year.)

Why are our intuitions about risk so out-of-line? Among the reasons are these: we fear what we cannot control, and what is most readily available in memory. The common citizen obviously has little connection to, and less control over, the involvement of jury consultants in the courtroom. And, because consultants tend to work on highly publicized cases with big stakes and big names, and because the media bring these cases to our attention, we have ready examples of consultants apparently altering the outcome of the jury process. That scares people, but I think (and I suspect that the authors would agree) that this characterization gives more credit to the industry than is due.

So, returning to the questions posed earlier: How effective are trial consultants at "stacking and swaying" juries and to what extent are they changing the face of justice in our country? Without a doubt, trial consultants have had *some* impact on the outcomes of *some* cases. But whether that impact constitutes a threat to the effectiveness, the independence, or the sanctity of the jury system is an altogether different issue.

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A handbook for courts

by Julia H. Barnes and John M. Greacen

Caseflow Management, The Heart of Court Management in the New Millennium, by David C. Steelman, with John Goerdt and James McMillan. National Center for State Courts. 2000. 288 pages. $27.00

Caseflow Management, The Heart of Court Management in the New Millennium is a book that should rest on the shelves of every court administrator and chief judge. In fact, it might be a good idea to have two copies in each office so that one is available for loan.

When Tom Henderson took on responsibility for the National Center for State Courts' publications program several years ago, he had two specific objectives: He wanted to document the past 30 years of

changes in the structure of state courts and he wanted to document the past 30 years of experience with reducing delay in state trial courts. *Caseflow Management* accomplishes this second goal.

Steelman and his colleagues have created a manual on caseflow management, bringing together in one place the fundamental precepts of caseflow management, the research on the topic, and practical guidelines for conducting caseflow management improvement projects in trial courts. He has demonstrated that we have indeed learned a great deal in 30 years.

The introduction documents the history of efforts to reduce the time required to dispose of cases in trial courts and makes the case that caseflow management lies at the heart of court management. Part One of the book presents the basic concepts. Chapter One sets forth the basic principles of caseflow management—early court intervention and continuous court control of case progress, differentiated case management, meaningful pretrial court events and realistic pretrial schedules, firm and credible trial dates, management of the trial itself, management of court events after initial disposition, and special considerations for rural trial courts. Chapter Two discusses the application of these basic principles to civil, criminal, and traffic case dockets while Chapter Three discusses their application to family and probate case dockets (family cases are divided into juvenile delinquency, child protection, divorce, and domestic violence).

Part Two of the book deals with elements of successful caseflow management programs. Chapter Four addresses the basic management conditions for success—leadership, commitment to a shared vision, adequate communication, and a learning environment. Chapter Five deals with setting time standards, establishing other caseflow management goals and policies (including backlog reduction and continuance policies), monitoring and measuring actual performance, and creating accountability.

The remainder of the book addresses program implementation. Chapter Six deals with caseflow management reports, court technology to assist in caseflow management, case assignment systems (individual versus master calendar systems and various types of hybrids), creating court calendars, alternative dispute resolution programs, and dealing with self-represented litigants. Chapter Nine is a guide to planning a caseflow management initiative. An Epilogue addresses two abiding questions: Why do so many trial courts not use the proven techniques? Why are many courts unable to sustain initially successful caseflow management efforts over time?

Included as appendices are the National Association for Court Management "Core Competency" Caseflow Management Curriculum Guidelines, excerpts from the Trial Court Performance Standards relating to caseflow management, a suggestion from Ingo Keilitz to create a single measure for a court's success in timely disposition of cases (which he calls a "caseflow timeliness and efficiency index"), sample caseflow management reports, and a 20-page bibliography of books, studies, reports, and articles. The book has a good index making it easy to find references to topics of interest. Steelman and his colleagues summarize the research findings on every topic they address; research results are spread throughout the book.

Real life stories

Like any reference book designed to cover a wide area, the book typically covers a topic in 3–4 pages. Often this provides only the most basic information. However, Steelman has countered the broad-brush sweep by including dozens of individual case studies. He has included set-aside text boxes every 3 or 4 pages identifying a specific project or program that has successfully used the case management technique described in that section.

These real life stories serve several purposes. First, they make the reading much more interesting and "hands-on." They also provide insight into how one court handled the topic under discussion, serving as a confirmation that this technique has worked in practice. Finally, they serve as an easy reference for courts that are beginning to apply a caseflow management principle to link with a court that has implemented it successfully.

Very few judges, administrators, or court staff will read this book from cover to cover. Despite the authors' many efforts to make the substantive content easily accessible, the book works best as a basic reference. We found in reading the book that we identified many short sections that we will want to bring to the attention of a particular judge or court. Julia's copy is full of yellow "stickie" notes to "refer Judge X to this chapter" or "try this in Y court."

A perfect place to start

Caseflow Management is not a call to arms to reduce court delay. It contains some sobering cautions about what is realistic. The book is rather a handbook for courts that already want to resolve cases more quickly. Some court administrators and judges are motivated to improve caseflow: they get frustrated with the unnecessary delays in the system; legislators and constituents demand a change; or, as is true in New Mexico, judicial performance evaluations rate the judge, in part, on efficient caseflow management.

Once you have an interested audience, the challenge has been how to get appropriate resources to develop and implement a caseflow management plan. This book is the perfect place to start. But it will not be sufficient in itself to meet the needs of most courts. The general descriptions of principles, the application of those principles to particular case types, and the examples of applications in specific courts are at a high level of generality.

The summaries of research findings suffer in the same way. They do not get down to the level of detail needed to apply them to specific situations. For instance, the summary of research findings on the effectiveness of alternative dispute resolution

does not consistently distinguish the results for different types of cases. Court administrators need to know the results of mediation for child custody, for child support, and for property settlement in domestic relations cases. They need to know the findings for small claims, for motor vehicle tort cases, for medical and legal malpractice. For the most part, the summary lumps all case types together.

Most courts desiring to develop caseflow management strategies will need more assistance than just reading this book—from judges and staff who receive in depth training on caseflow management from the Institute for Court Management, the National Judicial College, or the Justice Management Institute, or from court consultants who have applied these techniques elsewhere.

A few shortcomings

The book has a few additional shortcomings. It does not mention caseflow management in appellate courts. Appellate courts have the same delay problems as trial courts. Some are much faster than others, for reasons other than caseload and resources. There are a number of excellent studies on appellate caseflow management that could have been included by Steelman and his colleagues.

The section on automated case management information systems is not particularly helpful. It does not address the issues of most concern to trial courts: how do I go about obtaining an adequate case management system? Should I buy or build? It does not mention the functionality standards for trial court case management information systems. The first of those standards—for civil cases—has now been approved by NACM and COSCA. It is accessible through the National Center's website (www.ncsc.dni.us).

Finally, although the topic is addressed twice, *Caseflow Management* does not adequately explore the obstacle that most courts attempting to reduce delay encounter—how to achieve faster disposition times while simultaneously dealing with a serious case backlog. The two conditions—slow disposition times and serious backlog—usually occur together. And courts need very clear examples of how to slay both dragons at the same time.

Nevertheless *Caseflow Management* is an important addition to the literature about courts. We hope that the National Center will consider revising or supplementing it every five years or so. If not, the innovative concept to provide up-to-date examples of successful case management plans will be lost. ⚖

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Noteworthy

Christianson and Flanders, editors, **Cass Gilbert, Life and Work: Architect of the Public Domain** (W. W. Norton & Company, New York. 2001. $60). Cass Gilbert (1859-1934) produced hundreds of buildings across the U.S., including the Minnesota State Capitol, the Woolworth Building and U.S. Courthouse and Custom House in New York, and the U.S. Supreme Court. Essays by architectural historians, practicing architects, and specialists from other professions illuminate Gilbert's life and work. The book includes more than 200 photographs, a number of them in color.

Cultural Considerations in Domestic Violence Cases: A National Judicial Education Curriculum (Family Violence Prevention Fund, 415-252-8089, www.endabuse.org. 2001. $50). The curriculum is designed to help judges better identify cultural issues and determine when culture should be considered in cases involving abuse. Included are interactive exercises, discussion questions, and sample case studies, as well as instructions and materials for trainers. A diskette including the entire curriculum in Microsoft Word format accompanies each curriculum so it can be adapted to meet the needs of specific courts, regions, or jurisdictions.

Proceedings of the Western Regional Conference on State-Federal Judicial Relationships (Washington State Courts and U.S. Courts for the Ninth Circuit. www.ce9.uscourts.gov). The report highlights the meeting of state and federal judges and court administrators held in October 2000. Conferees considered four main topics: Genetics and the Law; Jury Trends and Innovations; Capital Habeus Corpus; and Effective Community Outreach.

Reference Manual on Scientific Evidence, Second Edition (Federal Judicial Center. www.fjc.gov. 2000). Among the many topics covered are management of expert evidence, how science works, statistics, survey research, epidemiology, toxicology, medical testimony, DNA, and engineering practice and methods. ⚖

Briefs

Report on appellate mediation

California's Task Force on Appellate Mediation has issued a report indicating that mediated cases in the courts of appeal are less costly, significantly reduce resolution time, and lead to a high degree of user satisfaction. The report is based on a two-year pilot program in the First Appellate District, which ended June 30, 2001.

The task force found that:

- More than 43 percent of the mediations resulted in full settlements.
- Counsel participating in the mediation program estimated net savings in excess of $6.2 million for their clients.
- The median time from the filing of the notice of appeal to resolution was 3.9 months for mediated appeals compared to 14 months for all appeals.
- More than 80 percent of the parties and their counsel would use the mediation process and the mediator again.

Due to the success of the pilot program, the task force has recommended that the mediation program should be extended indefinitely in the First Appellate District, that participation in the mediation program should continue to be mandatory, and that other appellate districts should have the option of developing or expanding their own alternative dispute resolution programs, with the financial assistance of the Administrative Office of the Courts, if necessary.

Copies of Mandatory Mediation in the First Appellate District of the Court of Appeal: Report and Recommendations *are available at www.courtinfo.ca.gov/reference/documents/mediation.pdf. For more information, contact John Toker at 415-865-7373.*

State court, tribal court agreement

Representatives from four Chippewa tribes in northern Wisconsin and the judge who oversees administration of the state courts in 13 northwest Wisconsin counties have signed an agreement to implement a new system for handling court cases in which the tribal and state courts share jurisdiction. It is believed to be the first agreement of its kind in the nation.

The new system will make it easier in cases involving shared jurisdiction to determine whether the state court or the tribal court should hear the case. Examples are divorces in which one party is a tribal member and lawsuits that involve a tribe. Often in such cases hearings were held in both the state and tribal courts on the same issues, resulting in confusion and inefficiency. Under the new system, state and tribal court judges temporarily stop actions that are filed in both courts and hold a joint hearing to determine which court should handle the case. If the judges cannot agree a third judge is summoned from a pool of state and tribal judges and the arguments are reheard until a decision on jurisdiction is reached.

For further information, contact Chief Judge Edward R. Brunner, Barron County Circuit Court, at 715-537-6399.

Justice improvement activities, 2001

A new report by the American Bar Association Coalition for Justice indicates that extensive justice system improvement activities are ongoing nationwide. The *Summary of State and Local Justice Improvement Activities—2001* is based on a survey of courts and state and local bar associations in every state. The report includes state-by-state entries with contact person information.

Among the report's findings:

- More than 1200 areas of justice system improvement activity by courts, bar associations, or bar foundations exist across the country. Activities include improving access, combating bias, establishing drug courts, improving judicial selection, enhancing jury duty, preserving independence, and making courts more user-friendly.
- Outreach to nonlawyers is increasing. Such "justice initiatives" include activities to improve justice that involve nonlawyer community representatives in two-way communication with lawyers or judges in citizen conferences, on-going commissions, and town hall meetings. Nationwide there are more than 300 such projects, up from 34 in 1995.
- Virtually all states are addressing public trust and confidence in the justice system. Activities, many involving community, business, and civic leaders, include steps to correct the justice system's perceived weaknesses and better communicate strengths.

For more information on the survey, or to learn more about the Coalition, contact Paula Nessel at 312-988-5450, or e-mail paulanessel@staff.abanet.org. *The full report is posted at www.abanet.org/justice.*

Cameras in the court

For the first time since 1995, the California Supreme Court in December granted television cameras access to its oral argument proceedings. "Pooled coverage" of arguments in *Manduley v. Superior Court* was permitted. The case involved a constitutional challenge to Proposition 21, the juvenile justice initiative approved by voters in 2000 that, among other things, allowed prosecutors rather than judges to decide whether to try juveniles as

Viewpoint

(from page 217)

the growth in litigation or its complexities. Although the number of Article III judgeships is almost twice what it was 30 years ago, criminal and civil cases have escalated at a much faster rate. Even without the considerable impact of additional pretrial proceedings, it would now be completely impracticable to try the one out of six-and-a-half criminal cases or the nearly one out of 10 civil cases that were tried in 1970. In 2000, that would have meant 41,000 total trial dispositions, as against the 10,000 that occurred. The cost of the necessarily gargantuan complement of more judges, logistical support, and courtrooms would be an intriguing figure to quantify—and contemplate in the distant mist of a political/economic mirage.

And while court administration since 1970 has become a mighty industry, judges continue to maintain a great deal of control over administrative matters and their own work. The judiciary is fortunate to have survived post-World War II bureaucratization much more intact than some of its institutional counterparts—for example, in health care, where the physicians no longer operate the hospitals, or in academia, where faculty no longer run the universities. In these instances, because of resource availability issues, a new breed of business managers has been empowered to control the delivery of human and social services. While the judiciary's annual budget has become a cumbersome and drawn-out process of negotiation, judges still manage their own assembly lines of cases and sign off on their budgetary applications.

Our cultural views of the law and the problematical nature of trials have also been a factor. Aside from the economic cost, litigants shrink from the uncertainties, the time investment, the lack of finality, the aggravation and stress, as well as the impaired opportunity for more productive activity. Other densely populated countries have found, no doubt impelled by similar considerations of expedience, that consensus and agreement through conciliation and mediation may be a more positive, and less destructive, approach to dispute resolution than an adversarial trial. In England, for example, the rule that the loser in civil cases pays costs, including attorney's fees, means that trials can come at a high price, even though the amounts requested may be reduced by a "costs judge" in a given case. The influence of that type of thinking has also made inroads in our country in the form of fee- and costs-shifting statutes.

Trials, to an increasing extent, have become a societal luxury. Correspondingly, the role of the trial judge has taken on new and larger dimensions that are essential to our society's welfare. Specialized training is available to assist judges in learning to facilitate early settlements and how best to be authoritative neutrals or, as case managers, to recommend the most auspicious referral for a non-trial resolution. The courts, as well as numerous other agencies, have put substantial resources into what has become the burgeoning field of how to settle cases and avoid trials. Some judges have experimented with ways to abbreviate trials, such as mini-trials, summary trials, and resolution hearings, and in many state courts and a few federal districts, there is compulsory arbitration of smaller claims, which is subject to *de novo* appeal.

While trials in some form will remain with us, it is predictable that their number will decline further, and that the role of the trial judge will continue to become more managerial, as the objectives of relatively inexpensive and prompt dispute resolution gain further ascendancy. Judges, characteristically, are conscientious and hard-working professionals, and their evolving role is more demanding of their time and energy, and of their capabilities, than the routinistic obligations of the garden variety trial. ⚖

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adults on certain criminal charges. Only one television camera and one still photographer were allowed in the actual courtroom.

Cameras are permitted with judicial consent in California trial and appellate courtrooms. However, courts are required to consider 18 factors in ruling on requests for camera coverage. These factors include the importance of promoting public access to the judicial system, preserving the privacy rights of participants, and maintaining the security and dignity of the court.

In announcing that camera coverage would be permitted in the *Manduley* case, Chief Justice Ronald M. George said, "The more that our courts improve public access to their proceedings the more the public will learn to understand and appreciate the important role that the judicial branch plays in our government." ⚖⚖

—Briefs *by David Richert*

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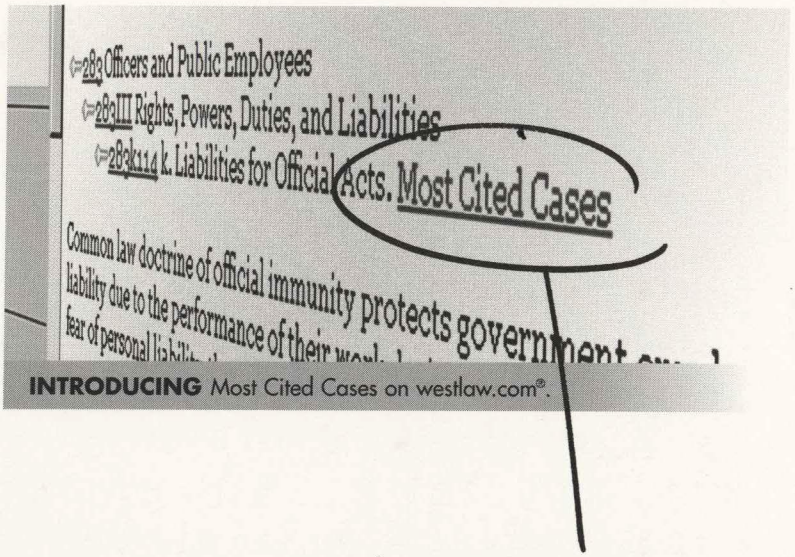

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