

ASSAULTS ON THE JUDICIARY

ATTACKING “THE GREAT BULWARK OF PUBLIC LIBERTY”

Report of the 1998 Forum for State Court Judges



THE *Roscoe Pound*
FOUNDATION

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**THE INDEPENDENCE OF THE JUDGES
IS THE GREAT BULWARK OF PUBLIC LIBERTY,
AND THE GREAT SECURITY OF PROPERTY.**

—JUSTICE JOSEPH STORY
MISCELLANEOUS WRITINGS

Table of Contents

EXECUTIVE SUMMARY	iii
------------------------------------	------------

FOREWORD	1
---------------------------	----------

BACKGROUND ON THE CURRENT CONTROVERSY SURROUNDING JUDICIAL INDEPENDENCE	3
--	----------

PAPERS, ORAL REMARKS, AND COMMENTS	13
---	-----------

Protecting Judicial Independence in a Politicized Environment

Professor Robert O’Neil	13
-----------------------------------	----

Oral Remarks of Professor O’Neil	27
--	----

Comments by Panelists	33
---------------------------------	----

Honorable Robert G. Flanders	33
--	----

Paul McMasters	36
--------------------------	----

Thomas L. Jipping, Esq.	40
---------------------------------	----

Mark S. Mandell, Esq.	43
-------------------------------	----

Response by Professor O’Neil	45
--	----

When Do Legislative Actions Threaten Judicial Independence?

Professor Erwin Chemerinsky	49
---------------------------------------	----

Oral Remarks of Professor Chemerinsky	63
---	----

Comments by Panelists	71
---------------------------------	----

Honorable Mary Ann G. McMorrow	71
--	----

Professor Stephen Wermiel	76
-------------------------------------	----

Mark Behrens, Esq.	78
----------------------------	----

Eugene I. Pavalon, Esq.	81
---------------------------------	----

Response by Professor Chemerinsky	84
---	----

LUNCHEON REMARKS BY PROFESSOR MICKEY EDWARDS 85

THE JUDGES’ RESPONSES 91

POINTS OF AGREEMENT AND CLOSING COMMENTS 131

APPENDICES

 Appendix A: Participant Biographies 141

 Appendix B: Judicial Attendees 145

ABOUT THE ROSCOE POUND FOUNDATION 151

On July 11, 1998, in Washington, DC, 116 judges, representing thirty-eight jurisdictions, took part in The Roscoe Pound Foundation's Forum for State Court Judges. The judges discussed the current controversy over the independence to which the judiciary is constitutionally entitled. Attempts to curtail judicial independence have come in many forms, including organized negative campaigns to drive judges from office for making unpopular decisions, denial of adequate funding for the judiciary, legislative attempts to control outcomes of litigation, and attempts by the legislative and executive branches to treat the courts as ordinary state government agencies rather than as a co-equal branch of government.

Two legal scholars who have been at the forefront of scholarship on the constitutional issues surrounding judicial independence presented papers addressing different facets of this controversy. Their papers were scrutinized by panels, each consisting of a second legal scholar, a lawyer with a differing viewpoint, a judge, and a trial attorney. Responses to the panels' comments were then made by the paper presenters.

- Professor Robert O'Neil, founding director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia, presented a paper titled "Protecting Judicial Independence in a Politicized Environment." He began with some historical examples of assaults on the judiciary and contrasted them with the current, more troubling spate of judicial criticism. He demonstrated that attacks on judges now come from many segments of the political spectrum, that those who wish to attack judges can do so now more readily than ever because of greatly enhanced communications, and that the freedom of judges to respond to criticism has generally diminished. He also reviewed the effect of court rules and codes of conduct on judges' ability to defend themselves. Looking to the other side of the bench, he noted that, while nonlawyer criticism is fully protected under the Constitution's "clear and present danger" standard for free speech, lawyers, as officers of the courts, are more susceptible to sanctions reasonably intended to protect the judicial process. Finally, Professor O'Neil discussed several proposals to counter assaults on the judiciary, including changes in the way judges are selected and retained in office, public education campaigns, and reform of libel law to give judges more recourse to the courts when they are defamed. He also advocated giving judges more latitude in efforts to educate the public directly on the judiciary's work and its crucial role in our system.

- Professor Erwin Chemerinsky, of the University of Southern California Law School, delivered a paper titled "When Do Legislative Actions Threaten Judicial Independence?" He surveyed numerous past attempts to limit judicial independence in both state and federal courts, whether prompted by unpopular decisions, a desire to deny access to the courts to particular classes of litigants, or antipathy to certain types of litigation. He identified the constitutional foundations of judicial independence and cited eight types of legislative actions that may infringe on judicial powers in different ways. He then considered their constitutionality, noting that legislative challenges based on separation of powers

requirements must take a number of factors into account. He concluded that a number of curtailments of independence currently encountered by judges may be unconstitutional, while others may not be. The dividing line between the two types, he warned, is not clear.

Following the commentaries on the papers, the judges divided into seven discussion groups to give their own responses to the papers and, under a guarantee of anonymity, discuss a number of standardized questions.

During lunch the judges heard an address by Mickey Edwards, a former member of Congress from Oklahoma and currently a Lecturer in Public Policy at the John F. Kennedy School of Government at Harvard University. Professor Edwards discussed a number of ramifications of judicial independence and described current efforts to protect it through the newly formed Citizens for Independent Courts, of which he serves as co-chair.

At the closing plenary session, the discussion group moderators reported that consensus had emerged from the dialogue within individual groups, along the following lines:

- There are a number of different approaches to judicial selection, retention, and discipline. All of them have both advantages and disadvantages, both to the judiciary and to the public. The judges were divided, for instance, on the question of “merit” selection versus public election and on lifetime tenure versus periodic re-examination of a judge’s fitness for office.
- Many judges had experienced negative campaigns during judicial elections, often instigated by special interest groups. Criticism is most wide open when elections involve endorsements by political parties. Campaigns by single-issue groups and unwarranted personal attacks are very difficult, if not impossible, to defend against. Negative publicity campaigns are sometimes mounted against judges by the news media and by candidates in legislative and executive branch elections.
- The public has a right to criticize judges, within the bounds established by the law of defamation. Lawyers also should be permitted to speak about judges within the bounds of their codes of professional ethics.
- Judges should have the right to speak out in their own behalf, but their use of that right must be tempered by the responsibility not to take a position on an issue likely to come before them in court in the future. In some situations, it is best to have third parties, such as a court public information specialists or bar representatives, make a measured response to attacks on the judiciary, just as is done by the other branches of government. Avoiding any appearance of partiality or other impropriety is a constant consideration.
- Credibility with the public is essential, and education of the public about the workings of the judicial system and its role in our democracy is important. Judges can and should participate in this effort, speaking to public organizations, opening their proceedings to public view, and even holding some court sessions outside the courthouse—for example, in public schools.

- Many kinds of legislative actions can and do erode judicial independence, some of them in retaliation for particular decisions or lines of decisions. The greatest single legislative threat to judicial independence is the failure or refusal to provide adequate funding for the judicial branch. The best solution to that is to educate legislators and carry on a continuing dialogue with them, particularly in this era when there are fewer lawyers in the state legislatures.
- Judges now work in a different, and more difficult, environment than they did previously, and they cannot afford to isolate themselves from the rest of government and from the public. In the past, the judiciary has been too secretive and too isolated from the public at large, and to some extent judges are now paying the price of past “sins.” But judges also are caught up in an era in which both the executive and legislative branches have lost public respect, and to a degree the judiciary is suffering the same loss of respect, by association with the rest of government.
- Judicial independence must be accompanied by judicial accountability.

Foreword

The Roscoe Pound Foundation's 1998 Forum for State Court Judges was the sixth time judges, legal scholars, and practicing attorneys have come together under our auspices for an open conversation about major issues in contemporary jurisprudence.

The forum is one of the activities The Roscoe Pound Foundation is most proud of. It recognizes the primary role of state courts in our system of justice, and it deals with issues of responsibility and independence that lie at the heart of the judge's work. It was conceived to open the dialogue among the bench, the academy, and the bar. Through it, we hope to find a common meeting ground for legal scholarship and pragmatism.

Those two qualities do not always go together comfortably. As we all know, there is often a gap between the academic point of view and the sometimes rough-edged reality that judges and practitioners see in the courtroom. We want to help bridge that gap, and we believe we can all learn in the process. When judges, scholars, and lawyers take time to examine these issues, sharing their thoughts and their experience, including those of participants who do not agree with the institutional positions of the plaintiffs' bar, they come to understand one another better. They find their ideas tested and their horizons expanded. They come to new conclusions, and sometimes (but not always) they arrive at a consensus.

Our past forums have covered such topics as the impact on state courts of the proposed long-range plan for the federal courts, the impact of the budget crisis on judicial functions, the American Law Institute's Restatement on products liability, and the scientific evidence controversy. The 1998 forum on the independence of the judiciary was particularly topical, considering recent developments in the United States and in the rest of the world.

More than 200 years ago, the founders of our nation designed a constitutional democracy based on a system of checks and balances. A fundamental part of our system is the independent judiciary and its place as a co-equal branch of government. Indeed, it could be easily argued that our democracy has survived precisely *because* we have enjoyed an independent judiciary. Although that concept was rather radical in 1776, its success has earned it a worldwide following. The best evidence is the global effort now being made, especially by the emerging democracies of Eastern Europe and Southeast Asia, to accept, live by, and enforce the rule of law.

Ironically, here in the United States, the bulwark of democracy, self-serving politicians and misinformed citizens appear to want to destroy our constitutional balance. Why is this happening? It is not because the judicial profession has been guilty of wrongdoing or improper conduct on any significant scale. Rather, these mean-spirited personal attacks, threats of impeachment, and even strident partisan political campaigns have often been launched simply because certain individuals or groups disagree with the decisions made by judges. They are practicing the art of intimidation in order to change those decisions.

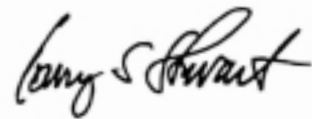
Our courts and their independent judiciary have helped to make America unique by defending our freedoms, protecting our rights, and checking the inevitable abuses of

power. We cannot afford to allow the independence of the judiciary—the commitment judges make to decide cases without fear or favor—to be undermined.

On behalf of The Roscoe Pound Foundation, we want to express our appreciation to Professors Robert O’Neil and Erwin Chemerinsky, who wrote the papers that set our 1998 discussions in motion, and to our panelists, Honorable Robert G. Flanders, Paul McMasters, Thomas L. Jipping, Esq., Mark S. Mandell, Esq., Honorable Mary Ann G. McMorrow, Professor Stephen Wermiel, Mark Behrens, Esq., and Eugene I. Pavalon, Esq. We greatly appreciate the contribution to the forum made by our luncheon speaker, Professor Mickey Edwards of Harvard University’s John F. Kennedy School of Government. We also thank the moderators of the small group discussions for facilitating the discussions and reporting on areas of agreement. And, of course, we thank our distinguished group of attending judges who shared with us their great fund of wisdom and experience.



Howard F. Twigg
President, The Roscoe Pound Foundation



Larry S. Stewart
Forum Program Chair

Some Background on the Current Controversy Surrounding Judicial Independence

One evening in 1948, at a social event sponsored by the Association of the Bar of the City of New York, a New York State judge named James Garrett Wallace took to the stage and sang a song of his own composition. Through it, he commented on a method of judicial “merit” selection then in operation in Missouri and its likely effect on the diversity of the judiciary if it were adopted widely. The tune has probably been lost, but the lyrics included the following:

*Oh, the Old Missouri Plan,
Oh, the Old Missouri Plan,
When Wall Street lawyers all judicial candidates will scan
If you're not from Fair Old Harvard,
They will toss you in the can....*

*Oh, the Old Missouri Plan,
Oh, the Old Missouri Plan,
It won't be served with sauerkraut nor sauce Italian.
There'll be no corned beef and cabbage,
And spaghetti they will ban;
There'll be no such dish as gefilte fish
On the Old Missouri Plan.¹*

Whether or not they agreed personally with him, no doubt many current-day judges would be impressed by Judge Wallace’s wit, his sense of social justice and responsibility, and his courage, both in bringing up the issue in a public forum and in doing so in music and rhyme. They would also very likely be horrified to find any judge doing the same in 1998, and fearful for the tenure of such a judge.

In its day, Judge Wallace’s ditty touched on at least two issues that were still alive and well (and still troublesome to judges) fifty years later, at the time of The Roscoe Pound Foundation’s 1998 Forum for State Court Judges:

- The critical issue of how judges should be selected in a democratic society, and the pros and cons of both the electoral process and the merit selection system. This includes concerns that ideological “litmus tests” may be used in the nomination process and that, by the time judges take office, they may be beholden to special interests or to the political leadership of the moment.²

1 Quoted in Charles E. Clark and David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 272–73 n.59 (1961). The song is reprinted in THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 66 (1985).

2 See, e.g., Lawrence S. Okinaga, *Choose Judges for Merit, Not Ability to Win Elections*, USA TODAY, August 13, 1998, at 13A (written by the then-current president of the American Judicature Society); Sheila Kaplan and Zoë Davidson, *The Buying of the Bench*, THE NATION, January 26, 1998, at 11; <www.thenation.com/1998/issue/980126/0126kapl.htm>.

- The right—some would call it the *responsibility*—of the judiciary, individually or collectively, to speak out on matters of public policy that affect the administration of justice. This includes concerns about political attacks on judges and their decisions and the related question of how advisable it is for individual judges to respond to such attacks personally rather than relying on institutional judicial representatives to do so.³

Both of those issues were discussed at the 1998 forum, along with several other current concerns relating to judicial independence, including the following:

- The proper role of the news media in reporting what goes on in courtrooms and the proper response by judges when the media fail to report accurately and fairly.⁴
- Free speech issues involving lawyers who are officers of the court but whose behavior and speech have the potential to interfere with the administration of justice.⁵
- Legislative encroachments on the rights and responsibilities of the judicial branch through direct enactment of statutes that change prior law.
- Deliberate inaction by legislatures on judicial nominations to exert political pressure on the judiciary as a whole or on the executive branch.⁶

3 For a survey of judicial attitudes on political attacks, their effects on public confidence in the judiciary, and judges' attitudes about responding to them, see KEVIN M. ESTERLING, *JUDICIAL INDEPENDENCE, PUBLIC CONFIDENCE, AND STATE/FEDERAL JUDICIAL COOPERATION IN THE MIDWEST: RESULTS FROM AN AJS SURVEY OF MIDWEST JUDGES* (American Judicature Society 1997). See also H. Lee Sarokin, *A Judge Speaks Out*, *THE NATION*, October 13, 1997, at 15, <<http://www.thenation.com/1997/issue/971013/1013saro.htm>> (deploring what he called the "Willie Hortonizing" of the federal judiciary).

4 See, e.g., Sandra Torry, *How to Face-Off with the Enemy . . . Er, Media*, *WASHINGTON POST*, August 11, 1997, at F7 (describing media relations seminar held at 1997 ABA convention).

5 See, e.g., Richard Willing, *Disorder on the Rise in Nation's Courts*, *USA TODAY*, August 6, 1997 (describing "an outbreak of rude, crude and downright uncivil behavior by lawyers in the nation's courts"); Mark Hansen, *It Didn't Please the Court: Texas Supreme Court Refers a Lawyer for Possible Disciplinary Action Because He Insulted the Justices*, *ABA JOURNAL*, May 1998, at 20.

Cf. the late Nobel Prize winner Isaac Bashevis Singer's description of the obstreperous conduct of *pro se* litigants at a Din Torah (a rabbinic trial) conducted by his father in Warsaw when he was a child:

I listened attentively to every insult, every curse. There was quarreling and bickering, but every once in awhile someone ventured a mild word or the suggestion that it was senseless to break off [an engagement to marry because of insulting behavior between the couple]. Others, however, raked up the sins of the past. One minute their words were wild and coarse, but the next minute they had changed their tune and were full of friendship and courtesy. From early childhood on, I have noted that for most people there is only one small step between vulgarity and "refinement," between blows and kisses, between spitting at one's neighbor's face and showering him with kindness.

ISAAC BASHEVIS SINGER, *IN MY FATHER'S COURT*, 70 (1966).

6 See Sandra Torry, *Putting the Magnifying Glass on the Evaluators*, *WASHINGTON POST*, March 17, 1997, at F7 (describing conflict over confirmation of federal judges). *Cf.* Peter Baker, *Clinton Says Republicans Are 'Threat' to Judiciary*, *WASHINGTON POST*, September 28, 1997 (reporting on the President's Saturday radio address criticizing the U.S. Senate for acting on only twenty of seventy judicial nominations submitted in 1997); THOMAS L. JIPPING, *SELECTING AND CONFIRMING FEDERAL JUDGES: WHAT HAS GONE WRONG?* 45 (National Legal Center for the Public Interest, Monograph No.14, 1997) (arguing that "Senators have an obligation, stemming from their oath to support and defend 'the' Constitution, to oppose the appointment of judicial activists to the federal bench"); Robert S. Greenberger, *GOP Fights to Limit Scope of Clinton's Judicial Legacy*, *WALL STREET JOURNAL*, May 24, 1999, at A32.

- The use, or threats of use, of the judicial discipline process (including impeachment) to intimidate or punish judges for a variety of possible reasons, including “judicial activism.”⁷
- The limits placed on members of the judiciary in their involvement with private legal organizations, and attempts to lobby judges through methods both subtle and not-so-subtle.⁸

JUDGES GIVE THE LAW

Why are there assaults on judges and on the judiciary as a whole? Why are there attempts to influence, embarrass, intimidate, and overwork judges? Why are there attempts to stifle judges’ exercise of free speech? Why are there attempts to exclude lawyers from appointments to the bench? Why are there attempts to dictate judges’ decisions, and sometimes to preclude all judicial action in some areas entirely? Perhaps the best answer is that the judiciary is under assault by those who do not like current law or are impatient with its processes, precisely because *judges give the law*. A judge who can be intimidated may “give” different law. A judge who is driven from office will “give” no law at all.

The notion that law comes from judges has distinguished roots. John Chipman Gray, one of the parents of the legal realism movement in American jurisprudence, stated forthrightly that

The law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties. . . .

. . . [N]o rule or principle which [the highest judicial tribunal of a country refuses] to follow is Law in that country. However desirable, for instance, it may

7 See, e.g., Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Anthony Lewis, *Destroy the Guardians*, NEW YORK TIMES, April 7, 1997 (criticizing suggestion of Rep. Tom DeLay (the House of Representatives Majority Whip) that “activist” judges should be impeached); Anthony Lewis, *Beware, Judicial Activist!*, NEW YORK TIMES, June 2, 1997 (criticizing new “watchdog” organization to guard against judicial activists, and observing that “some of the most radical, precedent-breaking ideas these days come from judges called conservative”); Tony Snow, *Seeking Relief from Judicial Tyranny*, WASHINGTON TIMES, March 17, 1997 (criticizing “judicial activism” but disagreeing with Rep. DeLay’s suggestion); Eugene W. Hickok, *Judicial Activism: An Inadequate Method of Ensuring Quality Education* (Washington Legal Foundation, Working Paper No. 93, 1999); Trent Lott, *Rehnquist’s Rush to Judgment*, WASHINGTON POST, February 2, 1998, at A19 (“ . . . many lifetime-appointed judges actually attempt to make law from the bench”).

8 See, e.g., Ruth Marcus, “Issues Groups Fund Seminars for Judges,” WASHINGTON POST, April 9, 1998, at A1 (describing complimentary multiday seminars on environmental and property issues held at western resorts for federal judges by legal organizations that fund litigation on the same issues); Tom Hamburger and Greg Gordon, “Tobacco Firm Linked to Travel by Judges,” MINNEAPOLIS STAR TRIBUNE, July 19, 1998, at A1; Editorial, “Maine Judges Were Wrong to Accept Free Western Trips,” KENNEBEC JOURNAL, May 4, 1998; Elizabeth Caldwell, “Judges Advised Against Joining Lawyers’ Group,” ARKANSAS DEMOCRAT-GAZETTE, April 22, 1999 (reporting on a ruling by Arkansas Judicial Ethics Advisory Committee that acceptance of complimentary judicial membership in the Arkansas Trial Lawyers Association would violate the Arkansas Code of Judicial Conduct); John J. Fialka, “How Koch Industries Tries to Influence Judicial System,” THE WALL STREET JOURNAL, August 9, 1999 (detailing corporate support for courses on “market-based” economics for judges and for development of a “pro-business”/“anti-business” rating system for appellate judges).

be that a man should be obliged to make gifts which he has promised to make, yet if the courts of a country will not compel him to keep his promise, it is not the law of that country that promises to make gifts are binding. . . .

. . . *As between the legislative and judicial organs of a society, it is the judicial which has the last say as to what is and what is not Law in a community.*⁹

(When Professor Gray wrote his essay, of course, every supreme court was, in fact, made up of “old gentlemen,” but with that difference, the principle is presumably as true today as it was then.)

In one of the most famous legal essays of all time, Justice Holmes took the question out of the theoretical and into the practical (for lawyers, at least), using a hypothetical of a “bad man” who wants only to know just how far he can go along a particular course of conduct without running afoul of the law:

[I]n societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. . . .

. . . [I]f we take the view of . . . the bad man we shall find that he does not care two straws for the axioms and deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of his mind. *The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*¹⁰

More succinctly and colorfully, the related notions of judicial independence and of judges as the source of the law were illustrated by Harvard Law School professor Lon L. Fuller, an avid sports fan who frequently used the image of the baseball umpire to illustrate his points:

*As between the legislative
and judicial organs of a
society, it is the judicial
which has the last say as
to what is and what is not
Law in a community.
—John Chipman Gray*

[The game of baseball should not] be taken with such solemnity that a little enlivening touch of advocacy may not be tolerated. After all, we should remember the remark of an old time umpire—a remark pregnant with meaning for legal and moral philosophy—“some is balls and some is strikes, and some ain’t nothin’ ‘til I calls ‘em.”¹¹

9 John Chipman Gray, *The Judge as Law-Giver*, in *THE NATURE OF LAW* 187–88, 197 (1966) (emphasis added).

10 Oliver W. Holmes, Jr., *The Law As Predictions of What Courts Will Do*, in *THE NATURE OF LAW* 175, 179 (1966); reprinted from Oliver W. Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897) (emphasis added).

11 What appears to be a debate, employing this anecdote, between Professor Fuller and Professor Yale Kamisar on ethical issues is used by the Center for Ethics at the University of Idaho as an instructional exercise. A partial transcript may be viewed at www.ets.uidaho.edu/center_for_ethics/paperthr.htm.

The confident and independent judiciary that is implicit in the observations of Gray, Holmes, and Fuller is closely connected to, and dependent on, the independence of the legal profession as a whole, which itself relies on the independence of law from (and its role as an antidote for) the regime of raw power.¹² The exercise of power is restrained by the force of law, by the work of lawyers, and by the independence of the judiciary. Thus, naturally, those who are impatient with the rule of law or reject it outright have only a few real avenues by which they can secure their interests: lobbying for more favorable laws, co-opting lawyers to do their bidding,¹³ and undermining judicial independence. In extreme cases—not unheard of even now, throughout the world—they sometimes deprive their societies of a rule of law by eliminating those who undertake to uphold it.¹⁴

Thus the law and the independent judiciary needed to enforce it often must depend strongly on the corresponding independence and the public spirit of the bar. As summarized by a recent president of the New York State Bar Association (NYSBA),

Historically, one of the legal profession's greatest strengths has been that, in the final analysis, its members have been utterly independent of any commitment other than to the rule of law. Lawyers have always been free to reject a client's

12 The late Jacob Bronowski cited a symbolic acknowledgment of the ascendancy of law over brute force in Iceland, where the country's national assembly (the "Althing") met in medieval times in a natural amphitheater called Thingvellir. The site, he said, was remarkable for the fact that it had been confiscated from a farmer who was guilty of murder—not of another farmer, but of a slave—and was subsequently outlawed. JACOB BRONOWSKI, *THE ASCENT OF MAN* 411 (1973).

13 Roscoe Pound defined "profession" as "an organized calling in which men pursue a learned art and are united in the pursuit of it as a public service— . . . no less a public service because they may make a livelihood thereby." Roscoe Pound, *The Professions in the Society of Today*, 241 *NEW ENG. J. MED.* 351 (1949). For an extensive (albeit partisan) look at the legal profession that asserts that many lawyers favor the attainment of the private goals of their clients over what should be their commitment to public service and justice, see RALPH NADER & WESLEY SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996), reviewed in 4 *CIV. JUST. DIG.*, Winter 1997, at 4. (The *CIVIL JUSTICE DIGEST* is a publication of The Roscoe Pound Foundation.)

14 Shakespeare's line for Dick the Butcher, "First thing we do, let's kill all the lawyers" (*Henry VI, Part II*, Act IV, Scene 3), is the most succinct expression of this desire, which is still alive and well. A very current illustration is a story from the Public Broadcasting System's *PBS NewsHour* on Byron Kelmendi, described by journalists as "Kosovo's leading human rights lawyer" and a leader in the effort to indict Yugoslav president Slobodan Milosevic for war crimes before the International Court of Justice in the Hague. On the first night of NATO's bombing of Yugoslav military installations (March 24, 1999), Kelmendi and his two sons (aged thirty and sixteen) were abducted from their home in Pristina at gunpoint by unmasked Serbian police. Their "tortured and bullet-ridden bodies" were discovered on a street in Pristina two days later. For Milosevic's despotic regime, it was literally one of "the first things we do." The story of Kelmendi's murder and his wife's return home after peace was restored is viewable at <http://www.pbs.org/newshour/bb/europe/jan-june99/crimes_6-18.html>.

Another, more optimistic, PBS report described the complex process of Kosovo's recovery from the combined effects of war and ethnic violence. A reporter related that "aid workers are now trying to restore basic services, power, water, and police. And they are pleading for help." A spokesman for the United Nations High Commissioner for Refugees (UNHCR) said, "For this reconstruction effort, we are broadcasting appeals . . . for refugees who have special expertise, people like water engineers, sanitation engineers, civil engineers, *lawyers*, doctors, administrators, some of these people who really have special knowledge *and who are crucial for rebuilding society*." (emphasis added) The report is viewable at <http://www.pbs.org/newshour/bb/europe/jan-june99/reconstruct_6-21.html>.

For a broad examination of a hypothetical return to a "might equals right" system in the United States, see INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, *LAW AND SOCIETY FOLLOWING THE DEMISE OF THE LEGAL PROFESSION* (1994).

Historically, one of the legal profession's greatest strengths has been that its members have been utterly independent of any commitment other than to the rule of law.

—James C. Moore

request or to counsel against a course of action. Indeed, it was an early and well-regarded NYSBA president (1910), Elihu Root, who said, "About half of the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop."¹⁵

ASSAULTS ON, AND DEFENSES OF, JUDICIAL INDEPENDENCE

Current efforts to encroach on judicial independence come in a variety of forms, and their varying legitimacy (and, in some cases, constitutionality) was a principal subject of the 1998 forum.

Some efforts are broadly and traditionally legislative, with special interest organizations securing the introduction, and sometimes the passage, of bills that seek to restrain judicial interpretation of constitutions and statutes.¹⁶ Others suggest constitutional litigation in federal courts, challenging the authority of the state courts to interpret their constitutions in derogation of the policymaking function of the state legislatures.¹⁷

Some efforts focus on the judicial selection and retention processes. Scrutiny of candidates for judicial office, whether through an executive nomination process or through initial or retention elections, gives both the general public and legislators legitimate opportunities to inquire into prospective judges' philosophies. However, it can also result in efforts by organizations with narrow interests (e.g., education, victims' rights, taxation, and civil rights) to "rate" judges on the basis of their

15 James C. Moore, *Lawyer Independence: Being Able to Tell the Client 'You Are a Damned Fool!'*, *NEW YORK STATE BAR JOURNAL*, January 1999, at 5.

A poignant account of the failure of a notable lawyer to exercise sufficient independence from his "client," with disastrous results for many of those involved, appeared in the recent obituary of Nixon presidential adviser John Ehrlichman:

While in the White House, with the president as his boss, he said he had "an exaggerated sense of my obligation to do as I was bidden, without exercising independent judgment in the way I might have if it had been an attorney-client relationship."

"I went and lied," he said, "and I'm paying the price for that lack of willpower. I, in effect, I abdicated my moral judgments and turned them over to somebody else."

"And if I had any advice for my kids, it would be never to never, ever defer your moral judgments to anybody. . . . That's something that's very personal. And it's what a man has to hang on to."

Martin Weil, *Key Nixon Adviser John D. Ehrlichman Dies*, *WASHINGTON POST*, February 16, 1999, at B6.

16 One example is the American Legislative Exchange Council's "Separation of Powers Act" and "Adoption of Common Law Act." See *Tort Revisionists Attack Courts' Authority to Hold Tort 'Reform' Statutes Unconstitutional*, 5 *CIV. JUST. DIG.*, Winter 1998, at 3. For discussion of an example on the criminal side, see Anthony Lewis, *Menacing the Judges*, November 3, 1997 (commenting on a bill introduced by Pennsylvania Senator Arlen Specter intended to greatly restrict habeas corpus remedies, in response to a much-criticized ruling by a federal court barring retrial in a state criminal prosecution. Senator Specter is quoted as saying, "This is a very responsible approach. It's a safety valve. It shows something can be done—not impeachment, not death threats. It's a matter of putting some restraints on so you can talk to the wild people.").

17 See, e.g., James D. Zirin, *Roadblocks to Tort Reform*, *FORBES*, January 11, 1999, at 80 (asserting that some courts "have thwarted the will of the people as determined by the legislatures" and suggesting litigation in federal court under Art. IV, sec. 4 of the United States Constitution, which guarantees "a Republican form of government" to every state).

decisions, and in the use of “litmus tests” for political affiliations and inclinations toward judicial activism in any number of areas, for the purported purpose of ferreting out candidates who might be inclined to be “imperialist”:

[C]ourts that insert themselves into the political process by behaving like superlegislatures will find themselves subject to other forms of political heat. Look for more Rose Bird-style campaigns to unseat imperialist judges in states where the judiciary is elected, and heightened pressure to influence the judicial appointment process in states where it is not.¹⁸

Other scrutiny of candidates focuses on narrower issues. Thus Ed Murnane, president of the Illinois Civil Justice League, writing about the Illinois Supreme Court’s decision in *Best v. Taylor Machine Works, Inc.*, which was discussed at the forum by Professor Chemerinsky and by Justice McMorrow of the Illinois Supreme Court, observed that

[a]lthough the final outcome was not what we wanted, we proved, and we learned, that the Courts need our attention. . . . [W]e learned that if we abdicate our responsibilities to participate in the judicial selection process, we’re going to get the kind of judiciary we deserve.”¹⁹

For their part, even judges who presumably support the concept of judicial independence are not all of a single mind on the subject of judicial “activism.” Thus Judge Ralph Winter of the U.S. Court of Appeals for the Second Circuit has argued that judicial activism often reflects “reformist” attitudes (namely, “hostility to a pluralist, party dominated, political process,” “a demand for ‘rationality’ in public policy,” and “skepticism about the morality of capitalism”) without being able to carry out true reform:

The cumulative impact of these attitudes ought to be a source of apprehension. They reflect a lack of understanding of the full political process and of the mysteries of government along with a generalized hostility to important institutions in our society which they seek to weaken but not replace.²⁰

In contrast, the late Judge Frank Johnson of the Eleventh Circuit wrote that

[I]n an ideal society, [judicial judgments and decisions criticized as “activist”] should be made, in the first instance, by those whom we have entrusted with these responsibilities. It must be emphasized that, when governmental institutions fail to make these judgments and decisions in a manner which comports with the Constitution, federal courts have a duty to remedy the violation. In summary, it is my belief that the judicial activism which has generated so much criticism is, in most cases, not activism at all. Courts do not

18 Dick Thornburgh, *A New Judicial Imperialism*, THE WALL STREET JOURNAL, May 18, 1998, at A23. See also Anthony Lewis, *Moving the Judges*, April 27, 1998 (quoting Senator Orrin Hatch of Utah as saying, “I’m as strong a proponent of an independent judiciary as there is. . . . But where I get tough is where judges want to make the law”, and Senator Jeff Sessions of Alabama asking nominees for federal judgeships, “Are you a member of the American Civil Liberties Union or have you ever been?”).

19 Ed Murnane, guest column, 3 ATRA REFORMER, Spring 1998, <www.atra.org/reformer/98spring.htm>.

20 Ralph K. Winter, *The Activist Judicial Mind*, in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 290, 291, 302 (1985).

relish making such hard decisions and certainly do not encourage litigation on social and political problems.

But the federal judiciary in this country has the paramount and the continuing duty to uphold the law. When a “case or controversy” is properly presented, the court may not shirk its sworn responsibility to uphold the Constitution and laws of the United States. The courts are bound to take jurisdiction and decide the issues, even though those decisions result in criticism. The basic strength of the federal judiciary has been, and continues to be, its independence from political and social pressures.²¹

In the face of these pressures, there remain judges who defend judicial independence and advocate a measured, rational form of judicial “activism” in the small number of cases in which the circumstances require it. Thus U.S. District Judge J. Thomas Greene of Utah recently told the Federal Bar Association,

When cautiously and deliberately applied, judicial activism can and should be utilized to achieve improvements in the conduct of litigation, to achieve improvements in court reform, and to achieve just results by filling in open spaces and gaps in the law after following the process of principled decision making.²²

And Judge Sarokin, questioning the motivation of some critics of judicial independence, has suggested that it

is essential to our democracy. Those who seek to tamper with it to gain a momentary political victory for themselves will cause a greater and more lasting loss to the public, and to the confidence in our judicial system, without which the rule of law cannot survive.²³

THE FORUM

One hundred sixteen judges, representing thirty-eight jurisdictions, took part in The Roscoe Pound Foundation’s 1998 Forum for State Court Judges. Their deliberations were based on original papers written for the forum by Professor Robert O’Neil, founding director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia (“Protecting Judicial Independence in a Politicized Environment”), and Professor Erwin Chemerinsky, of the University of Southern California Law School (“When Do Legislative Actions Threaten Judicial Independence?”). The papers were distributed to participants in advance of the meeting, and the authors also made less formal oral presentations of their papers to the judges. Each paper presentation was followed by discussion by a panel of distinguished commentators.

21 Frank M. Johnson, Jr., *Judicial Activism Is a Duty—Not an Intrusion*, in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 279, 283–84 (1985).

22 J. Thomas Greene, *Activist Judicial Philosophies on Trial* (November 6, 1997) (unpublished address to annual litigation practice seminar, Federal Bar Association, on file with The Roscoe Pound Foundation’s CIVIL JUSTICE DIGEST).

23 H. Lee Sarokin, *A Judge Speaks Out*, THE NATION, October 13, 1997, at 15, <<http://www.thenation.com/1997/issue/971013/1013saro.htm>>.

Responding to Professor O’Neil’s paper were Honorable Robert G. Flanders of the Rhode Island Supreme Court; Paul McMasters, First Amendment ombudsman at the Freedom Forum in Arlington, Virginia; and Mark S. Mandell, Esq., of Providence, Rhode Island, who was the 1998–99 president of the Association of Trial Lawyers of America. Thomas L. Jipping, Esq., vice president of the Free Congress Foundation and director of its Center for Law and Democracy and its Judicial Selection Monitoring Project, was invited to serve as a panelist and to comment on Professor O’Neil’s paper but was unable to attend the forum. He was offered an opportunity to submit written comments on Professor O’Neil’s paper, and they are included in this report, along with a written response by Professor O’Neil.

Responding to Professor Chemerinsky’s paper were Honorable Mary Ann McMorrow of the Illinois Supreme Court; Professor Stephen Wermiel, associate professor at Georgia State University Law School; Mark Behrens, Esq., of counsel to the law firm of Crowell and Moring in Washington, DC and co-counsel to the Product Liability Coordinating Committee and the American Tort Reform Association; and Eugene I. Pavalon, Esq., a trial lawyer practicing in Chicago, Illinois, and a past president of The Roscoe Pound Foundation and the Association of Trial Lawyers of America.

During lunch the judges heard an address by Mickey Edwards, a former member of Congress from Oklahoma, currently a Lecturer in Public Policy at the John F. Kennedy School of Government at Harvard University and co-chair of the newly formed Citizens for Independent Courts.

After each paper presentation and commentary, the judges separated into seven small groups, led by Fellows of The Roscoe Pound Foundation, to discuss the issues raised in the paper. The paper presenters and commentators visited the groups to share in the discussion and respond to specific questions. The discussions were tape-recorded and transcribed by court reporters, but, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the forum. A selection of the judges’ comments appears in this report.

At the plenary session that closed the forum, the moderators summarized the judges’ views of the issues under discussion, participants in the forum had a final opportunity to ask questions, and Professors O’Neil and Chemerinsky made brief concluding remarks.

This report is based on the papers written and presented by Professors O’Neil and Chemerinsky and on transcripts of the plenary sessions and group discussions.

James E. Rooks, Jr.

Forum Reporter

PROTECTING JUDICIAL INDEPENDENCE IN A POLITICIZED ENVIRONMENT

Robert M. O'Neil © 1998

Professor O'Neil begins with a review of several historical examples of assaults on the judiciary and contrasts them with the current, more troubling spate of judicial criticism in two ways: Because of improved information technology, current attacks are spread faster and more widely than was the case with earlier incidents, and they emanate not only from the political fringe, but from prominent legislators and members of the bar as well. Critics have broader license to attack than they did formerly; the freedom of judges to respond has, if anything, diminished; and the attacks have become integrated into the broader political strategies of a number of groups.

Professor O'Neil then summarizes the restrictions placed on judges by court rules and codes of judicial conduct. Judges generally lack access to mass media, and also are restricted from making public statements that may imply partiality or diminish the stature of the judiciary. Nevertheless, he cites two recent cases involving judges' public statements—either in defense of their records or on clearly political topics—that may evidence the emergence of a more sympathetic approach by courts to judicial expression.

On the other side of the bench, Professor O'Neil outlines several federal cases involving criticism by both lawyers and nonlawyers. While nonlawyer criticism is fully protected under the Constitution's "clear and present danger" standard for free speech, lawyers, as officers of the courts, are more susceptible to sanctions intended to protect the judicial process. Even in this area, however, there has been recent movement.

Finally, Professor O'Neil mentions several proposals from other quarters for action to counter assaults on the judiciary. These include public education campaigns conducted by bar organizations and changes in the way judges are selected and retained in office. Some other suggestions would require greater restrictions on anti-judicial speech, and reform of libel law to give judges more recourse to the courts when they are defamed—with all of the obvious constitutional problems the latter ideas bring with them. In the absence of other responses that will be workable in our constitutional and legal system, Professor O'Neil suggests that judges themselves (as "the persons who are most expert about, and are best able to demystify, the workings of our courts") be allowed greater latitude in efforts to educate the public as to what the judiciary does and the crucial role it plays in our system.

The theme of this forum evokes a particularly poignant memory. In the late summer of 1963, the United States Supreme Court convened in San Francisco to honor Chief Justice Earl Warren, just as I finished my first month of law teaching at Berkeley. The capstone event was a tribute at the Masonic Auditorium on Nob Hill. As the dignitaries were entering the building, an elderly female protestor bearing an anti-Warren placard thrust into the hands of a startled Chief Justice a leaflet that urged his immediate impeachment. The ever genial Warren regained his composure, smiled graciously, and accepted the flier with aplomb. For me, having just begun to teach constitutional law, this was a momentous experience. That image has remained vivid ever since. The memory seems especially fitting as we revisit these issues today.

That encounter between Earl Warren and the demonstrator demanding his impeachment reminds us these concerns are hardly new to the '90s. Judges and their opinions have been targets of attack, often intemperate, since the earliest days of the Republic. John Marshall probably took as much grief in the press of his time as has any successor Chief Justice—criticism from several presidents, as well as from editors and columnists. Much later, President Theodore Roosevelt said of the great Justice Oliver Wendell Holmes—who, he felt, had betrayed him in an antitrust case—that he “could carve out of a banana a judge with more backbone than that.” TR then declared that Holmes would never again set foot in the White House.¹

At a forum which proudly carries the name of Roscoe Pound, we might recall that nearly a century ago, this eminent dean of deans warned that a major cause of public distrust of the legal system was “public ignorance of the workings of courts due to ignorant and sensational reports in the press.”² So the issues we address today are surely not new, however much the targets of current attacks may feel like pioneers.

Nor, for that matter, are such indignities unique to the United States; a recent column in Canada's newsweekly *Maclean's*, headed “Potshots at the Judiciary,” notes with alarm: “The past few weeks have been open season on the men and women who preside over our courts.” The author laments an unprecedented “spate of robe-bashing” at both federal and provincial levels, and wonders whether Canada's courts will be able to withstand such a “popular frenzy.”³

Nonetheless, the intense judicial criticism of the late 1990s is not simply business as usual. In several ways, the current round of attacks on the bench seem more troubling than those of any time in the past. For one, the sheer speed with which such corrosive messages travel, and the vast impact they acquire through modern communications technologies, distinguish the current situation not only from colonial times, but also from the age of Earl Warren.

Those same information technologies have also brought the courts and their business into the living rooms and the daily lives of a far larger portion of the public than ever before. Even as an unrequited champion of cameras in the courtroom, and of openness in government, I recognize the degree to which such intense coverage has made a

1 See Michael Daly Hawkins, *Judges on Judging: Dining with the Dogs: Reflections on the Criticism of Judges*, 57 OHIO ST. L. J. 1353, 1360 (1996) (citing LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 405 (1991)).

2 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address at the Convention of the American Bar Association, August 26, 1906, in 35 F.R.D. 273, 289 (1964).

3 Bruce Wallace, *Potshots at the Judiciary*, *MACLEAN'S*, April 27, 1998, at 25.

fragile institution more visible and thus more vulnerable than ever before—perhaps without materially improving public understanding of the law, the courts, and why judges do things the way they do.

A second difference lies in the source of these attacks. Bench-bashing seems to have moved from the fringe, where it once was largely confined, to the mainstream. Instead of the little old lady in tennis shoes who thrust the impeachment flier into Earl Warren’s hand, today’s critics are to a distressing degree prominent members of Congress and of the bar. Attacking judges, once seen primarily as the perverse province of extremists—with an occasional President of the United States, as I mentioned above—has become an eminently reputable activity for the political and legal establishment.

Let me note other ways in which the equation has altered. On one hand, the critics—even highly intemperate critics—seem now to enjoy a measure of legal license they did not always have. While lawyers are still constrained to a greater degree than others, even the anti-judicial speech of attorneys has been progressively unshackled. This trend is, on the whole, one that we champions of free expression applaud. Nonetheless, it is potentially worrisome in the current climate because of the political purposes to which the old tradition of judge-bashing has been turned lately.

Meanwhile, freedom of speech for judges has not fared so well. The capacity for judicial response, even to highly intemperate criticism, is severely constrained by canons and norms of judicial ethics—though there have been several encouraging developments, of which I shall speak later.

Finally, there is the deeply troubling, ever tighter nexus between attacks on judges and political strategies and outcomes. The last presidential campaign focused to an unprecedented degree on the selection of federal judges, and came as close as at any time I can recall to offering a pledge by one candidate to reshape the views of the federal bench on specific issues of obvious concern to anxious voters. While the outcome of the election may moot the immediate threat, the prospect persists in ominous form at the state level as well as in Congress. Stephen Bright, director of the Southern Center for Human Rights in Atlanta and a close observer of these phenomena, wrote late last year:

Politicians have long blamed judges for forcing them to take unpopular actions. . . . But many of these politicians had enough respect for the courts that they were careful not to take their criticism too far. Today, however, politicians criticize judges for the purpose of intimidating them and getting specific results.⁴

So in all these ways, the current attack on the judiciary evokes a greater measure of alarm than anything we have witnessed before. This situation creates a most fitting theme for this forum.

There is a deeply troubling, ever tighter nexus between attacks on judges and political strategies and outcomes.

4 Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997).

The purpose of this paper is to address three issues: First, to what degree may judges respond to attacks upon them and their decisions? Second, to what extent are attacks upon the judiciary—even irresponsible and damaging attacks—protected by the First Amendment? Third, what may be done, within these constitutional limits, to enhance the civility and rationality of such discourse—and, in the process, to protect the judicial independence that is presently under attack?

HOW MAY JUDGES RESPOND TO CRITICISM?

Let us start in the judge’s corner, and think about the degree to which verbal attacks on the judiciary may be countered or corrected. The conventional wisdom is that which New York Court of Appeals Chief Judge Judith Kaye has recently and helpfully explained:

[T]o secure an impartial forum, even for their most vocal critics, and to assure the dignity of the judicial process, judges by and large must stay out of the fray. They do not duel with public officials about the correctness of their decisions; they do not conduct press conferences about cases; and they have no call-in radio and television programs to explain their rulings. They rely on their decisions, whether written or oral, to speak for themselves.⁵

Stephen Bright adds the practical caveat that “judges do not command the media attention of a presidential candidate, [and] do not start media ‘feeding frenzies.’”⁶

Judges have been taken to task for what would seem to most lay people, and even to many experts, wholly innocuous public statements.

These constraints have been embodied in the Model Code of Judicial Conduct and comparable canons of judicial ethics and responsibility with which any group of judges is intimately familiar, and on which elaboration here would be presumptuous. Such constraints, as Chief Judge Kaye notes, “bar judges from making statements that detract from the dignity of office, commenting publicly on the merits of a pending or impending action, or making any statements that cast doubt on their impartiality.”⁷

The cases are legion in which judges have been taken to task for what would seem to most lay people, and even to many experts, wholly innocuous public statements.⁸ To cite but one case, in which our Center filed an amicus curiae brief in the United States Supreme Court last year, New Jersey trial judge Evan Broadbelt was barred from even appearing as a commentator on Court TV because the network has commercial sponsors, even though he scrupulously avoided any comment on cases pending in New Jersey or likely ever to come before his court.⁹ In myriad situations where other citizens holding

5 Judith S. Kaye, *Safeguarding A Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 711–12 (1997) (part of Symposium on Judicial Independence).

6 Bright, *supra* n.4, at 326.

7 Kaye, *supra* n.5, at 712.

8 See generally Gregory C. O’Brien, *The Sound of the Gavel: Perspectives on Judicial Speech: Speech May be Free, and Talk Cheap, but Judges Can Pay A Heavy Price for Unguarded Expression*, 28 LOY. L.A.L. REV. 815 (1995).

9 In re: Inquiry of Broadbelt, 146 N.J. 501, 683 A.2d 543 (1996), *cert. denied*, 117 S.Ct. 1251 (1997).

any other position would be completely free to speak, judges are held to appreciably higher standards, reflecting the values Chief Judge Kaye outlined.

Judges have not always been so severely constrained. Chief Justice John Marshall, albeit under a pseudonym, answered his critics through a series of letters to a newspaper editor, explaining and defending both the Court over which he presided and the merits of particular decisions.¹⁰ Former ABA President Talbot (Sandy) D'Alemberte notes that “the level of tolerance shown judicial speech since the birth of the United States has fluctuated depending upon the passion of the speech, the popularity of the speaker, and the power of those against whom the speech was directed.”¹¹ Yet the conventional wisdom these days is, as Chief Judge Kaye recently observed, that judges are expected to suffer in silence, no matter how inflammatory or inaccurate the attack may be.

Even in these circumspect times, one would be naive to insist that judges must always be seen but not heard, save for technical rulings from the bench and innocuous graduation speeches or after-dinner tributes. The best catalogue of the occasions for judicial speech I have found comes from an article written several years ago by my colleague at this forum, Professor Erwin Chemerinsky:

There are many reasons why a judge decides to talk to the press. Perhaps the judge wishes to criticize an aspect of the legal system and call for reform. Perhaps the judge wants to clarify a matter about which there is confusion. Perhaps the judge sees a unique opportunity to educate the public. Perhaps, at times, it is simply a matter of ego and the judge enjoying the media attention.¹²

Several recent cases provide evidence of an emerging and more sympathetic view of judicial expression.

Professor Chemerinsky concludes, fully conscious that his tolerance is not universally shared: “Hopefully speech by judges will enlighten and educate the public or, at the very least, allow the public to see judges in a more human light.”¹³

Several cases provide evidence of an emerging and more sympathetic view of judicial expression. Recall, for a moment, the unique plight of Los Angeles Superior Court Judge Roosevelt Dorn. The only African-American jurist on the court, Dorn had been tapped to preside over the trial of those who beat truck driver Reginald Denny in the riots following the Rodney King verdict in April 1992. But prosecutor Ira Reiner used his one peremptory challenge to bar Dorn from the case.

When confronted by the press, Reiner initially cited potential problems with Judge Dorn’s calendar and concerns about security in his courtroom—though Dorn had painstakingly cleared his calendar with his chief judge, who praised Dorn as one of his

10 Hawkins, *supra* n.1, at 1357.

11 Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 620 (1987).

12 Erwin Chemerinsky, *Is It the Siren’s Call? Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A.L. REV. 831, 849 (1995) (part of Symposium, “The Sound of the Gavel: Perspectives on Judicial Speech”).

13 *Id.* at 849.

most productive colleagues. Reiner soon recanted, conceding that neither the calendar nor the security issue was his true rationale. He now claimed that Dorn lacked a “judicial temperament,” adding that “he has a severe difficulty with a good many people who appear in his courtroom.”¹⁴

Judge Dorn was understandably indignant. He took the highly unusual step of calling a press conference to, as he put it, “set the record straight.” The calendar pretext he termed “an out and out lie.”¹⁵ Such a claim was worse than simply false; there were racial overtones, noted the judge, to have it “going throughout the country that the black judge was not effectively able to handle the calendar.”¹⁶ He now insisted that both the calendar and temperament claims were “just another attempt to cover up whatever [Reiner’s] real reason is for taking this action.”¹⁷

Later, when Reiner sought re-election, Judge Dorn entered the political fray, telling parishioners at a black church that “the issue is how African-Americans are being treated by elected officials in this community.”¹⁸ Whether or not this comment affected the outcome, Reiner lost the election to Gil Garcetti. Judge Dorn, meanwhile, returned to his criminal docket. No one (not even Mr. Reiner) suggested that Dorn should be chastised, much less disciplined, for his outspoken defense—even though California judges are probably held to stricter standards in regard to out-of-court comment than those of most other states.

The Dorn case offers a compelling example in which constraints that would normally deter or inhibit a besieged trial judge were implicitly relaxed, even without benefit of formal language or advisory opinion. Several factors support that view, despite the pointed nature of the judge’s statements and the novelty of the medium through which they were expressed (recall Chief Judge Kaye’s comment that “judges do not conduct press conferences about [pending] cases”).

The allegations against Judge Dorn were not only false to the point of contrivance or fabrication. They were personally insulting, and (in effect if not intent) racially derogatory as well. To have allowed such claims to go unanswered would almost certainly have undermined citizen confidence in the judicial process—especially in the African-American community. Moreover, revealing the truth entailed no reference to the facts of the pending case—Dorn never mentioned the merits of the Denny prosecution—but only to such issues as whether his calendar was clear and his courtroom secure. Those matters could be and were discussed very publicly without impugning the fairness of the eventual trial of Denny’s assailants before another judge.

Finally, the person best equipped to “set the record straight” was obviously Judge Dorn himself. Forcing reliance on the words of a chief judge or of a nameless “court

*To allow some criticism
to go unanswered can
undermine citizen confidence
in the judicial process.*

14 See Jim Nelson, *Judge Attacks Reiner Over Removal From Denny Case*, L.A. TIMES, August 27, 1992, at A1.

15 George de Lamz, *Prosecutor, Black Judge Trade Charges in L.A. Riot Beating Case*, CHI. TRIB., August 27, 1992, at C26.

16 *Black Judge Hits Back Over Being Dismissed from Riots Case*, Reuters, August 26, 1992.

17 Nelson, *supra* n.14.

18 Eric Malnie, *Feud Escalates as Jurist Calls for Reiner’s Defeat*, L.A. TIMES, September 4, 1992, at B4.

spokesperson” would have missed the point. This, almost uniquely, was a case in which the judge had to be able to defend himself in ways that only he could effectively have done. Thus, while the canons might well condemn what Judge Dorn did, it seems inconceivable that violations would have been charged. And if such charges had been brought, a California appellate court would almost certainly have exonerated him. Judge Dorn’s case is, in other words, the type of case I assume Professor Chemerinsky had in mind when he spoke of judicial statements that “educate the public” and “allow the public to see judges in a more human light.”

Another case, on which the ink is barely dry, seems consistent and potentially helpful, though it is also controversial. Justice Richard Sanders was elected to the Washington Supreme Court in the fall of 1995. Immediately after taking his oath the following January, Sanders addressed a rally of his supporters, convened by an avowedly anti-abortion group. In his brief remarks, Sanders asserted that “nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life.” Noting that “I owe my election to many of the people who are here today,” Sanders thanked his supporters and added that “our mutual pursuit of justice requires a lifetime of dedication and courage.”¹⁹

The Washington Commission on Judicial Conduct undertook a formal inquiry of the propriety of Justice Sanders’s statement. Commission Counsel Don Marmaduke put the concern this way: “Justice Sanders stepped over the line and broke the rules. [His] conduct undermines public confidence because his participation and speech effectively made him, in his judicial capacity, an advocate for the pro-life movement.”²⁰ The Commission agreed, and found that Sanders had indeed breached several of the norms of judicial propriety. He was formally reprimanded, and required to complete a course in judicial ethics.²¹

Sanders sought the aid of the Washington State Civil Liberties Union, which believed his free speech had been abridged. He appealed, and in late April of 1998, the Washington Supreme Court—actually court of appeal judges sitting *pro tempore* as the supreme court—exonerated Sanders and dramatically reshaped the applicable legal standards. The key to this ruling, said the high court, was that “judges do not forfeit the right to freedom of speech when they assume office.”²²

The court not only found the clear state interest in judicial impartiality to be outweighed by free expression, but also held that the test to be applied in such a case was that of strict scrutiny—the highest level of First Amendment review of government curbs on citizen speech. A judge’s speech could therefore be penalized only on the basis of “clear and convincing evidence of speech or conduct that casts doubt on a judge’s integrity, independence, or impartiality” or “clear and convincing evidence of conduct that threatened or compromised the integrity or appearance of impartiality.”

The primacy of expressive interests reflected not only a judge’s right to speak freely; the interests of Washington’s citizens and voters were no less compelling to the

19 See Todd Woody, *How Free Should a Judge’s Speech Be?*, THE RECORDER, April 11, 1997, at 1.

20 Id.

21 In re the Matter of Justice Richard B. Sanders, 1997 WL 259202 (Wash. Comm. on Judicial Conduct, May 12, 1997).

22 Matter of Disciplinary Proc. Against Sanders, 955 P.2d 369, 370 (Wash. 1998).

court—the “need for the free expression of [judges’] views in a system wherein members of the judiciary are elected to office by the vote of the people.”²³ Applying such precepts to the facts, the court found nothing in Sanders’s impromptu remarks that expressed or implied either a promise or a refusal to “decide particular issues in a particular way, or as an indication that he would be unwilling or unable to be impartial and follow the law if faced with a case in which abortion issues were presented.”²⁴

Justice Sanders and his supporters, including the ACLU, were ecstatic, feeling fully vindicated by this welcome judgment of peers. Media reaction, though, has been predictably mixed. *The Seattle Times* applauded the ruling: “Free speech protections for judges have been strengthened. The prospect for fair, informed, democratic elections of judicial candidates has been improved.”²⁵ *The Tacoma News Tribune*, less comfortable with the ruling, cautioned that the court had gone “a long way toward dismantling the rule against political activity,” adding that, despite basic First Amendment guarantees, “there is no constitutional right to be a priest—or a judge—while exploiting that right.”²⁶ Others have simply expressed puzzlement, like the Lewiston, Idaho, columnist who queried a few weeks later, “Is anyone clear on what Washington judges can say?” If, he posited, judicial candidates have “the same right to free speech as everyone else, where does that leave the [state Judicial] code’s prohibition?”²⁷

It is too early to offer full analysis of the *Sanders* ruling. The court did not, of course, invalidate any part of the Washington Judicial Code. Nor did it overrule or even qualify prior rulings on the propriety of judicial statements or conduct—indeed, given the *ad hoc/pro tempore* nature of the tribunal, it is not even clear that such disapproval could have been expressed. What the *Sanders* court did say was two things of profound importance to the status of judicial expression, whatever one’s view of the merits of the justice’s remarks: First, that judges enjoy so substantial a measure of free speech that constraints upon them must be tested by the strictest scrutiny that protects political speech of private citizens. Second, that despite Sanders’s not-so-veiled espousal of pro-life views, nothing he said from the capitol steps amounted either to a promise regarding future judicial action or to a disclosure of disqualifying bias.

Surprisingly few commentators have wrestled with these constitutional issues. One who has done so, with characteristic insight, is my colleague on this program, Professor Chemerinsky. In his 1995 article in the Loyola symposium, he anticipated many of these questions, albeit in the context of judicial comments about pending cases. On the precise constitutional issue raised in the *Sanders* case—the proper First Amendment standard for gauging curbs on judicial speech—he suggested that the choice among the conventional options may matter less in the judicial context than elsewhere. He did argue that two recent West Coast cases were wrongly decided under

23 Sanders, 955 P.2d at 374.

24 Sanders, 955 P.2d at 376.

25 SEATTLE TIMES, April 29, 1998, at B4.

26 TACOMA NEWS-TRIBUNE, April 30, 1998, at A10.

27 LEWISTON MORNING TRIBUNE, May 8, 1998, at 6A.

whatever may be the proper test, and that Judge Lance Ito’s celebrated interview with KCBS after the Simpson trial was clearly First Amendment-protected.²⁸

Had such issues arisen in the Washington state system, at least post-*Sanders*, there would be little doubt about the outcome. The crucial issue now is how many other states are likely to follow *Sanders*. The State of Washington has a history of being different—sometimes a pioneer or bellwether for the rest of the nation, at other times maintaining a lonely vigil. It remains to be seen which way this issue will devolve.

HOW IRRESPONSIBLY CAN CRITICS ATTACK?

So much for the judge’s side of the equation. Let us turn now to the critic’s corner. Those who attack courts and judges are clearly engaged in political speech. Yet it is a kind of speech that government may well seek to constrain. As Stephen Bright notes, “irresponsible criticism which brings about the removal of judges from office or influences their decisions is incompatible with judicial independence and the rule of law.”²⁹ The tension is endemic and of long-standing; Chief Judge Kaye observes that “for as long as there have been judges, there have been lawyers critical of their decisions, often very vocally.”³⁰

Speaking ill of judges and their judgments was once risky business. In 1907, Justice Oliver Wendell Holmes, writing for a nearly unanimous Supreme Court, sustained the contempt conviction of a Denver publisher who dared run editorials and cartoons that were critical of Colorado’s supreme court. The commentary on which the charge was based suggested (with substantial basis in fact) that a partisan Colorado bench had become captives of corporate as well as political interests, and had betrayed the voters on issues of utmost importance. But Justice Holmes saw the case as an easy one—partly because the First Amendment did not yet extend to the states, while nothing in the general language of due process precluded such an exercise of the contempt power.³¹ Thus even state courts that were clearly out to protect their own images from hostile media might send a publisher or editor to jail for disrespectful commentary.

Speaking ill of judges and their judgments was once risky business.

These matters remained until, in 1941, the United States Supreme Court, in *Bridges v. California*, adopted a dramatically different view. The issue was whether a labor leader and a newspaper could be punished for their public and critical views about a

28 See Chemerinsky, *supra* n.12, at 843–44. In Judge Ito’s interview, he discussed the background of his family (including their internment with other Japanese Americans during World War II), what makes a good judge, major influences in his life, and the problems of instant celebrity. He also made a number of remarks about the O. J. Simpson trial, including one about his selection of a retired judge who was his mentor to serve as special master and take custody of “the mystery envelope”—a particularly controversial bit of evidence whose contents the defense strenuously attempted to keep secret.

29 Bright, *supra* n.4, at 308.

30 Kaye, *supra* n.5, at 705.

31 *Patterson v. Colorado*, 205 U.S. 454 (1907).

pending case—expressed, respectively, in a telegram and an editorial. The state courts had imposed such contempt, finding ample evidence that such comments could threaten the fair and orderly administration of justice. A sharply divided Supreme Court reversed the sanctions against both defendants.³² Nothing less than a “clear and present danger” to the fairness of the judicial process would warrant restraining the media or a private citizen from expressing critical views. Though many state courts had upheld contempt convictions under such conditions, the majority rejected that view and insisted that this most rigorous of free speech standards applied as fully “to out of court publications pertaining to a pending case” as it did in other contexts. While both the Bridges telegram and the *Los Angeles Times* editorial could be read as posing a threat—of a strike in one case and of future press criticism in the other—neither met the “clear and present danger” standard.

The four dissenters in *Bridges* viewed the case quite differently. They insisted that “a trial is not a ‘free trade in ideas’” to which full First Amendment protection applies, and warned that “a court is a forum with strictly defined limits for discussion.” “Freedom of expression,” they cautioned, “can hardly carry implications that nullify the guarantees of impartial trials.” Extending the concept of “clear and present danger” to such statements seemed to the dissenters especially pernicious.³³

Had one member of the *Bridges* majority shared these views, the whole course of our constitutional history would have been quite different. Such a conference as this one would probably never have been necessary. But a bare majority in 1941 set the Supreme Court on a course from which it has never really wavered—a course that treats commentary on pending judicial proceedings as fully protected speech, punishable only if a clear and present danger is posed to a pending trial.

The *Bridges* doctrine has been applied in myriad subsequent cases, several at the highest level—to reverse contempt convictions, for example, imposed on an outspoken Georgia sheriff,³⁴ and in the celebrated case involving caustic comments by New Orleans District Attorney Jim Garrison.³⁵ The Garrison decision not only reaffirmed the Bridges principle, but extended to judicial commentary the *New York Times*³⁶ privilege of fair comment on public officials and public figures, thus encompassing statements that were not only critical, but also potentially defamatory.

The speech of lawyers has, of course, always been a special case. Chief Judge Judith Kaye recently observed that “from earliest times lawyers have had, in addition to special privileges, special responsibilities to the courts.”³⁷ While those obligations have been substantially codified in the canons of professional ethics and state codes of professional responsibility, Judge Kaye notes a surprising “paucity of published decisions”—a lacuna that leaves the scope of the formal constraints curiously imprecise. Moreover, the difficult issue of how different lawyer speech is for First

32 *Bridges v. California*, 314 U.S. 252 (1941).

33 314 U.S. at 283 (Frankfurter, J., dissenting. The other dissenters were Chief Justice Stone and Justices Roberts and Byrnes.)

34 *Wood v. Georgia*, 370 U.S. 375 (1962).

35 *Garrison v. Louisiana*, 379 U.S. 64 (1976).

36 *New York Times v. Sullivan*, 376 U.S. 967 (1964).

37 Kaye, *supra* n.5, at 716.

Amendment purposes from judicial attacks by nonlawyers remains surprisingly unsettled; Judge Kaye cites several state cases that limit lawyers' statements "implicitly, if not explicitly, [on the ground that] as members of a regulated profession and officers of the court, lawyers surrender some of their First Amendment rights."³⁸

The Supreme Court has addressed the limits of lawyer speech on many occasions, most often in the context of advertising. The patchwork that has emerged from those rulings seems the least satisfactory facet of commercial speech—happily a topic I need not revisit in this paper. The few cases that shed light on the issue before us are somewhat more satisfying. In the late 1950s, the Court recognized that attorneys owed a special duty—and were thus properly held to a higher standard than others—in comments on pending proceedings.³⁹ That view persisted, with little controversy, through the ensuing three decades. By the early '90s, the time had come to revisit the issue in a substantially changed constitutional environment. The Court's decision in *Gentile v. State Bar of Nevada*⁴⁰ sustained against First Amendment challenge a state bar standard somewhat lower than "clear and present danger" for curbing attorney speech on pending cases.

The majority noted that, in striking down restraints on media coverage of judicial proceedings, even Justice Brennan wrote that "as officers of the court . . . attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." The *Gentile* Court adopted as the operative limit on attorney speech the one that most states had adopted, pursuant to the ABA Model Rules of Professional Conduct—speech that poses "substantial likelihood of materially prejudicing an adjudicative proceeding." On the facts, the sanction was reversed, since the timing, content, and probable impact of the statement in issue seemed unlikely to create such "material prejudice."

The *Gentile* case leaves unresolved several difficult issues: How far beyond attorneys—for example, other officers of the court, and ordinary citizens—does the lesser standard apply? What difference does it make whether or not the statement targets a judge? And, most important for our current focus, how far does the lower standard apply, if at all, to hostile or critical attorney speech that does not address a specific pending case? (Professor Monroe Freedman rightly observes that "*Gentile* is inapplicable to criticism of a judge that does not relate to a pending or impending trial."⁴¹) *Gentile* simply does not resolve these issues, and the Supreme Court has not subsequently addressed them.

Perhaps, therefore, we should not be surprised by the division among lower courts on the scope of protection for what might be called judge-bashing in the abstract, i.e., criticism not directed at the judge's handling of any pending case. The law is clearly in flux. An intriguing split seems to be emerging among federal courts of appeals. The Ninth Circuit, often the source of strange and novel notions, has embarked on a different course in this area as well. The case involved a Southern

38 Kaye, *supra* n.5, at 719.

39 *In re Sawyer*, 360 U.S. 622 (1959).

40 501 U.S. 1030 (1991). In *Gentile*, the Nevada Supreme Court had found that an attorney who held a press conference after his client was indicted on criminal charges had violated its rule prohibiting lawyers from making extrajudicial statements to the press that he knew or reasonably should have known had a "substantial likelihood of materially prejudicing" an adjudicative proceeding.

41 Monroe Freedman, *The Threat to Judicial Independence by Criticism of Judges: A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 736 (1997).

California attorney named Yagman, who had called a particular judge (among other less than endearing terms) “dishonest,” “a buffoon,” and “a drunk.” He had also charged the judge with acts of anti-Semitism, specifically of singling out Jewish lawyers for harsher treatment in his courtroom. Yagman was disbarred for two years, for violating a local federal district court rule that forbade attorney conduct that “degrades or impugns the integrity of the Court.”

Yagman’s appeal, however, found a sympathetic Ninth Circuit panel. Relying mainly on defamation cases, the court ruled that even so disrespectful a lawyer could be disciplined only if his statements were demonstrably false—an issue on which the complainant or disciplinary body bore the burden of proof. Moreover, such charges could bring sanctions only if they “imply a false assertion of fact” and not simply an expression of opinion.⁴² Under so rigorous a standard, the scope of protection for attorney speech (including attacks on judges) becomes, in the view of one commentator, coterminous “with the free speech rights . . . of ordinary citizens engaged in political debate.”⁴³ Since the statements for which Yagman had been cited contained far more opinion than fact, and since the burden of proof had not been met even with respect to the fact-based claims, the disbarment was rescinded.

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While the *Yagman* holding seems not to have been followed elsewhere, it substantially enhances the scope of protection for critical lawyer speech in California—the most litigious part of the country. By applying so strict a First Amendment standard to highly damaging charges by lawyer against judge, the Ninth Circuit seems to have invited a level of attorney incivility that would have been abhorrent

in earlier times. Yet the premise of the *Yagman* decision—that lawyers do not forfeit their First Amendment freedoms unless their comments could jeopardize a pending case—is consistent with expanding precepts of free expression in other settings. The problem is that such a ruling could not have come at a worse time for the already frayed relationship between bench and bar.

IS THERE A KINDER, GENTLER ALTERNATIVE?

Finally, what might be done to enhance civility and rationality in this vital dialogue, and, in so doing, enhance judicial independence along the way? Chief Judge Kaye, once again, offers a most helpful framework:

Through the ages, legal luminaries have wrung their hands over the proper balance between the fundamental value of respect for the law and the fundamental right of citizens—even lawyer-citizens—to have their go at courts and judges. By the same token, we have long struggled with the question of the appropriate response for judges who find themselves the targets of such criticism.⁴⁴

42 Standing Comm. on Discipline v. Yagman, 856 F.Supp. 1384, 1386 (C.D. Cal. 1994) (per curiam), rev’d, 55 F.3d 1430 (9th Cir. 1995).

43 Caprice L. Roberts, Note, *Standing Committee v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?*, 54 WASH. & LEE L. REV. 817, 842–43 (1997).

44 Kaye, *supra* n.5, at 705–06.

There has been no shortage of thoughtful solutions. Judge Kaye herself would expand public education and understanding—carrying on essentially where Roscoe Pound left off nearly a century ago. The ABA has responded both with strongly supportive statements, and by creating at the highest level a Special Committee on Judicial Independence.⁴⁵ Many state bar groups have also stepped up by supporting judges who are under fire and by chastising critics who have created such fire.⁴⁶ The American Judicature Society has intensified its efforts, raising the profile of its new Center for Judicial Independence.⁴⁷ This is not the place or the time to assess such responses, beyond the obvious point that the judiciary needs all the help it can get.

There are those who believe the only real solution lies in major structural change to the means by which judges are chosen and reaffirmed. (Here, I must confess, I forfeit any possible credibility. A decade ago, at the request of Chief Justice Harry Carrico, I chaired a Commission on the Future of Virginia’s Judicial System. We knew ours was one of only two states in which the legislature appointed and reappointed judges. We also knew the system had its faults. But we had no heart to recommend any change more drastic than greater reliance by the General Assembly on advisory panels in screening judicial candidates—a practice which has gained some greater currency in recent years). In any event, such proposals are clearly not suitable for today’s agenda.

*If critics may not
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be empowered?*

Other observers argue that tighter reins must be imposed on critical comments, especially by attorneys. This spring, for example, a panel of federal judges in the Southern District of California proposed a rule that would disbar, suspend, or fine lawyers for making comments that “impugn the character or integrity of any judicial officer.” As Chief Judge Terry Hatter explained, such a standard might ensure that “reckless kinds of statements do not interfere with the administration of justice.”⁴⁸

Apart from the obvious question of how one might square such language with the *Yagman* decision on First Amendment grounds—this is the very district court, after all, where *Yagman* arose—so restrictive a rule would raise serious policy concerns. Ronald Talmo, a former law school dean, who is now an active Southern California practitioner, called the proposal “crazy,” adding: “Judges should know better. To pass a regulation to protect themselves from criticism is disgusting. This is a good example of why people hate government.”⁴⁹ One need not share Mr. Talmo’s rhetoric to reject the proposal. Curbing the critics is not the answer for a variety of reasons—save as may be necessary and constitutionally acceptable to ensure the fairness and impartiality of particular trials.

What may be more promising is to revisit the other side of the equation. If critics may not be suppressed, can judges be empowered? Any such hope would, of course, not lie

45 See, e.g., CHICAGO DAILY LAW BULLETIN, November 12, 1997, at 1; Jerome J. Shestack, *The Risks to Judicial Independence*, ABA J., June, 1998, at 8.

46 E.g., *2 Panels to Review Criticism of Judges*, N.Y.L.J., September 30, 1996, at 2; Dana Coleman, *NJSBA Counters Judge-Bashing*, N.J. LAWYER, December 2, 1996, at 3.

47 AM. JUDICATURE SOC’Y REP., Spring 1998, at 2.

48 Davan Maharaj, *California and the West*, L.A. TIMES, April 20, 1998, at A3.

49 Id.

through the law of defamation; judges have repeatedly lost libel suits, since they are public officials, and usually public figures as well. Very recently the Ninth Circuit, in just such a case, reminded fellow jurists that “wise judges, even when wounded by unfair assaults, have learned that the best policy is ordinarily to dismiss the attacks as part of the baggage of their jobs. Abusive criticism simply goes with the territory.”⁵⁰

Yet the Ninth Circuit added, offering what may seem small solace, “this is not to say that the bench is helpless.” That comment, albeit in a slightly different context, reflects the approach I would stress. The instances I cited earlier—notably the cases of Judge Dorn and Justice Sanders—suggest a quite different view of judicial speech. Let me return by way of conclusion to the case of Judge Evan Broadbelt, which I cited earlier, and in which I noted our Center had filed a Supreme Court amicus brief. Though I regret I never saw him on the air, Judge Broadbelt had been a popular commentator on Court TV in the early and mid-1990s. He scrupulously avoided any reference to New Jersey cases or issues that might come before his court. His commentaries focused on such nationally celebrated cases as the O.J. Simpson and Menendez Brothers trials in California.

Though he had a substantial following, and many viewers found his insights helpful in understanding better the working of the criminal courts—indeed, the entire judicial system—Judge Broadbelt was told he must cease his broadcasting because his appearance on a commercial network could be seen as lending the prestige of his office to “advance the private interests of others,” in violation of one of New Jersey’s canons of judicial ethics. Broadbelt challenged the ruling, without success, through the New Jersey courts, and unsuccessfully sought U.S. Supreme Court review.⁵¹ At each stage, he insisted the canon had been read too strictly—not only depriving viewers of valuable information and insight, but abridging a judge’s freedom to speak on subjects and in ways that could not possibly compromise the impartiality or objectivity of New Jersey’s bench.

Though I admit to a bias through our Center’s direct (if volunteer) role in the *Broadbelt* case, it seems to me the entire court system missed an invaluable opportunity here. Professor Chemerinsky has written eloquently of the potential value of judicial commentary, warning that public confidence in and support for the bench “will only decline unless the public understands some details of the constraints under which judges must adjudicate”—adding that “judges must take the forefront in actions to educate the alienated.”⁵² Of course a judge could be barred from appearing on a program that was actually sponsored by a bail-bonding firm, or by a court stenographic service, or perhaps by a private detective agency. But if mere commercial sponsorship forecloses any judicial participation, then the appearance of impartiality comes at too high a price.

My closing suggestion, therefore, would be to encourage, rather than discourage, general judicial commentary of the type that Judge Broadbelt had been providing until

50 *Dodds v. American Broadcasting Co.*, 1998 WL 264837, 1998 U.S. App. LEXIS 10459, at 14 (9th Cir. May 27, 1998).

51 *In re: Inquiry of Broadbelt*, 146 N.J. 501, 683 A.2d 543 (1996), *cert. denied*, 117 S.Ct. 1251 (1997).

52 Chemerinsky, *supra* n.12, at 845. *See also* Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENVER U.L. REV. 549, 578 (1988); Mark Scott Bagula & Robert F. Coates, *Trustees of the Justice System: Quasi-Judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 SAN DIEGO L. REV. 617, 637 (1994).

he was silenced by his peers. There are, and should continue to be, extensive restrictions on judicial expression—restraints that are necessary to preserve both the fact and the appearance of impartiality and objectivity in our courts. But those vital interests do not require that the persons who are most expert about, and are best able to demystify, the workings of our courts, need be kept silent. My modest hope is that inflammatory criticism of judges would diminish—or would at least have less venal potential—if the general public had more exposure to judges in their role as experts and commentators on that which they know best.

ORAL REMARKS OF PROFESSOR O'NEIL

The introduction I've received has been a pleasant contrast to an experience I had speaking to a service club earlier in the week. It was one of those events where things take longer than they should. Clearing the tables had gone slowly, but everyone was relaxed. So, my host turned to me and said, "Should I introduce you now or shall we let them enjoy themselves a little while longer?"

I never will know the answer. The introduction came. The speech went on. Life continued. It was also a happy contrast to an occasion where I was speaking a couple of weeks ago. It was late in the day. I must have been tired. The speech was probably not my best effort, but afterwards one of my former students came up and said, "Gee, that was a great speech. Is it going to be published somewhere?"

I said, "Oh, I don't know. Maybe someday it will appear posthumously."

"Oh," she said, "in that case, the sooner the better."

We are still looking for a publisher.

I am not now, and never have been, a judge. And given my stage in life, it is unlikely that I ever will be a judge. But I certainly can say that some of my best friends are judges, and also, since I have been an active participant in the University of Virginia's LL.M. program in judicial administration (the only one of its kind in the country), I can say that some of my best *students* have also been judges. And that has been a particularly satisfying experience.

Like all thoughtful American lawyers and law teachers, I have been dismayed and deeply troubled, at times anguished, by the current state of criticism—including irresponsible criticism, attack, and deliberate undermining—of the independence of our judicial system.

All of you, I know, have the text of my paper and I certainly would not presume to do more than summarize briefly what is in there. As you know, I start by observing that the current wave of judge-bashing is neither uniquely American (witness, for example, some of what has been going on in Canada within the past six to nine months) nor uniquely a product of the 1990s. Every court, every chief justice, and many other judges over the years have been targets of irresponsible criticism. I cite with particular relevance Theodore Roosevelt's remark about Justice Oliver Wendell Holmes after the antitrust decision, which so angered the president (who had recently appointed his old friend to the Supreme Court). Roosevelt said, "I could carve out of a banana a judge with more backbone than he shows." There have been such comments through

history, but it seems to me that the current climate is different in several rather ominous ways. One way has, of course, to do with technologies—the speed with which such irresponsible words travel not only across the country, but also around the globe, and the vastly greater number of people whom they reach in a short time.

Second, it seems to me that the source of such criticism has subtly but importantly shifted. I recall that incident involving, literally, a little old lady in tennis shoes whom I saw thrusting the “Impeach Earl Warren!” flyer into the great chief justice’s hand in 1963. Those were people, by and large, on the fringe. Today, however, the critics are no longer at the fringe. Some of them may still be, of course, but irresponsible criticism has moved uncomfortably toward the core of the mainstream of society and public policy.

Finally—and this really is the focus of my paper—I note some important changes on both sides of the equation. On one side, there is a greater freedom for critics of the courts to speak out publicly (and that is a trend that, on the whole, as a devotee of the First Amendment, I applaud). The other side of the equation is, however, one that I lament. That is what appears to be an increasing restraint on the capacity of judges and courts to explain their actions and respond to criticisms of them.

The source of criticism has subtly shifted. Today, the critics are no longer at the fringe. Irresponsible criticism has moved uncomfortably toward the core of the mainstream of society.

My paper, as you know, focuses on each of the elements of the equation. I start with the judges’ perspective, and after noting the conventional wisdom (using the especially helpful and appropriate words of Chief Judge Judith Kaye of the New York Court of Appeals),¹ setting the stage in describing those things that judges can’t and aren’t supposed to do and, in a general sense, the reasons why judges are not expected to be able to speak out or respond to attacks as most other citizens can. I also note, at that point, that the current level of constraint has not always been so scrupulously observed. There have been times in our history when judges seemed to be substantially freer to respond than they appear to be today, although as Sandy D’Alemberte, a friend of many of ours, has noted in a particularly helpful article, there has also been a kind of ebb and flow, a sort of flux in the levels of expected judicial restraint.

Well, even in these circumspect times, I think it would be naive to suppose that judges may only speak from the bench, or in an occasional innocuous after-dinner tribute, or a luncheon address on a hobby, or something as remote from the judicial process. So, at this point, I focus on two examples, two instances, which seemed to me helpful illustrations and potentially a source of a slightly different approach.

JUDGE ROOSEVELT DORN CASE

One is the fascinating experience of Judge Roosevelt Dorn. He was the judge who, in the Los Angeles Superior Court, was originally assigned to the trial of those accused of beating Reginald Denny in the post-Rodney King verdict upheaval in that community. Judge Dorn happened to be the only African-American judge on that

1 See O’Neil paper, n.44.

panel. Immediately upon the announcement of his selection as the judge to preside at that trial, the prosecutor exercised his one peremptory challenge to have Judge Dorn removed from the case. Initially the prosecutor said, “Well, it is because his calendar is too crowded and we are not sure that his courtroom is adequately secure.” Immediately, it became clear that Judge Dorn had cleared his calendar with the chief judge and that there was no security problem. So, the prosecutor then moved to a completely different rationale and said, “Well, we understand he lacks an adequate judicial temperament.”

At this point, Judge Dorn, presumably with the blessing of the chief judge and others, felt compelled to call a press conference. All of us were fascinated by the very *fact* that this had happened, even more in that sense than what was said. I have often reflected upon the importance of that moment for several reasons—not the least of which, of course, was the fact that the only person who could set the record straight was Judge Dorn himself. It was especially important that he explain that his calendar had been cleared and that there was no problem of security—and, incidentally, in appearing as he did before the public, that one might have a sense of what his temperament was. So, as I suggest in the paper at much greater length, it seems to me that, far from undermining public confidence in the judicial process or the bench, Judge Dorn’s ability to come forward on that occasion actually *enhanced* public confidence, not only within the African-American community where it was crucial, but within the larger community as well.

I do make one other point: that it was perfectly possible for Judge Dorn to say everything he needed to say without in any way compromising the fairness of the trial of the Denny assailants—a trial which soon proceeded before another judge. Incidentally, as many of you know, the prosecuting attorney was soon up for re-election. Judge Dorn actually did participate, in one sense, in the politics of that election. Whether this had anything to do with the result, one doesn’t know, but Ira Reiner was not re-elected. That brought to office Gil Garcetti, and the rest is, of course, history.

JUDGE RICHARD SANDERS CASE

The other case that I discussed is one that is really very much with us because it was decided only recently—in April 1998.² On the day on which he took the oath as a justice of the Washington State Supreme Court, Justice Richard Sanders attended a rally organized by some of his supporters who had a strong anti-abortion persuasion. Justice Sanders made a very brief statement. In that statement were a couple of comments which could be construed, without too much imagination, as expressing a point of view with respect to abortion and related issues. The matter was immediately brought under investigation, and Justice Sanders was charged with improper conduct.

At the end of April 1998, a court sitting as the Washington Supreme Court (and my understanding is that these were actually Washington Court of Appeals justices sitting *pro tem* as the state supreme court for this purpose) completely vindicated Justice Sanders with regard to this statement, and in so doing established a new and considerably more rigorous standard for proving, at least in Washington State, something that is awfully close to a “clear and present danger” standard. The issue has

2 See O’Neil paper, nn.21–27.

not arisen since then anywhere else, so we don't know what the impact will be elsewhere, but at least that was the effect in Washington State.

CITIZEN CRITICISM

It is at this point that I turn to the area in which the “clear and present danger” standard has always been the rule, and that is criticism of the courts by citizens. It all goes back to the Supreme Court’s 1941 *Bridges* decision.³ It was a sharply divided Court, 5 to 4, but the majority laid down what has essentially been, ever since, the applicable standard at least for citizen and media comment, and that is a “clear and present danger” standard.

The only significant exception—and this is the one to which the balance of the discussion is devoted—is the standard which applies to attorneys. In this area we have what seems to me, as one who has taught First Amendment law for something over thirty-five years, to be remarkably little guidance. We have the Supreme Court’s *Gentile* decision,⁴ which applies to attorney comment about a pending case. The Court itself in *Gentile* was split in so many different ways that it is not easy to read a single standard. Moreover, *Gentile* clearly does not apply to attorney comment or criticism that is unrelated to a pending case. So there are all kinds of things we would like to know about the Supreme Court’s view on the scope of attorney criticism, apart from the facts or circumstances of *Gentile*.

*We should not disempower
the critics, but rather
empower judges.*

We have had some post-*Gentile* developments which, at least in parts of the country, seem to expand substantially the scope of criticism, most notably the *Yagman* case in the Ninth Circuit,⁵ which imposes upon disciplinary bodies, whether it be the court or bar groups, a very high standard with respect even to utterly irresponsible attorney criticism. And the *Yagman* case really was such a case. But proving a violation of even *constitutionally acceptable* rules of a district court turns out now in the Ninth Circuit to be very difficult.

What I try to do in the closing section of the paper is to suggest some possible alternatives—ways in which to move. I draw some comfort from a number of the recent suggestions—some having to do with more and better education, some having to do with various groups stepping forward.

RECENT DEVELOPMENTS

Even since I wrote the paper, there have been two very positive developments. The first is the creation of Citizens for Independent Courts, about which I gather we will hear more at lunch today. And second, my own Virginia State Bar within the last few weeks has stepped forward in a very significant, positive way in creating a new process by which groups of lawyers can come to the support and defense of embattled or beleaguered judges.

3 See O’Neil paper, n.32.

4 See O’Neil paper, n.40.

5 See O’Neil paper, n.42.

I reject several of the alternatives that have been proposed which seem to me either unproductive or, in the extreme, unconstitutional. For example, there are some recent suggestions for tightening the standards with regard to attorney criticism that are *not* related to pending cases. My preferred solution is not to *disempower* the critics (something which seems to me highly questionable both constitutionally and in policy terms), but rather to *empower* judges. I draw some comfort from both the *Dorn* and *Sanders* cases of ways in which it seems to me society and we in the legal profession ought to be more comfortable with certain forms of judicial response than I think we have been in the past.

JUDGE EVAN BROADBELT CASE

My closing comment has to do with a case in which our Thomas Jefferson Center was deeply involved (a disclosure which I think is essential), and that is the fascinating case of New Jersey Judge Evan Broadbelt, who had for several years been a very popular commentator on Court TV and elsewhere, until he was told by the New Jersey Supreme Court that he could no longer continue his commentary so long as it appeared on a commercially sponsored channel.

Now, as the vice chairman of the board of a public television service station, I should have been delighted because that would have meant that we could have featured Judge Broadbelt, even though Court TV could not. But in fact I was deeply disheartened, because Judge Broadbelt had taken great care to avoid any commentary with respect to New Jersey cases or to issues likely to come before his court. He was immensely helpful in helping viewers and listeners to understand the judicial process in cases like the *Simpson* and *Menendez* cases.

Even so, he was silenced. And it seems to me not only that we lost a particular judicial voice, but also that we lost—and by this I mean we lost it through the failure of the higher courts really to assess the issues—a marvelous opportunity to define that relationship and that responsibility. It could have led to a far better balance between the inescapable need for restraint on one hand and, on the other hand, the equally inescapable need of people to know things that often only judges can explain—or, at the very least, things which judges are best positioned to explain.

We need to balance the inescapable need for restraint on one hand with the equally inescapable need of people to know things that often only judges can explain.

EXPANSION OF PROFESSOR O'NEIL'S PAPER

Maybe I could take this occasion to mention a couple of factors in this debate that seem to me part of the process about which I really didn't write in the paper. There simply wasn't time, but it seems to me that in the interest of completeness they might be mentioned.

One is a desire to avoid conflict, which is uncommonly high in certain professions. It is uncommonly high, for example, among librarians, who will often simply pull a controversial book off the shelf before it is challenged. Thus the incidence of self-censorship among public librarians is far higher than the incidence of formal pressures that lead to official censorship.

My sense is that self-restraint is also a characteristic of the judiciary. I vividly recall, three years after I was with Justice Brennan in the 1962 term, the controversy about Justice Fortas, which led, of course, to his not becoming the chief justice and ultimately to his resignation from the Court. Justice Brennan's response, as many of you know, was to withdraw from everything—not simply to stop making speeches, which was a great loss, but even to stop participating in the NYU Appellate Judges Seminar, which he had done every summer for many years. He simply told his staff, "I will accept no invitations. To avoid any possible risk of misunderstanding, I am just getting out of anything that is public." He remained thus cloistered or sequestered for a good many years, and it seems to me that was an understandable and, in some ways, commendable act of self-restraint on the justice's part. As you can tell, it is one with which most of his former law clerks did not fully concur, but he was the justice, after all, and he had so decided.

Self-restraint is a characteristic of the judiciary.

The second factor is one that I did mention briefly in the discussion of the *Sanders* case and that is those officials who are charged—different kinds of people, different structures in each state—with enforcing judicial conduct and bringing formal charges of misconduct. Here I will cite a poignant example of some seven or eight years ago involving a trial judge. I won't even mention the state. A trial judge whom I knew, and who had been on the bench for several years, chose to explain, strictly, the process in a certain highly publicized case to a reporter from the principal local daily newspaper. The next day, she had a visit from "the enforcer," a person whose title and certainly whose name I ought not to disclose, but the person who was charged under state law with enforcing the Canons of Judicial Conduct. He came in and he said, "That was wrong. You should not have done that."

I think that is absolutely the kind of thing that a justice ought to be able to do. But she was told that that was wrong, and, as a result, the word went out among the judiciary in that state, and, to my knowledge, it hasn't happened since. No judge in that system, at least in that part of the state, has since then been willing to come forward and explain even the *process* of what goes on in the courtroom.

Now, obviously that was excessive zeal on the part of the person charged with enforcing the standards of propriety. I don't know how that happens, but it seems to me that the combination of self-restraint on the part of the judge and excessive zeal on the part of those charged with enforcing the Canons may produce a climate that is, in important if subtle ways, different from the climate that most of us believe ought to exist.

COMMENTS BY PANELISTS

HONORABLE ROBERT G. FLANDERS

PAUL MCMASTERS

THOMAS L. JIPPING, ESQ.

MARK S. MANDELL, ESQ.

HONORABLE ROBERT G. FLANDERS

I am a state appellate court judge, and I was a trial lawyer for over twenty years before going on the bench some two and a half years ago. So I speak from that perspective and also from the perspective of a judge who, unlike most state court judges, is appointed rather than elected, and appointed through a “merit selection” process in which names are submitted to the governor and the governor picks one of those candidates. Then there is an affirmative requirement of ratification from both houses of the legislature.

I am going to speak more about that in a minute, but I think it is important to distinguish between two things in talking about judicial independence. One is *institutional independence*, that is, independence for the judiciary as a branch of government, and the other is *adjudicative independence*, which is the freedom of individual judges to decide cases and also to defend themselves and to be free from the kind of attacks and other external influences that Professor O’Neil was referring to.

ADJUDICATIVE INDEPENDENCE

I think it is important in looking at the latter, adjudicative independence, to start from what constrictions and existing freedoms there are under the Model Code of Judicial Conduct, which, in one form or another, is in existence in most jurisdictions throughout the country.

Under the typical code of judicial conduct, judges do have what I would call a “safe harbor” to comment on pending cases to explain the procedures that are going on. Now, I would suggest to you that that is a very significant safe harbor because it allows a judge to explain the context of what is happening outside the proceeding even though the judge knows it is going to be disseminated in the public media.

Often what happens, as we know, is that there is distortion in the media reporting about the procedural aspects of the case. I would think that judges in any given case would be well-advised, especially in a case that attracts a lot of media attention, to take advantage of the opportunity to explain procedure—not only in the course of performing their traditional functions, but even—whether off the record or on the record—to explain to a media representative the procedural context of what is happening. I think that is a very important empowerment that we have under the present code.

Judges can make public statements in the course of performing their official duties.

Another feature of the code is that judges can make public statements in the course of performing their official duties. I think that suggests especially that, in a case where there is a high media profile, judges should be conscious of the fact that they are speaking not just to the litigants and their immediate families and so forth, but to a larger public. In the course of performing judicial functions, ruling on motions, and ruling on evidence, I think it is entirely appropriate for judges to explain the procedure of what is happening and explain it in a way that can, and often will, go beyond just the parties to the case and will reach out to the larger audience that is watching what is going on.

This is something that the Model Code expressly allows. The only two restrictions that are directly applicable under the code are that a judge in a pending proceeding is not supposed to say anything that would reasonably be perceived (1) to be likely to affect the outcome in a case, or (2) to impair the fairness of the proceedings.⁶

That, I suggest to you, does give some latitude to judges to respond to unfair criticism that goes beyond just the old chestnut, “You have to keep your mouth shut and take it, however frivolous the commentary may be during the pending proceeding.”

So, especially considering that judges do have ways to insulate the fact finder from things that may arguably affect the outcome, I think it is an important thing to remember that those are the only two restrictions. In addition, we have the affirmative ability to make comments to explain the procedures that are going on in the court. I think those are things that are very important to bear in mind from an adjudicative independence standpoint.

FIVE PILLARS OF INSTITUTIONAL INDEPENDENCE

Now let me turn to something that Professor O’Neil did not directly cover, but that I think is equally important. That is the *institutional independence* of the judiciary. In my judgment there are five pillars of institutional independence for the judiciary. The first is merit selection. The second is lifetime tenure. The third is adequate funding for the courts. The fourth is protection of constitutional—and particularly *state* constitutional—rights and being able to say what the law is. The fifth is full First Amendment protection for judicial commentary.

1. Merit selection. As I say, I come from a state that has only recently adopted this procedure after many years of having the selection function performed by just one branch of government—the legislature. I think the virtue of that procedure is that, although it is still subject to influence and external forces, at least it exposes to public comment the candidates who are selected for judicial appointments. I think it presents the best option that is available to be sure we get judges who are going to be independent-minded from the “get-go,” who aren’t going to come in having made promises, having to campaign on platforms, and so forth.

I just cannot imagine what it is like to have to be elected and run as a judge and make promises and solicit contributions. I think it must have unfortunate and untoward

6 See ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(9) (1990).

consequences because I think it compromises judicial independence.

2. Life tenure—meaning tenure during good behavior—is absolutely essential, I think, to judges, having the kind of independence to be able to do what is right, free of external forces, and not having to justify how they rule in a given case. Obviously we want judges to be independent, but not independent of the rule of law. That is the one thing that we want judges to be faithful to as they proceed.

3. Adequate funding. This is absolutely critical because without salaries, without facilities, and without resources, a judge’s independence is chimerical. It just won’t stand up without adequate funding.

4. Protection of state constitutional rights. “Why,” you might ask, “is that important for an independent judiciary?” If judges are not able to say what the law is—if, for example, one needs *legislative* mechanisms to secure private rights of action—many of the actions that judges take that may run counter to the sentiments of the majority would effectively be overruled. Rights of action then would be dependent on the legislature. The legislature, in effect, could veto affirmative constitutional provisions by doing nothing—by not providing private rights of action, by not providing remedies. It is absolutely critical for judicial independence that judges be able, as Chief Justice Marshall said so many years ago, “to say what the law is”—and that function should be independent of whether there are express provisions for private rights of action or not.

5. First Amendment rights for judges. Finally, I think, I would wholeheartedly endorse Professor O’Neil’s observation that we need to *empower judges to respond as human beings* when they are under attack in very critical situations, and give them the full First Amendment protections that we are now giving to the critics of the judiciary. It is foolish to take action to try to limit the free speech

protections of our critics. We ought to assume that critics of the judiciary are going to receive the full protections of *New York Times v. Sullivan*⁷ and its progeny. In other words, absent proof of actual malice, public officials, like judges, are going to be criticized unfairly, but we are going to have to live with that because even defamatory statements about judges will be protected under the First Amendment. I think the answer is not to restrict that type of free speech, but to allow judges to respond with all the full protections that are afforded to them—bound by the obvious need not to prejudice the outcome of given cases or to affect the fairness of the proceedings.

But incidents like the *Broadbelt* case, I think, are outrageous—where a judge was disciplined because he was said to be “lending the prestige of judicial office to the private interest of others” merely by commenting in a public way on a Court TV program that had nothing to do with any of the cases he was hearing. I would suggest to you that is far too attenuated a connection, and I hope we will soon get the opportunity to test whether the *Broadbelt* rule is going to extend beyond the borders of New Jersey. I hope the *Sanders* rule from Washington, to which Professor

It is absolutely critical for judicial independence that judges be able to “say what the law is.”

7 376 U.S. 967 (1964).

O’Neil alluded, and which really gives the full First Amendment protections to judicial speech, *would* take hold beyond Washington.

I think those are the best ways to enhance judicial independence.

PAUL McMASTERS

I always thought that Professor O’Neil should have been on the bench. He is brilliant and he is knowledgeable and he is eloquent and he is fair to a fault. In a word, he is the very picture of a judge, in my mind. I can only speculate that I was invited this morning as a deliberate contrast to that image.

As I prepared for this morning’s program, I was struck by how easy it is to find such topical examples of the issues Professor O’Neil discusses in his paper, and as a relaxed journalist, I have to give you some bulletins from this week’s news, in case you haven’t heard about them yet.

- On Monday, the California Commission on Judicial Performance reported that it had accused J. Anthony Kline, a longtime state appeals court judge, of “conduct prejudicial to the administration of justice that brings the judicial office into disrepute, improper action, and dereliction of duty.” Justice Klein’s offense was to exercise his First Amendment right to say, *in a dissent* (which is, as you know, a judicial statement with no legal effect) that, as a matter of conscience, he could not adhere to a state supreme court ruling upholding the practice of stipulated reversal.⁸
- On Tuesday, a New York City Criminal Court Judge named Lorin Duckman was fired by the Court of Appeals, the state’s highest court, for abuse of power. In dissenting from the 5–2 ruling, one Court of Appeals judge said Judge Duckman was a victim of a witch hunt sparked by criticism from public officials.⁹
- And on Thursday, the *Los Angeles Times* reported that municipal Judge Joan Comperet-Cassani got tired of being interrupted by a defendant who was representing himself in her court and, after warning him several times, finally ordered her bailiff to zap him with an eight-second jolt from the electronic security belt he was wearing. (I know every one of you has been tempted, at one time or another, to do the same.)

Obviously, there are a lot more examples out there, but you get the picture.

I will devote the rest of my remarks to two of the issues raised by Professor O’Neil: (1) whether *speech that is critical of the judiciary* should be *restricted*, and (2) whether *the protection afforded judicial speech* should be *expanded*. I am tempted to end my remarks right there by simply saying “None of the first, and a lot more of the second,” but I need to go beyond that. There are three points I would like to make.

8 See *Morrow v. Hood Communications, Inc.*, 69 Cal. Rptr. 489, 490 (Cal. App. 1997) (Kline, J., dissenting). See also Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOYOLA L. A. L. REV. 1033 (1993).

9 Mark Humbert, *Court Upholds Removal of Judge*, AP wire story, July 7, 1998.

A PLEA FOR PERSPECTIVE

The first is a plea for perspective. It is perfectly understandable that judges are sensitive these days. They are under siege by a barrage of criticism (much of it unfair as well as unwarranted) coming from pundits, politicians, and lawyers—even Ann Landers readers sending in isolated anecdotes of judicial laxity or intemperance!

As Professor O’Neil points out, the impact of such criticism seems to be intensified because it whips about the globe with electronic speed. Judges should keep in mind that every major institution in our society, not just the judiciary, is under siege these days—the government, business, education, medicine, the press, you name it. That is partly because Americans are more sophisticated and demanding than ever, and partly because a challenge to power and authority is a cleansing and uniquely democratic process. Not only do Americans have a right to criticize public officials, they also have a *duty* to pay attention to the activities and decisions of those who are paid from the public treasury and who determine public policy. This is especially true of judges.

With mindfulness, of course, comes criticism. This does not mean that judges should bend to the winds of the electorate. It *does* mean that judges need to recognize that criticism is a manifestation of public concern about the state of justice in America. In a way, the amount and intensity of criticism is a measure not only of an institution’s importance, but also of its strength and durability.

A second part of my plea for perspective, something to keep in mind throughout these deliberations that you are involved in today, is to remind you that judges have an enormous arsenal at their command when it comes to power over speech. They can issue gag orders that muzzle police officers and officers of the court. They can slow the presses with protective orders and seal settlements. They can punish speech with civil and criminal contempt orders. They can compel speech with search warrants and subpoenas. (And I guess I should add that, if they are a little provoked, they can silence courtroom outbursts with 50,000 volts of electricity.)

But when all is said and done, when all the second-guessing, the unfair criticism, the untoward analysis, and the political posturing has ceased, there is the judge’s ruling. It’s the last word, and the final word endures.

I have a good example of that. Just two weeks ago, Allyn & Bacon Publishers released a new book as a companion to its college texts on political science and government. The book is titled *10 Things That Every American Government Student Should Read*.¹⁰ Of those

Judges need to recognize that criticism is a manifestation of public concern about the state of justice in America.

10 10 THINGS THAT EVERY AMERICAN GOVERNMENT STUDENT SHOULD READ (Allyn & Bacon 1998).

ten readings, which include the writings of philosopher John Locke and esteemed academics, two are Supreme Court decisions and one is an essay by Justice Brennan.¹¹

But the last word is not the only word. Judges explain and exhort from the bench. They appear in symposia and conferences. They lecture at schools and universities. They write in law reviews and journals. They write books. Many even campaign in elections.

Of course, none of this scratches the itch that comes from wanting to reply immediately and firmly to the untoward comments about the case at hand or the decision just handed down. Chief Judge Judith Kaye of New York captured this judicial frustration perfectly when she wrote recently, “A decision should stand as the last word. But this means that when judges are sound bitten, they can’t bite back.”¹²

THE PREVENTION AND TREATMENT OF CRITICISM

The second point I would like to make is that there are a number of things judges can do to head off criticism and to deal with it when it happens. I will just tick them off quickly and if you wish to go into more detail, we can do that during the discussion period.

First and foremost, you can and should *make frequent and passionate use of the wide variety of forums* you already have for expressing your opinions. Write more. Speak more. Engage in dialogue more.

There are a number of things judges can do to head off criticism and to deal with it when it happens.

Second, no matter how provoked, *try not to overreact* to criticism from the public, the politicians, and the press, but try to engage in interaction. There are some great examples of that. I will just mention one. Two years ago, I was asked to help organize what turned out to be a wonderful two-day conference at the National Judicial College in Reno that some of you in this room attended. The audience, as we planned it, was about half judges and half journalists. Needless to say, there were some sharp exchanges, but they were productive, and I think each side left with a better understanding of the other side, and a desire to make things better.

Third, *be less isolated, insulated, and secretive*. The more open you and your proceedings are, the more understood and respected you are.

Fourth, *enlist the aid of others in your cause*. There are a number of ways to do this, and Professor O’Neil has mentioned just one that I endorse also because it is in my home state. That is the bar association decision to serve as a clearinghouse for complaints

11 The ten writings, which were selected by several hundred political science professors by ballot during the 1997 annual meeting of the American Political Science Association at the request of the publishers, are: John Locke, *Of the Beginning of Political Societies*; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819); Richard E. Neustadt, *Presidential Power and the Power to Persuade*; Morris P. Fiorina, *The Rise of the Washington Establishment*; Justice William J. Brennan, Jr., *Reading the Constitution As Twentieth-Century Americans*; V. O. Key, Jr., *The Responsible Electorate*; Larry J. Sabato, *Inquisition, American Style: Attack Journalism and Feeding Frenzies*; Theodore J. Lowi, *Interest-Group Liberalism*; *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); and Paul McMasters, *Free Speech v. Civil Discourse: Where Do We Go From Here?* [N.B.: Only the Forum Reporter’s prodding induced Mr. McMasters to furnish this list, which includes his own essay prominently among the ten influential writings selected by the government professors. J.R.]

12 Judith S. Kaye, *The Third Branch and the Fourth Estate*, MEDIA STUDIES JOURNAL 74 (Winter 1998), viewable at www.mediastudies.org/courts/kaye.html.

about news reports criticizing judges and their decisions. In my mind, that would be an awfully big help if that were replicated in every state. Another way to do this, formally or informally, is to designate a retired judge or a respected law professor to serve as a guide to the press during high-profile or highly technical cases.

Fifth, *do unto others as you would have them do unto you*. As much as you are tempted, do not try to amplify your own voice by muzzling the voices of others. To extend more freedom of speech to lawyers, police, witnesses, and jurors is to put forth a persuasive argument for expanding your own speech rights. As Justice Brandeis wrote in *Whitney v. California*¹³ in 1927, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

Those are just a few of the things you can do in addition to employing and exploiting the usual courtroom tools you have at your disposal for making yourselves heard and understood.

BE THE BULWARK

Finally, just a quick reminder to consider carefully the title of this conference, in which the judiciary is quite justly referred to as “the great bulwark of public liberty.” In a recent book, University of Texas law professor David Rabban points out that, until World War I, the courts of this land were essentially hostile to the idea of freedom of expression, especially between the Civil War and World War I.

During that time, Professor Rabban writes, “The overwhelming majority of decisions in all jurisdictions rejected free speech claims, often ignoring their existence. No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case.”¹⁴ Since then, of course, courts at all levels have found their First Amendment footing. With some regrettable exceptions from time to time, judges have shown a deep and admirable appreciation for the need for open, free, and, yes, sometimes even painful speech.

They have shown they understand and support the idea that the people, the politicians, and even the judges should be wary of trying to define a distinction between civil discourse and the din of democracy. I am often asked when talking to international audiences what it takes to make sure we will always have freedom of speech and freedom of the press. I believe it

I believe it takes three things to make sure we will always have freedom of speech and freedom of the press: first, a clear, unequivocal constitutional guarantee; second, an informed and committed public; and third, an independent judiciary.

13 274 U.S. 357, 377 (1927).

14 DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920*, at 131 (Cambridge University Press, 1997).

takes three things: first, a clear, unequivocal constitutional guarantee; second, an informed and committed public; and third, an independent judiciary.

It is my fervent hope that this nation's judiciary will hold onto its claim to be the bulwark. No matter how large the provocation, no matter how strong the desire to talk back and lash out, no matter how powerful the desire to silence or punish the critics, I hope this nation's judges will hold on to the title you have so richly earned as "the great bulwark of public liberty."

THOMAS L. JIPPING, ESQ.¹⁵

Making the case for a proposition requires, among other things, establishing its premises. The main flaws in this paper are that it identifies but fails to define what needs to be protected (judicial independence) and fails even to identify what it needs to be protected from. Absent these fundamental premises, it becomes a discussion relevant only to its author but of little use to others.

Though Professor O'Neil asserts that "the judiciary needs all the help it can get,"¹⁶ presumably because "judicial independence . . . is presently under attack,"¹⁷ he fails entirely to define judicial independence. This is unfortunate, because the definition of judicial independence significantly affects any conclusion about whether it is indeed threatened by something Professor O'Neil identifies or, for that matter, by anything else.

Stating and repeating the phrase is no substitute for defining it. Independence of what—the judicial branch as an institution, decision making by individual judges? Independence from what—citizen criticism, legislative manipulation, external political pressure, internal political considerations? Definition is certainly possible. The American Bar Association's Commission on Separation of Powers and Judicial Independence, for example, defined it thoroughly, distinguishing between "decisional independence"¹⁸ and "institutional independence."¹⁹ The National Commission on Judicial Discipline and Removal appeared to view judicial independence only in its institutional sense.²⁰

The reader needs a definition even though the author has not supplied one. Without an explicit definition, the reader may be left implicitly defining judicial independence in terms of the supposed threats to it discussed in the paper. There is, of course, a serious problem with this approach. Since a prior definition is necessary to know whether something might be a threat to judicial independence, defining it in terms of the stated threats automatically establishes them without any analysis at all. I hope this is not what Professor O'Neil intended, because it is logically weak and ultimately unpersuasive.

15 Mr. Jipping was invited to serve as a panelist, and he accepted The Foundation's invitation. He did not attend the forum, but accepted a further offer to submit written comments on Professor O'Neil's paper in lieu of making his comments in person.

16 O'Neil, "Protecting Judicial Independence in a Politicized Environment." Paper presented at the 1998 Forum for State Court Judges (July 11, 1998), *supra* p. 25 (hereinafter O'Neil).

17 *Id.*, at 16.

18 American Bar Association, *An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence* (July 4, 1997), at 11.

19 *Id.*, at 12.

20 See National Commission on Judicial Discipline and Removal, *Draft Report and Tentative Recommendations* (June 1993), at 1.

PROTECTION FROM WHAT?

In addition to identifying but failing to define what needs to be protected, Professor O'Neil fails even to identify what it needs protection from. The ABA Commission, in contrast, identified and discussed at length a variety of supposed threats to judicial independence.²¹ In his entire paper, Professor O'Neil discusses only one thing that he even suggests might threaten judicial independence: free speech. This is very shaky ground from the start. It is surely a weak kind of independence that is threatened by free speech and, conversely, can only be maintained by censorship. Though he could have offered a thorough and sophisticated review of free speech directed toward the judiciary, Professor O'Neil instead made two errors that seriously undermine the value of his paper. First, he used excessively pejorative language that, though it may have an emotional effect on the reader, does nothing to identify and evaluate any threat to judicial independence. Second, he implied that all free speech that criticizes, evaluates, or otherwise comments negatively on judges or the judiciary warrants a pejorative label and, as such, presumptively threatens judicial independence (however defined).

From the very first sentence of the executive summary, Professor O'Neil uses a string of derogatory references for the free speech that he apparently believes threatens judicial independence. He draws no distinctions, designates no categories, separates no examples, or otherwise suggests that some free speech critical of judges or the judiciary may not threaten judicial independence.

Professor O'Neil's labels for free speech directed at the judiciary are almost absurd in their number: "assaults on the judiciary," "attacks," "anti-judicial speech," "robe-bashing," "attacks on the bench," "corrosive messages," "bench-bashing," "attacking judges," "judge-bashing," "attacks on judges," "attacks upon the judiciary," and so on. The paper contains at least two dozen such references. These are neither objective nor self-defining labels, making their use in an academic paper highly questionable. They appear instead to be loaded phrases intentionally used to make the reader automatically dismiss as inappropriate whatever free speech these labels may designate. This approach is insulting in its simplicity, apparently assuming that readers will be so uncritical as to accept this boilerplate without thought or evaluation. As such, Professor O'Neil's own paper includes better examples of the "intemperate,"²² "irresponsible,"²³ or "inflammatory"²⁴ criticism that he suggests threatens judicial independence.

If Professor O'Neil is asserting that all such undifferentiated criticism of judges, evaluation of judicial decisions, or public statements (even negative ones) about the

It is a weak kind of independence that is threatened by free speech and, conversely, can only be maintained by censorship.

21 American Bar Association, *supra* nn.4, 15–35.

22 O'Neil, at 14, 15.

23 *Id.*, at 16.

24 *Id.*, at 17.

judiciary constitute “assaults” or “attacks,” then his position, and this paper asserting it, should be rejected out of hand. If this is not his position, then he has failed even to state his real position with any clarity, much less establish it persuasively.

Examples of free speech that can threaten judicial independence might help compensate for the author’s lack of definition or description. This search, however, yields nothing, because Professor O’Neil provides not a single example of the free speech that supposedly threatens judicial independence (however defined). He skips what would seem the obvious need to credibly establish the threat, and the first section of his paper looks immediately at how judges can respond to “attacks upon them and their decisions.”²⁵

The temptation again is for the reader simply to infer the existence or nature of the threat from what Professor O’Neil describes as a defense against it. One example is Judge Roosevelt Dorn’s response to Los Angeles District Attorney Ira Reiner’s public criticisms.²⁶ According to Professor O’Neil, Reiner’s criticisms were “false to the point of contrivance or fabrication” and “personally insulting.”²⁷ It appears that Professor O’Neil is arguing, by observing that Judge Dorn took the unusual step of publicly refuting or countering Reiner’s claims, that such criticism threatens judicial independence. If this is his argument, the reader has no basis for evaluating it without any definition of judicial independence. If this is not his argument, then the relevance of this story to a paper on protecting judicial independence remains a mystery.

Professor O’Neil’s second example is Washington Supreme Court Justice Richard Sanders’ successful defense against an attempt at judicial discipline following his own comments about his views on certain issues.²⁸ Again, it appears Professor O’Neil is arguing that this effort at judicial discipline threatened judicial independence, and, again, the reader cannot evaluate this argument without a definition of judicial independence. In addition, this rare example involved potential violation of the Model Code of Judicial Conduct. It is unclear how enforcing a conduct code designed to enhance judicial independence can instead threaten judicial independence, and Professor O’Neil does not offer any clarity. If this is not his argument, then the relevance of this story to the paper is not at all clear.

The closest Professor O’Neil comes to identifying a specific category of free speech that might in some way threaten judicial independence is a passing reference to “irresponsible criticism which . . . influences [judges’] decisions.”²⁹ The ABA Commission similarly noted concerns about “criticism that seeks to influence the outcome of a pending case.”³⁰ The examples that follow, however, involve attorney speech that is subject to specialized restrictions.

In the end, Professor O’Neil appears to be arguing that free speech that criticizes, evaluates, or negatively comments on judges or the judiciary is an “attack” and an

25 *Id.*, at 16.

26 *Id.*, at 17–19.

27 *Id.*, at 18.

28 *Id.*, at 19–20.

29 *Id.*, at 21, quoting Stephen Bright.

30 American Bar Association, *supra* n.4, at 19.

“assault” and, therefore, a threat to judicial independence, which he has not defined. This provides no real understanding of the problem and, therefore, no insight into any solution. I completely reject such an assertion and believe it fails to accomplish the task identified by the title of this paper.

MARK S. MANDELL, ESQ.

I want to recount to you briefly the experience in Rhode Island. When I was president of the state bar, there was a small group of us who were charged with studying what would be the best process for the selection of judges. We studied the pluses and minuses of the election of judges. As we went through it, in my mind and I think in everybody’s mind, the key to us was the independence of the judiciary—the requirement that there be in place something that ensured, as much as possible, the independence of the judiciary.

I have been practicing about twenty-four years and I can even tell you as an attorney, as an advocate, that the thing that has meant the most to me and my clients is the objectivity of the judge, of the tribunal. Whether I won or lost—and no one likes to lose—it was critical that my client and I *believed that we at least had a fair opportunity to put our case on*. That is why, in my mind, during the deliberations about what kind of system we would have in Rhode Island, we came up with merit selection.

In my practice, whether I won or lost, it was critical that my client and I believed that we at least had a fair opportunity to put our case on.

COMBINE MERIT SELECTION WITH LIFE TENURE

I think, as Justice Flanders says, it needs to be coupled with life tenure. Rhode Island is one of the few states, I understand, that actually has life tenure for state judges. At first, that was scary to us. We wondered what that would mean in terms of how a judge would view the litigants and view the attorneys, but I believe it has worked well, and I would advocate its use elsewhere. I think that has been very important: the combination of merit selection and lifetime tenure.

The independence of the judiciary is the crown jewel of our system of justice. That sounds almost poetic, but I do believe it is true. I agree with Justice Rehnquist that independence of the judiciary is the critical element of the success and the integrity of our system.

I want to compliment Professor O’Neil on his paper. The only disagreement I have is with his very last sentence, where he said that if judges reach out and attempt to educate the public, not just about the procedures that are in place but about the entire system and what the case is about and what judges do, then hopefully the criticism will disappear or lessen.

I don’t think that is actually going to happen, and if it does, it is not going to happen in the near future. I say that for two reasons: first, because half of all litigants still lose,

and second, because of the politicization of the criticisms. And I would refer back to the last presidential election when *both* parties criticized Judge Harold Baer. There were other criticisms of the judiciary, too. I think the criticism has become so political, both criticism of judges during judicial elections in many states and also criticism of particular decisions, that I don't think the criticisms are going to disappear.

So the first question is whether there should be a response at all. I actually see great value to not only a response, but also an *active* response to unwarranted, unfair, inaccurate criticism of a judge's decision or of the procedures used. I think it *hurts* the independence of the judiciary when there is no response.

The consensus that there is an impartial judicial system allows the public to submit to the system voluntarily and to use the system.

I was talking the other day with a friend of mind from Rhode Island, who is in the audience, and he said, quoting John Rawls, the great commentator and writer, the author of *A Theory of Justice*, who said that, once a judge takes the oath of office, there is not just a *possibility* that the judge will respond to an attack, but there is actually a *responsibility*—a duty to respond. I think there is a lot of wisdom to that.

But *when* to respond? I think it is very important that judges pick their battlegrounds carefully. I don't think there should usually be a response unless the person who is making the criticism is someone people listen to—really listen to—whether it is someone in politics or a member of the media. I also think there is probably a relationship between the nature and the extent of the attack and the need to respond.

THE IMPORTANCE OF PUBLIC PERCEPTION

To me, the key issue is this: What is the real value of the public's perception that the judicial system is impartial and objective, and that they will get a fair trial? What is the value of that? Why is that important, really? To me, it is because the consensus that there is an impartial judicial system allows the public to submit to the system voluntarily and to use the system.

Judges can't tax, and they can't raise armies. You can't force people to submit to the system willingly and use it. So, to me, the value of a common belief that there is impartiality there, that there is objectivity, is that the public willingly uses the system. So if a response to criticism is within the range, so that it doesn't shake the consensus of impartiality, then that begins to define what is permissible.

Then, I think, the next question is: How do you define what conduct within that range is appropriate? What is the balance? Judges clearly don't give up First Amendment rights. I agree with Justice Flanders that there should be the fullest First Amendment right to be able to respond.

On the other hand, it is critical not to create an impression of partiality. I think that is what underpins the public's confidence in the system: the impartiality of the judiciary.

With that balance, I think the *Sanders* decision actually was an appropriate decision, and I would just say that judges enjoy so substantial a measure of free speech that

constraints upon them should be tested by the same strict scrutiny that protects the political speech of private citizens. I believe that is critical.

How can and should judges respond? In what form? Should it just be an op-ed piece? Should it be a press conference? Should it be on the radio? Should it be on TV? Well, I think there are probably times when the choice of media may go too far, but I think that would be a rare instance. To me, what is more important than the medium is the message. It is the content that is the most important to me. I think the only limit on the content should be not creating any impression of partiality.

The last thing I'd like to say is that, because this issue is so important to those of us who practice law, as well as to you all, this year in the Association of Trial Lawyers of America (ATLA) I am appointing a Judicial Independence Committee. It is the first time ATLA has had such a committee. It will have both trial lawyers and judges on it. We will also try to get all of our affiliated state organizations to form their own committees on the independence of the judiciary. Our goal is to have rapid response teams throughout the country that are prepared, when there is unwarranted criticism of the judiciary, to make a prompt, correct, and effective response to it.

How can and should judges respond? The only limit on the content should be not creating any impression of partiality.

RESPONSE BY PROFESSOR O'NEIL

In keeping with the opportunity to respond to criticism, which in this case has been totally responsible, rational, reasonable, and so on, I did want to mention one example of what seems to me forthright judicial commentary. It's not necessarily outspoken, but you will appreciate the circumstances.

In the 1962 term, my co-clerk with Justice Brennan was Richard Posner, who is now chief judge of the Seventh Circuit. One of the major issues on which Dick had worked that year was habeas corpus. There were some major habeas corpus cases later in the term. About the middle of the term, Justice Brennan was invited to address the annual banquet of the Yale Law Journal in New Haven. He eagerly agreed, although as a Harvard Law School graduate, relations with the Yale Law School had always been a bit strained, but he thought this offered an opportunity for rapprochement. He was delighted. He went to New Haven carrying a very major speech dealing with habeas corpus.

The cocktail hour before the banquet was long. Actually, "hour" was a euphemism. It was well over two hours. The dinner hour was also long, and so when Justice Brennan was finally to be presented, it was 12:45 a.m. He went to the podium and he said, "Given the hour, I suspect most of you assume that I will simply thank you for inviting me here and say it is time to end the evening and go home."

"Wrong!" he said. "I have a long and important speech on habeas corpus, and you are going to sit and listen to every word of it."

And at 1:30 a.m., he concluded his speech. Now, that was a time when the justice felt somewhat freer to speak on public occasions, and actually it was an extraordinarily important speech. In fact, it preceded by some months the Court's decision in *Fay v. Noia*,³¹ which was the principle habeas case that was part of this cycle. Justice Brennan's speech happened to deal in a very general way with an issue that was then before the Court. It was not an issue on which anyone knowing the justice's views, which had already been embodied in opinions, could have acted in a way that could have compromised that or any other case. But for the record, it was a comment on a pending case.

Let me just add a couple of other comments along the way. I have mentioned my concern about the "safe harbor," which Justice Flanders mentioned. My sense is that that is where the safe harbor ought to be, but it is not always fully so understood. That is the ideal and I would heartily endorse everything he said with respect to how that balance ought to be struck.

Paul McMasters's comments seemed to me equally worthy of endorsement. (I guess I should, in the spirit of full disclosure, say that I did not solicit Paul's endorsement of me for a judicial appointment, but if he can find the proper place, I would be happy to accept his support.) Paul and I have had the opportunity to support and endorse one another on many an occasion and, happily, our views converge in most respects, as, indeed, they do today.

In his comments, **Mr. Jipping**³² chiefly expresses concern about the absence in this paper of a definition of "judicial independence"—though he notes quite correctly that the American Bar Association Commission and other groups cited in my paper have provided such definitions in their lengthier reports and statements. Reliance upon such sources for definitions, as well as for other purposes, seems entirely appropriate.

*It is far too late in the day
to doubt whether or not the
judiciary faces grave threats.*

However, to the extent that Mr. Jipping expresses doubt about the existence of a serious threat to the independence of judges and courts, the evidence marshaled by several sources cited in the paper seems overwhelming. It is far too late in the day to doubt whether or not the judiciary faces grave threats; the challenge of the Roscoe Pound Forum and other conferences like it in these times is to seek responses and solutions, not to revisit or redefine the problem.

As to **Mr. Mandell's** comments, I quite agree with his sense that my concluding sentence contains or conveys that myopia (which concluding sentences often do, as a way of getting off stage) of hoping that there will be a bright, rosy future, when in fact, of course, he is absolutely right. The most that one could hope for, if we were to take the positive steps we have been discussing, is a higher level of understanding and maybe a less rancorous public discourse, but surely not the disappearance of all criticism. Nor, indeed, for reasons that I think all of us have indicated, would we want that criticism to terminate even if that were to happen.

31 372 U.S. 391 (1963).

32 Professor O'Neil reviewed Mr. Jipping's comments after they were submitted in writing.

I also heartily applaud his creation of ATLA's new Committee on Judicial Independence. I think it bodes exceedingly well. It is very much in the spirit of what seems to be happening literally this spring and summer, of constructive response from the organized bar, at various levels and in various ways, to step up and help out along lines that several of my colleagues have suggested.

I think I said at the outset that in recent weeks several good things have happened. The one perhaps not so good thing has to do with one of those invitations I did not accept. Some of you may also have received an invitation from Bork & Associates to attend an unveiling and a signing of Max Boot's book called *Out of Order: Arrogance, Corruption and Incompetence on the Bench*, which was also the subject of a *Wall Street Journal* op-ed piece about that same time. Interestingly, several weeks later, the *Wall Street Journal* did carry several very interesting critiques of the op-ed piece, and in one case actually a response to something in Mr. Boot's piece under the banner heading "Unfairly Tarred and Feathered." Perhaps that suggests that there is, on the media side, a greater willingness to re-create, re-establish, and legitimize this kind of dialogue.

So, as I reminded myself that Mr. Bork was himself was once a judge (something he may have forgotten or may wish to forget), even in such a statement as the op-ed there are the seeds of a response and of a dialogue, of which this gathering today strikes me as a particularly appropriate one and one in which I am honored and delighted to have been invited to join with you.

WHEN DO LEGISLATIVE ACTIONS THREATEN JUDICIAL INDEPENDENCE?

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Professor Chemerinsky considers the concept of “judicial independence” in light of the many historical attempts to limit it, at both the state and federal levels. These efforts may arise from unpopular decisions by particular judges or courts, as a general attempt to deny access to the courts to particular classes of litigants, or out of antipathy to certain types of litigation.

Professor Chemerinsky identifies the constitutional foundation (both state and federal) of judicial independence (as a legal doctrine, beyond its obvious rhetorical attractions) and identifies eight representative types of legislative action that may infringe judicial powers: threatened or real deprivation of adequate funding for the courts; legislation that dictates the result in particular cases; legislation that dictates court procedures in particular cases and classes of cases; legislation restricting court jurisdiction to prevent courts from entertaining entire disfavored classes of litigation; legislation limiting available remedies; legislation limiting judicial (including juror) discretion in finding facts and devising remedies; legislation assigning the courts nonjudicial tasks; and legislation changing substantive law in response to particular decisions.

Professor Chemerinsky analyzes the eight legislative actions to determine their likely constitutionality in terms of both the separation of powers and due process requirements of federal and state constitutions.

Legislative challenges based on separation of powers requirements must take into account whether the legislative action would affect past or pending cases or merely change substantive law for the future; whether it would restrict jurisdiction or judicial discretion; and whether it would dictate actual results or rather procedures to be followed in arriving at those results.

Professor Chemerinsky concludes that a number of limitations on judicial independence may be unconstitutional, but that others may not be amenable to constitutional challenge, and that the dividing line between the two types is anything but bright.

*The greatest threats to
judicial independence are
at the state level.*

I. INTRODUCTION: THE ISSUE

The topic of judicial independence has deservedly received much attention in recent years. Interestingly, more of the attention has focused on judicial independence at the federal level than in the states. For instance, in 1997, the American Bar Association’s blue ribbon Commission on Separation of Powers and Judicial Independence presented a detailed report on the current threats to an independent judiciary.¹ The report focused virtually entirely on ensuring independence for federal judges.

Yet, the greatest threats to judicial independence are at the state level. The life tenure of federal judges provides them an independence that elected state court judges never can enjoy. Increasingly, state court judges are being targeted for particular

1 AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997).

rulings and are being ousted from office for their decisions.² Throughout the country, the costs of judicial elections are skyrocketing, requiring judicial candidates to raise growing amounts of money, especially from attorneys who may represent clients with cases that will come before the successful candidates, as well as potential litigants themselves.

At the same time, legislatures throughout the country are targeting courts and attempting, directly or indirectly, to exercise more control over legal decision making. Statutory caps on compensatory and punitive damages, sentencing guidelines, and laws dictating procedures in particular types of cases (such as the Prison Litigation Reform Act³) all are efforts by legislatures to control matters previously left to judicial or juror discretion.

Not all legislative actions directed at the judiciary should be regarded as unconstitutional.⁴ To cite two obvious examples, Congress has set an amount-in-controversy requirement in diversity suits since the first judiciary act in 1789, and state legislatures always have set salaries for state court judges.

When, however, do legislatures go too far and impermissibly interfere with an independent judiciary? This paper focuses on the question of when such legislative actions are inconsistent with judicial independence. Specifically, what types of legislative actions exercising control over the judiciary should be regarded as permissible and which should be viewed as unacceptable or even unconstitutional infringements of judicial independence?

In this paper I have three objectives. First, I seek to identify the constitutional foundation for judicial independence so as to assess when legislative actions are unconstitutional. Second, I attempt to categorize the different types of legislative actions that might be regarded as a threat to judicial independence. Finally, I appraise the constitutionality of the different types of legislative action to answer the basic question: When do legislative actions infringe judicial independence?

II. WHAT IS JUDICIAL INDEPENDENCE, AND WHY DOES IT MATTER?

Declarations about the importance of judicial independence in the United States can be traced to its earliest days. Alexander Hamilton, quoting Montesquieu, forcefully declared: "For I agree, that 'there is no liberty, if the power of judging be not separated from legislative and executive powers . . . the complete independence of the courts of justice is peculiarly essential in a limited constitution.'"⁵ The Constitution's framers

2 See, e.g., Penny J. White, *An America Without Judicial Independence*, 80 JUDICATURE 174 (January–February 1997) (a former Tennessee Supreme Court Justice describing the campaign that ousted her from office).

3 18 U.S.C. §3626 (1996); 28 U.S.C. §1915 (1996); 42 U.S.C. §1997(e) (1996).

4 See, e.g., REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 16 (1993) ("Although . . . the constitutional provisions pertaining to judicial tenure and the power of the courts may be understood in terms of their underlying purpose of judicial independence, this is not to say that everything that could interfere with the work of an Article III judge or court is unconstitutional.").

5 THE FEDERALIST No. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990), quoting MONTESQUIEU, SPIRIT OF LAWS, at 181.

were acutely concerned about judicial independence because of their experience with judges in the colonies who served at the pleasure of the King and were widely distrusted because of their lack of independence.⁶ Article III's grant of life tenure to federal judges and its assurance that their salaries cannot be reduced embody the goal of creating an independent judiciary.

Yet, despite the majestic words of Alexander Hamilton, the Constitution does not create an entirely independent federal judiciary. The Constitution, in Article III, creates a Supreme Court, but gives power only to Congress to establish lower federal courts. Even as to the Supreme Court, Article III limits the Supreme Court's appellate jurisdiction to "such Exceptions, and under such Regulations as Congress shall make." Also, the Constitution grants Congress the power to impeach and remove federal judges for treason and for "High Crimes and Misdemeanors." As with all aspects of separation of powers, the Constitution creates both an independent and an *interdependent* judiciary.

The same, of course, is true in every state. Many of the states experimented in their initial constitutions with the establishment of all-powerful legislatures⁷ as a contrast to an all-powerful executive, only to learn the truth of Thomas Jefferson's warning that "173 despots would surely be as oppressive as one."⁸ By the middle of the nineteenth century, states were rewriting their constitutions to constrain legislative power and begin a march toward greater judicial independence.⁹

In discussing judicial independence, a distinction sometimes is drawn between "decisional independence" (the authority of an individual judge to decide a case solely on the basis of his or her judgment about the facts and law and without consideration of any other interests) and "institutional independence" (the insulation of the judiciary as a branch of government from control by the other branches of government).¹⁰ For example, the need for judges to please the voters in elections is seen as a serious threat to decisional independence, while a refusal by the legislature to fund the courts adequately would be a threat to institutional independence.

Although the distinction between decisional and institutional independence is often invoked, I think it adds relatively little to the understanding of judicial independence. Fear of legislative reprisals by cutting off judicial funds may influence particular judges in specific cases and thus threaten both decisional independence and institutional independence. And the accountability of state judges at the polls creates a threat both to the independence of the entire judicial institution, as well as a risk to independence in particular cases.

6 See Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997).

7 See, e.g., Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L. J. 911, 916–17 (1993).

8 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 157 (1781; W. Peden ed. 1954).

9 See, e.g., ILL. CONST. (1848), OHIO CONST. (1851), and IND. CONST. (1851).

10 See, e.g., Deanell Reece Tacha, *Independence for the Judiciary for the Third Century*, 46 MERCER L. REV. 645 (1995).

A far more important distinction is to be drawn between judicial independence as a *normative concept* and judicial independence as a *constitutional principle* that can be protected from legislative actions. For example, both state voters denying retention to judges because of controversial rulings and congressional impeachment and removal of judges because of specific rulings undoubtedly would pose grave threats to judicial independence, but would likely not be held to be unconstitutional.¹¹

When can legislative actions be challenged as unconstitutionally infringing judicial independence? At the outset in addressing this question it must be emphasized that threats to judicial independence are not less important simply because they are not

The important distinction is between judicial independence as a normative concept and judicial independence as a constitutional principle that can be protected from legislative actions.

vulnerable to constitutional challenge. As alluded to earlier, some of the greatest contemporary threats to judicial independence are the targeting of state court judges for their specific decisions and the escalating costs of judicial elections that cause judges to turn to attorneys and litigants for ever increasing sums of money. My focus, however, is on when legislative acts cross the line and unconstitutionally interferes with the judicial branch of government. There are two constitutional foundations for judicial independence and either might be violated by a legislative action.

First, *separation of powers* protects judicial independence. At the federal level and in every state, the judiciary is a co-equal branch of government. Justice Powell explained that the doctrine of separation of powers can be violated in two ways: “One branch may interfere impermissibly with the other’s performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.”¹² In other words, legislative

actions unconstitutionally violate separation of powers if they *prevent* the judiciary from performing its duties or if the legislature *takes over* responsibilities exclusively assigned to the judiciary.

Second, *due process of law*—both procedural and substantive—provides a basis for constitutional protection of judicial independence. Legislative actions that deny a meaningful hearing before a neutral decision maker violate procedural due process. The Supreme Court long has declared that the very essence of due process of law is a fair hearing before an impartial decision maker.¹³ Additionally, legislative actions that deprive people of liberty or property without adequate justifications deny substantive due process. Over a century ago, the Supreme Court declared that due process “is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any ‘due process of law,’ by its mere will.”¹⁴

11 The Supreme Court has held that the challenge of a former federal judge to the impeachment and removal process posed a non-justiciable political question. *See Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732 (1993).

12 *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring).

13 *See, e.g., Gibson v. Berryhill*, 411 U.S. 564 (1973).

14 *Murray’s Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1856); *see also Hutardo v. California*, 110 U.S. 516, 531 (1884).

When do legislative actions threatening judicial independence violate either or both of the doctrines of separation of powers and due process? In Part III of this paper I attempt to identify a number of different types of legislation that might be perceived as a risk to an independent judiciary. In Part IV, I then analyze which of these offend separation of powers and/or due process.

III. TYPES OF LEGISLATIVE ACTIONS THAT THREATEN JUDICIAL INDEPENDENCE

I have identified eight different types of legislative actions that can seriously threaten an independent judiciary, some of which may also be unconstitutional. Although this list is by no means exhaustive, it does provide a useful starting point for analyzing when legislative actions may cross the line and violate the Constitution. The issue of their constitutionality is analyzed in Part IV.

1. Legislative actions that undermine the institutional functioning of the courts. The judiciary depends on legislatures for necessities essential for their operation. The most obvious example is funding. If a legislature were to refuse to fund the judiciary entirely, or refuse to fund it adequately, the judiciary would be compromised in its ability to function. Judicial independence would be threatened especially if this were done in response to particular rulings, or even if the judiciary compromised its judgments merely due to serious fears that unpopular rulings *might* lead to such reprisals.

The judiciary depends on legislatures for necessities essential for their operation.

2. Legislation dictating the result in particular cases. More than a century ago, in *United States v. Klein*,¹⁵ the Supreme Court held that Congress cannot constitutionally direct particular substantive results. *Klein* arose during Reconstruction, and concerned an 1863 statute providing that individuals whose property was seized during the Civil War could recover the property, or compensation for it, upon proof that they had not offered aid or comfort to the enemy during the war. The Supreme Court subsequently held that a presidential pardon fulfilled the statutory requirement of demonstrating that an individual was not a supporter of the rebellion.¹⁶

On the basis of that decision and his presidential pardon, Klein won his case in the Court of Claims. The government appealed, however, and *while the case was still pending*, Congress adopted another statute¹⁷ making a pardon inadmissible as evidence in a claim for return of seized property, and providing further that a pardon, without an express disclaimer of guilt, was proof that the person aided the rebellion. In those circumstances, the statute operated to deprive the federal courts of their jurisdiction over the claims, providing that, upon “proof of such pardon . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.”

15 80 U.S. (13 Wall.) 128 (1872).

16 *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

17 92 Stat. 2076.

The Supreme Court held that the statute adopted while Klein's case was pending was unconstitutional. The Court stated:

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department in the cases pending before it? . . . We think not. . . . We must think that Congress has inadvertently passed the limit which separates the legislative power from the judicial power.¹⁸

Klein remains powerful authority that a legislature acts unconstitutionally if it commands that the judiciary decide a case in a particular manner.¹⁹

3. Legislation dictating procedures in particular cases and particular classes of cases. Rules of procedure at the federal level are adopted pursuant to a federal statute, the Rules Enabling Act.²⁰ In many states, court rules are embodied in or are created through a constitutionally mandated rule making process that places exclusive rule making authority in the state's highest court.²¹

Rules created pursuant to statute, however, can pose a serious threat to judicial independence when they target particular cases or classes of cases for treatment different from that afforded other cases. A legislature might, thus, try to control decision making by controlling procedures. In one example at the state level, the Ohio Supreme Court has invalidated, on constitutional grounds, statutes that overrode procedural and evidentiary rules.²²

In another example, the proposed global tobacco settlement agreement would do exactly this, by precluding any class action suits or joinder of claims.²³ The settlement agreement would also limit who could be plaintiffs in lawsuits by precluding actions by third-party payors such as insurance companies or union health and welfare funds under some circumstances.²⁴

18 80 U.S. at 146-47.

19 A legislature attempting to compel a particular result in a particular case is doing nothing less than exercising judicial power, an authority that our system of separated powers denies it.

In 1846, the Tennessee Supreme Court struck down such a legislative action in a case in which an 1838 statute regulating the sale of liquor was repealed and the legislature attempted to absolve all prior offenders of the earlier statute. In a case involving a pending prosecution, the court found the statute an unconstitutional interference with the judicial function. *State v. Fleming*, 26 Tenn. 152 (1846).

A similar result was reached by the Pennsylvania Supreme Court in 1850 after the state legislature attempted to grant a new trial to the losing party in a trespass case. *DeChastellux v. Fairchild*, 15 Pa. 18 (1850).

20 28 U.S.C. §§2071-2077 (1994).

21 *See, e.g.*, OHIO CONST. art. IV, §5(b), which provides that the "supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right" and that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

22 *Hiatt v. Southern Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994); *In re Coy*, 616 N.E.2d 1105 (Ohio 1993).

23 STATE TOBACCO INFORMATION CENTER, PROPOSED RESOLUTION: SETTLEMENT TERMS, Section VIII.B.2, accessible through WESTLAW's "TOBACCONews" database or at <<http://stic.neu.edu/settlement/6-20-settle.htm>>.

24 *Id.* at Section VIII.B.5.

4. Legislation restricting the jurisdiction of courts. The legislature can also attempt to control judicial decision making by restricting the authority of courts to hear particular types of cases.

Legislation of this kind, directed at the federal courts, has been advanced for years in response to major controversies. Altogether, between 1953 and 1968, over sixty bills were introduced into Congress to restrict federal court jurisdiction over particular topics.²⁵ For example, during the 1950s, after the Supreme Court invalidated some loyalty oaths for government workers and attorneys,²⁶ the Jennings-Butler Bill²⁷ was introduced in the United States Senate to prevent review of State Board of Bar Examiners' decisions concerning who could practice law in a state.

Similarly, during the 1980s, there were proposals in Congress to prevent federal courts from hearing cases involving challenges to state laws permitting prayer in public schools or restricting access to abortions.²⁸ The obvious purpose of these jurisdiction stripping bills is to achieve a change in the substantive law by a procedural device. Proponents of the legislation would have preferred to overturn the court rulings in question by enacting constitutional amendments, but bills creating such amendments have not attracted sufficient strength in Congress to be forwarded to the states for possible ratification. Unable to directly overrule the Supreme Court, opponents of these decisions believe that they might achieve a substantive change in the law by limiting federal court jurisdiction. Without lower federal courts or the Supreme Court to protect particular rights, the litigation would be entirely in state courts with no review in the federal judicial system.

Proponents of jurisdictional restrictions are hopeful that state courts, especially without the prospect of federal judicial oversight, will be more sympathetic to their causes and thus be more likely than federal courts to sustain state laws regulating abortion or permitting school prayers. Thus, the goal of federal jurisdictional restrictions is the “de facto reversal, by means far less burdensome than those required of a constitutional amendment, of several highly controversial Supreme Court decisions dealing with matters such as abortion, school prayer, and busing.”²⁹

5. Legislation restricting remedies that can be imposed by courts. As long ago as the monumental decision in *Marbury v. Madison*, Chief Justice Marshall's declared that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”³⁰ The same

25 PAUL BATOR, DANIEL MELTZER, PAUL MISHKIN, AND DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 377 (3d ed. 1988).

26 See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

27 S. 3386, 85th Cong., 2d Sess. (1958).

28 See, e.g., S. 158, 97th Cong., 1st Sess. (1981); H.R. 3225, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction in abortion cases); S. 481, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction over cases that involve voluntary school prayers).

29 Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129–130 (1981); see also Lawrence Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 69 (1981).

30 5 U.S. (1 Cranch) 137, 163 (1803).

sentiment is found in the constitutional text of 39 states where the “right to a remedy” is explicitly protected.³¹

Even where they do not restrict jurisdiction outright, legislatures might attempt to limit judicial independence by limiting the remedies available for redress of proven violations of common law, statutory, or constitutional rights. For example, many state legislatures have attempted to impose limitations on damages in particular types of cases, abolish joint and several liability, or abrogate the collateral source rule. If the effect of such legislation is to prevent courts from providing an adequate remedy, or to create other obstacles to access to the courts, the judiciary is crippled in its ability to perform its core function. Certainly, a right without a remedy is but an illusion.

6. Legislation limiting the traditional discretion of the courts. Federal courts long had substantial discretion in determining the punishment for federal crimes. The federal Sentencing Reform Act³² and federal sentencing guidelines adopted pursuant to it³³ now dramatically limit the discretion of federal judges in imposing sentences in criminal cases. The limitations on damages alluded to above also limit the traditional discretion of the courts or of the jurors who, in their role as fact finders, act as adjuncts of the courts.

7. Legislation assigning nonjudicial functions to the courts. Legislatures may attempt to assign courts burdensome administrative tasks or responsibilities inconsistent with the judicial function. An early example appeared during the administration of President George Washington, when Secretary of State Thomas Jefferson asked the Supreme Court for its answers to a long list of questions concerning American neutrality in the war between France and England.³⁴ The justices responded to President Washington, but declined to answer the questions asked. They explained that the constitutional separation of powers requirement would be violated if they were to give such advice to another branch of government:

[The] three departments of the government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to.³⁵

Whether the legislature has *unconstitutionally* assigned nonjudicial tasks to the judiciary, however, depends on the specific facts of the case. Much more recently, in *Mistretta v. United States*, in upholding the placement of the Sentencing Commission

31 See, e.g., TENN. CONST. art. I, §17; William C. Koch, *Reopening Tennessee's Open Courts Clause*, 27 MEMPHIS L. REV. 333 (1997).

32 Federal Sentencing Reform Act of 1984 (P.L. 98-473, Title II, ch. II, October 12, 1984, 98 Stat. 1987).

33 28 U.S.C. §994(a) *et seq.* The placement of the Federal Sentencing Commission within the judicial branch (see next subsection) was a related development.

34 In his letter to the justices, Jefferson explained that the war between these countries had raised a number of important legal questions concerning the meaning of United States' treaties and laws. Jefferson's letter said that “[t]he President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the [Court], whose knowledge of the subject would secure us against errors dangerous to the peace of the United States.” For example, Jefferson asked the justices, “May we, within our own ports, sell ships to both parties, prepared merely for merchandise? May they be pierced for guns?” See P. Bator, et al., *supra* n.1, at 65–67 (reprinting the correspondence between Jefferson and the Supreme Court).

35 *Id.*

within the judicial branch, the Court stated that “Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”³⁶ This formulation, however, suggests that federal legislation assigning new duties to the courts is unconstitutional if it does usurp the powers of another branch of government or interfere with “the central mission of the judiciary.” The Court provided no criteria for assessing when this occurs.

8. Legislation changing substantive law in response to judicial decisions.

Legislatures might attempt to supplant common law principles with statutes dictating different results in future adjudications, or legislatures might respond to particular court rulings interpreting statutes by modifying the statutes. Such actions obviously seek to control judicial rulings in future cases. In some instances, these modifications may be designed to bring a statute into compliance with constitutional requirements when a court has invalidated a prior version of the statute. No intrusion on judicial independence occurs by such good faith response to a judicial ruling.

The constitutionality of all of these types of legislative actions is analyzed in Part IV.

IV. WHICH LEGISLATIVE ACTIONS INFRINGE JUDICIAL INDEPENDENCE?

A. Violations of Separation of Powers.

In analyzing when legislative actions concerning the judiciary violate separation of powers, three distinctions are key.

1. Past versus present. First, it is necessary to distinguish between statutes dictating different results in particular cases decided *in the past* or now pending in the courts and statutes changing the substantive law *in the future*. The former, but not always the latter, should be regarded as violating a separation of powers requirements.

If the legislature disagrees with a judicial interpretation of a statute, it can modify the statute to reflect its intent. These legislative actions are generally within the legislature’s province. The extent of that province, however, is often overlooked or misunderstood by courts.

The recent decision in the case of *Caulk v. Superior Court*³⁷ illustrates this problem at the state level. The California Welfare and Institutions Code required that county governments provide eligible individuals needed food, clothing, shelter, and medical care. In an earlier decision, the Court of Appeal interpreted a specific provision of the Code as relieving the duty of counties to provide medical care in certain circumstances not relevant to the present discussion. The state legislature then enacted a statute in response to the court’s initial decision, seeking to make it clear that county governments in fact had the duty to provide such care. The California Court of Appeal declared that the new statute constituted an *ultra vires* attempt to “instruct the judicial branch in the interpretation of a statute.”³⁸ This seems wrong; the legislature can revise its own statutes to make its intent clear.

36 488 U.S. 361, 388 (1989).

37 71 Cal.Rptr.2d 904 (1998), *review granted*, 1998 WL 275615 (May 13, 1998).

38 *Id.* at 906.

The same problem exists at the federal level, as illustrated by a recent Supreme Court decision.³⁹ In 1991, in the *Lampf* case, the Court had ruled that actions brought under §10(b) of the Securities and Exchange Act of 1934⁴⁰ and the Securities and Exchange Commission’s Rule 10(b)(5) must be brought within one year of discovering the facts giving rise to the violation and within three years of the violation.⁴¹ Thereafter, Congress amended the law to allow cases to go forward that had been filed before *Lampf* took effect—if they could have been brought under the prior law.

In *Plaut v. Spendthrift Farm, Inc.*, the Supreme Court declared the amended statute unconstitutional as violating separation of powers.⁴² Justice Scalia wrote for the Court that the Constitution “gives the Federal Judiciary the power, not merely to rule on cases, but to decide them.”⁴³ Because the “judicial power is one to render dispositive judgments,” he reasoned, the federal law “effects a clear violation of separation-of-powers.”⁴⁴ The Court held the statute unconstitutional on the ground that, in effect, it overturned a Supreme Court decision and gave relief to a party that the Court had said was entitled to none.

Legislatures retain control over statutes and wield substantial, but not unlimited, authority over the common law.

The difficulty with Justice Scalia’s analysis is that Congress always has the ability to respond to the Supreme Court’s interpretation of a statute by amending the law in question. The Court was properly concerned that Congress was reinstating cases that had been dismissed by the judiciary, but it is not clear that Congress cannot give individuals a cause of action, even if the courts have previously ruled that none existed. For example, if the Court ruled that a group of plaintiffs could not obtain relief under a particular civil rights law, Congress surely could amend the law to provide relief in the future, and could entertain private legislation to right past wrongs. Critics of *Plaut* argue that that was exactly what Congress did with regard to the Securities and Exchange Act following the Supreme Court’s ruling in *Lampf*.

Thus do legislatures retain control over statutes. They also wield substantial, but not unlimited, authority over the common law.⁴⁵ If a legislature dislikes a judicially created common law rule, it can replace or modify the common law with a statute, but only within constitutional limitations. For example, due process requires that a

39 *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447 (1995).

40 15 U.S.C. §78j(b) (1988 ed. Supp. V).

41 *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

42 The Court acknowledged that *Hayburn’s Case*, 2 Dall. 409 (1792) (Congress could not vest review of decisions of Article III courts in officials of the Executive Branch) was distinguishable.

43 115 S.Ct. at 1453.

44 *Id.* at 1447, 1456.

45 Wisconsin is the only state giving its legislature plenary power over state common law. See Wis. CONST. art. XIV, §13: “Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.”

traditional commonlaw cause of action may be abrogated only if a reasonably adequate alternative is available to vindicate the rights at stake.⁴⁶

2. Jurisdiction versus discretion. A second distinction must be drawn between laws restricting jurisdiction and laws restricting judicial discretion.

Legislatures can narrow the range of judicial discretion so long as they do not dictate results in particular cases or violate due process. The federal sentencing guidelines, mentioned above,⁴⁷ undoubtedly restrict judicial discretion, but that does not make them unconstitutional. Prescribing the punishment for a crime always has been a legislative prerogative. There is no violation of separation of powers if the legislature chooses to be more specific about the extent of punishment, even if, in so doing, it leaves judges less discretion.⁴⁸ However, where a restriction on discretion impinges on the fundamental fairness of a trial, a constitutional violation may occur.

Similarly, not all restrictions on jurisdiction are unconstitutional. As mentioned earlier, Congress always has imposed amount-in-controversy requirements, and states always have had courts of limited jurisdiction. But restrictions on jurisdiction may become unconstitutional, as argued by the late Professor Henry Hart a half century ago, when they compromise the “essential functions” of a court. In a famous article written as a dialogue, Hart said that Congress’s power to prescribe exceptions to the Supreme Court’s jurisdiction “must not be such as will destroy the essential role of the Supreme Court in the constitutional system.”⁴⁹

What is included in this “essential role” that is so protected? The Court’s essential function of ensuring the supremacy of federal law could be undermined if Congress were to restrict the Supreme Court’s jurisdiction. States could ignore Supreme Court precedents with impunity, even though they remained the law of the land, and thus make state law supreme over federal. If such were the case, the notion of a national Constitution with uniform meaning throughout the country would be lost.

Additionally, the Court’s essential function in checking the legislature would be lost if Congress could enact a statute immunizing the law from judicial review. The power of the federal courts to review the constitutionality of federal statutes, established in *Marbury v. Madison*, would be largely meaningless if Congress could

The Court’s essential function in checking the legislature would be lost if Congress could enact a statute immunizing the law from judicial review.

46 The paradigm example is probably the universal creation of state workers’ compensation plans with the concomitant extinguishing of the right to jury trial in workplace injury cases. The guarantee of scheduled benefits for employment-related injuries is a substantial *quid pro quo* given the uncertain outcome of trial in court. See *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

47 *Supra* n.33.

48 *Mistretta v. United States*, 488 U.S. 361, 388 (1989).

49 Henry Hart, *The Power of Congress to Limit Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1402 (1953). Other commentators as well have argued that there is a limit on Congress’s power to create exceptions. See, e.g., Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982); Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Sager, *supra* n.11, at 37–42.

enact unconstitutional laws and then restrict jurisdiction to prevent their review by federal courts.⁵⁰

3. Result versus procedure. A third important distinction must be drawn between laws dictating *results* and those dictating *procedures*. As discussed earlier, *United States v. Klein*⁵¹ clearly and correctly holds that the legislature cannot direct the result in a particular case. In some states, the legislature has no power over procedure; its authority in other states remains substantial. However, separation of powers is surely offended if the legislature uses this authority to control effective access to the courts, create impossible burdens on parties, or dictate the results in particular cases or classes of cases.⁵²

At the federal level, a strong argument can be made that provisions of the Prison Litigation Reform Act⁵³ are unconstitutional on this basis. The statute, in part, requires that federal courts terminate consent decrees entered in litigation concerning prison conditions where relief was granted in the absence of a finding that it was the minimum appropriate relief. For that reason, the United States Court of Appeals for the Ninth Circuit recently declared the Act unconstitutional, explaining that “Congress, in violation of the Constitution, has reopened the final judgments of the federal courts and unconditionally extinguished past consent decrees affecting prison conditions.”⁵⁴

B. Violations of Due Process.

As discussed earlier, *procedural* due process requires that notice and a fair hearing be available before a person’s life, liberty, or property is deprived; legislative actions that serve to deny individuals of their life, liberty, or property without a fair and impartial hearing thus violate the Constitution. *Substantive* due process requires that all government actions are justified by a sufficient purpose. Likewise, arbitrary government actions infringe substantive due process.

Courts have struggled with what this means in terms of legislative actions that eliminate or otherwise burden a person’s access to the courts. Where, for example, the statute implicates other constitutional provisions, such as the right to trial by jury, or the fundamental fairness of a trial, courts have used substantive due process to strike down the law.⁵⁵ Where the process due is procedural in nature, courts have split.

50 Such a limitation on the courts has been advanced by former federal judge Robert Bork:

There appears to be only one means by which the federal courts, including the Supreme Court, can be brought back to constitutional legitimacy. That would be a constitutional amendment making any federal *or state* court decision subject to being overruled by a majority vote of each House of Congress. The mere suggestion of such a remedy is certain to bring down cries that this would endanger our freedoms. To the contrary,... it is the courts that are not merely endangering our freedoms but actually depriving us of them, particularly our most precious freedom, the freedom to govern ourselves democratically unless the constitution actually says otherwise. The United Kingdom has devolved [sic] and retained freedom without judicial review.

ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICA* 117 (Regan Books 1996) (emphasis added).

51 *Supra* n.15.

52 *See, e.g.,* Best v. Taylor Machine Works, Inc., 689 N.E.2d 1057 (Ill. 1997).

53 *Supra* n.3.

54 Taylor v. United States, 1998 WL 214578, at 3 (9th Cir., May 4, 1998).

55 *See, e.g.,* Plumb v. Fourth Jud. Dist. Court, 927 P.2d 1011 (Mont. 1996)(striking down on substantive due process grounds a revised version of a law establishing an “empty chair” defense, the previous version of which had been struck down in *Newville v. State of Montana Dep’t of Family Service*, 883 P.2d 793 (Mont. 1994).

Although there also is substantial authority rejecting the notion that restrictions on recovery deny due process. The Supreme Court has expressed that “[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”⁵⁶ Yet, in the same case, the Court strongly suggested that a state might not, “without violence to the constitutional guaranty of ‘due process of law,’ suddenly set aside all common law rules respecting liability . . . , without providing a reasonably just substitute.”⁵⁷

The major recent case evidencing this duality of views is *Duke Power v. Carolina Environmental Study Group, Inc.*,⁵⁸ which involved provisions of the Price-Anderson Act. The relevant part of the Act limits the aggregate liability of a utility for accidents at nuclear power plants to \$560 million per incident. The challengers argued that the limitation on liability violated due process because the due process clause “protect[s] them against arbitrary governmental action adversely affecting their property rights and that the Price-Anderson Act . . . constitutes such arbitrary action.”⁵⁹ The Court rejected the due process objection to the limitation of liability:

Our cases have clearly established that ‘[a] person has no property, no vested interest, in any rules of common law.’ . . . The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object . . . despite the fact that ‘otherwise settled expectations’ may be upset thereby.”⁶⁰

Still, without determining that it was a necessary prerequisite for its decision, the Court went out of its way to note that the Act provided a substantial and adequate *quid pro quo* for the rights it displaced.⁶¹ In so holding, the Court found the Act similar to workers’ compensation statutes that abolish negligence liability and certain damages for employees while entitling workers to compensation for economic losses without regard to fault and thereby providing a reasonably equivalent *quid pro quo*.⁶² Although the issue of whether the due process clause requires the substitution of a reasonable alternative remedy remains unsettled at the federal level, there is considerable state constitutional precedent, consistent with Professor Thomas Cooley’s authoritative 19th century treatise,⁶³ that holds it a necessary element of due process.⁶⁴

56 *New York Central Railroad Co. v. White*, 243 U.S. 188, 198 (1917).

57 *Id.* at 201.

58 438 U.S. 59 (1978).

59 *Id.* at 69.

60 *Id.* at 88 n.32.

61 *Id.* at 88. The Court noted that the act required the nuclear power industry to waive all defenses and that Congress pledged to be a guarantor of compensation for any excess liability. *Id.* at 65, 66–67, 85–87.

62 *Id.* at 93 (citing *New York Central R. Co.*, *supra* n.56).

63 THOMAS M. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 351 (5th ed. 1883)(emphasis added)(stating that a “legislature may even take away a common-law remedy altogether, without substituting any in its place, *if another and efficient remedy remains*”).

64 *See, e.g.*, *Bonin v. Vannaman*, 929 P.2d 754 (Kan. 1996); *Ecker v. West Hartford*, 530 A.2d 1056 (Conn. App. 1987); *Boswell v. Phoenix Newspapers*, 730 P.2d 186 (Ariz. 1986); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985); *Park v. Rockwell Int’l Corp.*, 436 A.2d 1136 (N.H. 1981); *Wright v. Central DuPage Hosp. Ass’n*, 347 N.E.2d 736 (Ill. 1976); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973); *Baptist Hospital of Southeast Texas v. Baber*, 672 S.W.2d 296 (Tex. Civ. App. 1978); *Gallegher v. Davis*, 183 A. 620 (Del. Super. 1936).

The argument is that a claim for recovery is a property interest under the due process and takings clauses, and that a government action depriving a person of such a claim must meet the test of the due process clause and be accompanied by just compensation. *Mullane v. Central Hanover Bank & Trust Co.* held that terminating claims of possible beneficiaries of a trust required notice and a hearing because the claims were property protected under the due process clause.⁶⁵ The Supreme Court has declared: “[A] cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause. . . . The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”⁶⁶

In *Logan*, an employee claimed that he was terminated from his job because of a physical disability. He challenged his firing through the proper state administrative agency, but the agency negligently failed to hold a hearing within the statutorily prescribed time limit. The employer secured a dismissal of the plaintiff’s claim with prejudice. The Court concluded that the dismissal denied the defendant a property interest without due process.

In *Logan*, the Court emphasized that under well-established law, a property interest exists where an individual has an “entitlement” grounded in state law.⁶⁷ The argument is that state law has created an entitlement in providing a reasonable expectation for tort law recovery for injuries. Indeed, in *Martinez v. California*, the Court accepted that “arguably” a state tort claim is a “species of ‘property’ protected by the due process clause.”⁶⁸ As the Court concluded in *Logan*: “As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.”⁶⁹

Lower courts, too, have recognized a property interest in claims for recovery of injuries. The Ninth Circuit, for example, has stated: “There is no question that claims for compensation are property interests that cannot be taken for public use without just compensation.”⁷⁰

Closely related, it can be argued that there is a liberty interest—even a fundamental right—in access to the courts. The Supreme Court has spoken of “the fundamental constitutional right of access to the courts.”⁷¹ The Court long has said that the right to be heard in court is protected by the First Amendment’s Petition Clause⁷² and an essential aspect of due process.⁷³ For example, in *Windsor v. Mcveigh*, in 1876, the Court spoke of the right to be heard as a principle which “lies at the foundation of all well-ordered systems of jurisprudence” and “founded in the first principles of natural

65 339 U.S. 306 (1950).

66 *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–29 (1982).

67 *Id.* at 430; *Board of Regents v. Roth*, 408 U.S. 564, 576–578 (1972).

68 444 U.S. 277, 281–282 (1980).

69 455 U.S. at 433.

70 *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 n.10 (9th Cir. 1980).

71 *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

72 *Brotherhood of Railway Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964).

73 *In re Murchison*, 349 U.S. 133, 136 (1965).

justice.”⁷⁴ Yet, despite this language, there is strong authority, described above, the legislatures violate due process when they preclude recoveries for injuries. Caps on compensatory and punitive damages are constitutionally suspect if they prevent individuals from receiving adequate remedies for the violation of their rights.

CONCLUSION

The concept of “judicial independence” has enormous rhetorical force. An independent judiciary is widely and correctly regarded as an essential component of American government. Yet, clashes between the legislative and judicial branches over the scope of their respective spheres are inevitable and have been apparent since the beginning of our constitutional system of government. The difficulty, examined in this paper, is to discern the difference between those impingements on judicial independence that violate constitutional principles and those that otherwise limit the completeness of that independence but do not rise to a constitutional violation. While some of these differences are apparent and easily recognized, there are times when the line between the two is rather indistinct. Moreover, when legislative action has the effect of burdening the essential functions of our courts, an otherwise legitimate legislative act can cross the line into unconstitutionality because of the doctrine of separation of powers.

An independent judiciary is widely and correctly regarded as an essential component of American government.

ORAL REMARKS OF PROFESSOR CHEMERINSKY

Judicial independence is deservedly much discussed today. I think the catalyst for the contemporary discussion of judicial independence is the incident that occurred with Federal District Court Judge Harold Baer two years ago. When Judge Baer suppressed evidence of a large cache of drugs in a federal narcotics prosecution, the then-candidate for the Republican nomination, Robert Dole, said that either Judge Baer should resign or there should be consideration of impeachment of Judge Baer. And President Clinton’s press secretary, too, said that Judge Baer should consider resigning unless he changed his ruling. When Judge Baer then *did* reverse himself and decided to permit the narcotics into the trial, everyone asked if this was perhaps because of the political pressure, and if this then showed a real threat to judicial independence.

Then, when Representative Tom DeLay, on the floor of the House of Representatives, said that *federal* judges hand down rulings that he regards as inappropriate and therefore should be subjected to impeachment proceedings, more fuel was thrown on the fire as to whether judicial independence was under attack. The American Bar Association formed a blue ribbon commission to look at the topic of judicial independence.

What is surprising to me in all of this is that the focus has been almost exclusively on judicial independence at the federal level. The ABA report, for example, focused

74 93 U.S. 274, 277, 280 (1876). See also *Hovey v. Elliot*, 167 U.S. 409, 417 (1897).

exclusively on judicial independence for the federal courts. Yet, I believe that the really serious threats to judicial independence in our country are much more at the state level than at the federal level. The reality is that federal judges have life tenure.

“Electoral review of judges is like the crocodile in the bathtub. No matter how we want to pretend otherwise, we can’t expect the judges will ever forget that that crocodile is there.”
—Justice Otto Kaus

As unpleasant as the criticism has been so far, none has led to serious impeachment efforts. But in the vast majority of states, judges face some type of electoral review. Increasingly, there are incidents like that which occurred in California a decade ago and more recently in states like Tennessee and Nebraska, where judges were denied continuation in office solely in response to controversial rulings.

The late California Supreme Court Justice Otto Kaus said, “Electoral review of judges is like the crocodile in the bathtub. No matter how we want to pretend otherwise, we can’t expect the judges will ever forget that that crocodile is there.”¹

To me an equally grave threat to judicial independence is the need for judges and candidates for judicial office to raise ever larger sums of money—money that almost inevitably comes from the litigants and lawyers who will appear before them. There are many other threats to judicial independence at the state level. On July 6, 1998, the California Commission on Judicial Discipline sent a formal letter indicating that charges are being brought against a California Court of Appeal Justice, J. Anthony Kline, solely for indicating in a dissenting opinion that he thought that the California Supreme Court should reconsider its position²—a position at odds with the unanimous ruling of the United States Supreme Court.

THREATS FROM THE LEGISLATURES

What I want to focus on now is yet another threat to judicial independence—that which comes from legislatures. I want to focus on this for several reasons.

One is that, increasingly, legislatures are adopting laws that directly impact the work of the judiciary. Whether it is sentencing guidelines or tort reform or budget efforts, whatever the particular guise, there are more and more laws that might be seen as a threat to judicial independence.

Second, it seems particularly important and sensitive as a constitutional issue. Such legislative efforts require you as judges to evaluate when a legislature violates separation of powers, when it impinges on the judiciary. This is obviously sensitive, because, in doing so, you are considering whether to strike down a state law because of the effect it has on you, the judiciary.

In addition to all of this, I think this is a topic that is worthy of attention because it has been so ignored in the literature about judicial independence. As I began work on

1 Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives, and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994) (quoting Kaus).

2 See, *Judge Faces Discipline for Opinion*, in the online edition of the California Bar Journal: <www.calbar.org/2cbj/98aug/index.htm>.

the topic for this paper and this speech, I went and did extensive research to see what has been written with regard to when legislative actions threaten judicial independence. I could find articles on particular aspects of the issue, but I could find no one who has thought systematically about the question, “When do legislative actions threaten judicial independence?”

I would like to divide my remarks into three parts.

First, I want to talk about the constitutional framework for analyzing the issue. Second, I want to try to catalogue some of the major kinds of legislative efforts that might be seen as a threat to judicial independence. And then third, and finally, I want to talk about what kinds of laws should be regarded as unconstitutional and which are constitutional.

I think it is important at the outset to point out that I want to draw a distinction between judicial independence as a purely normative concept and judicial independence as a constitutional concept. We can talk about judicial independence and its desirability from a purely policy perspective. What I want to focus on this afternoon is when legislative actions cross the line and violate the Constitution.

A CONSTITUTIONAL FRAMEWORK FOR ANALYSIS

In order for us to talk about this, we need a constitutional framework. There is no doubt that the framers of the American Constitution cared deeply about judicial independence. They had lived under a system where the judges in the colonies were appointed by, and removable at will by, the King of England. There was no trust of such judges in the colonies.

It is not surprising that when the Constitutional Convention met in Philadelphia in 1787, Article III created a federal judiciary with life tenure and salaries that could not be reduced during the judge’s term of office. And, yet, though the framers cared about judicial independence, they did not create a completely insulated federal judiciary. The salaries of judges are set by Congress. The jurisdiction of the lower federal courts—indeed, the very existence of the lower federal courts—was left to Congress. Congress can impeach and remove judges for treason or for high crimes and misdemeanors.

As in all areas of separation of powers, there is both independence and *interdependence*, and thus, there is the need to decide which legislative acts are permissible as part of the interdependence among the branches and which cross the line and violate judicial independence. There are two main constitutional principles at stake: separation of powers and due process.

As in all areas of separation of powers, there is both independence and interdependence.

SEPARATION OF POWERS AND DUE PROCESS

One principle, obviously, is separation of powers. To be brief, I think that actions by Congress can violate separation of powers with regard to the judiciary in either of two ways. One is when Congress takes over the powers of the judiciary. If one branch of

government usurps the authority of another branch of government, there is then a violation of separation of powers. The other way is if Congress prevents the judiciary from being able to carry out its functions—if, somehow, through statutes, the judiciary is impeded in carrying out the core judicial functions assigned to it.

The other constitutional principle at stake here is due process of law. As you know, due process has both substantive and procedural components. Substantive due process requires that every government action be justified by a sufficient purpose. What is sufficient will depend upon the right at stake and the group that may be discriminated against, but every government action, at every level of government, must be justified by a sufficient purpose. An arbitrary or capricious government action, no matter what the context, is unconstitutional. Thus, there is a key judicial role in making sure that this is so. Procedural due process, of course, requires that the government follow proper procedure before taking away a person's life, liberty, or property. So, the legislature could violate judicial independence at the state or the federal level if it prevented the judiciary from carrying out due process in either of these ways.

TYPES OF LEGISLATIVE THREATS

With this as a quick sketch of the constitutional provisions, I want to talk about what kinds of legislation might be a threat to judicial independence. What I have sought to do here is simply to catalogue, to try to identify the kinds of laws that might threaten judicial independence in order to facilitate the last part of my remarks, which evaluates which actions are constitutional and which are unconstitutional. There are many kinds of legislation that threaten judicial independence, and I don't claim that my list is exhaustive.

The legislature has some prerogative with regard to providing funding for the courts or the prerogative to block judicial nominees. At what point, though, does it become so extreme as to undermine judicial independence?

1. Legislation that threatens the institutional functioning of the courts. Imagine that a legislature in any state might choose, in a given year, simply to *not fund* the courts. Lest this seem ridiculous to you, you might remember your first constitutional law course. When *Marbury v. Madison*³ was pending before the Supreme Court, Congress simply canceled that term of the Supreme Court. Thus it took almost a year and a half before the Supreme Court addressed *Marbury v. Madison*.

Right now in California, the state bar has largely gone out of existence, because the governor, in a political reprisal against it, vetoed the current bill authorizing and requiring lawyers to pay fees to the California State Bar. The bar has now fired virtually all of its employees and has nearly ceased functioning.⁴ If they can do it to the state bar, they might try it against the state courts.

Another example of this would be a refusal by a legislative body to confirm judicial nominees when the confirmation function is assigned to a legislative body. If there is this kind of blocking of the appointment process and the judiciary is denied necessary personnel, there will obviously be interference with the institutional function of the court.

3 5 U.S. (1 Cranch) 137, 163 (1803).

4 See, e.g., the State Bar's News Release, *State Bar Seeks Supreme Court Order to Stop Shutdown*, at <www.calbar.org/2rel/3nr8/3nr9806b.htm>.

The difficult question here, as in all of the areas I want to talk about, is where to draw the line. Undoubtedly the legislature has some prerogative with regard to providing funding for the courts or the prerogative to block judicial nominees. At what point, though, does it become so extreme as to undermine judicial independence?

2. Legislation that directs the results in particular cases. The bill of attainder clause found in Article I, Sections 9 and 10, is an example of this. If the legislature directs that *a particular person* be punished, that is a bill of attainder. That is unconstitutional. If the California legislature were to pass a law saying “Erwin Chemerinsky shall be put to death,” that would be a bill of attainder. That is impermissible, because the framers didn’t want the legislature directing results in particular cases.

The leading Supreme Court case here is a Civil War case, *United States v. Klein*.⁵ Prior to *Klein*, Congress had said that if a person was not involved in rebellious activities during the Civil War, the person could recover any property that had been seized by the government during the war. The Supreme Court said a presidential pardon was proof that the person had not been a rebel during the Civil War and thus could have the property back. Congress then passed a law that said a presidential pardon is conclusive that a person *was* engaged in impermissible activities and that the courts should dismiss any action to recover property brought by such a person. The United States Supreme Court said in *Klein* that this violates the separation of powers doctrine. The Court said for Congress to direct results in particular cases in this manner crosses the line and violates the Constitution.

If the legislature tries to alter jurisdiction to change substantive results, there is a threat to judicial independence.

3. Legislation that directs procedure in particular cases or classes of cases. The legislature often controls judicial procedure. At the federal level, it is the Federal Rules Enabling Act⁶ that authorizes the enactment of the Federal Rules of Civil Procedure. In many states, such as California, it is the Code of Civil Procedure adopted by the legislature that provides the essential rules of court. But if the legislature decides to change procedure *in particular cases* to affect the outcome, then there is a serious threat to judicial independence.

Consider as an example the proposed global tobacco settlements into which the states entered a year ago. Part of the settlement agreement said that no state court could hear any class action suits in any tobacco cases—a clear effort on the part of the legislature to control judicial procedure in state courts. Had Congress adopted this—and there was a strong argument over it—it would have been unconstitutional on both federalism and separation of powers grounds.

4. Legislation to restrict jurisdiction so as to change substantive outcomes. Court jurisdiction is often controlled by statutes. At the federal level, there has been an amount-in-controversy requirement in diversity cases since the first Judiciary Act of 1791, and your states undoubtedly have statutes to decide which cases go to probate court and which go to family court. But if the legislature tries to alter jurisdiction to

5 See Chemerinsky paper, n.15.

6 See Chemerinsky paper, n.20.

change substantive results, then there is a threat to judicial independence. As an example, there were proposals in the 1980s to say that no federal court could challenge any state laws restricting access to abortion or any state laws allowing school prayer. There is a strong argument that such laws violate both separation of powers and due process. Similar state laws would have the same flaws.

5. Legislation that limits remedies in particular types of cases in an effort to control outcomes. There is no doubt that legislatures have a good deal of say over what remedies will be available in particular cases, but there is a point when the legislature is keeping the judiciary from carrying out its essential mission. In *Marbury v. Madison*,⁷ Chief Justice John Marshall said there must always be a remedy when there is a violation of a right. So, if the legislation, say, in the name of tort “reform” keeps injured plaintiffs from being able to recover compensation for their injuries, there is a strong argument that the legislature has crossed the line. There was a proposal before Congress in the early 1980s that said no federal court can impose bussing as a remedy in any school desegregation case. Again, one can make a strong argument that this crosses the constitutional line.

6. Legislation that limits the traditional discretion accorded to judges. At the federal level and in many states, sentencing guidelines have been promulgated. Some have argued that they take discretion away from judges. It needs further analysis, but this might be a violation of separation of powers or of the due process right of the defendant.

7. Legislation that assigns particularly burdensome, nonjudicial tasks to the courts. One way in which legislatures could obstruct the operation of the courts is simply by assigning to judges nonjudicial tasks that take up a great deal of their time.

Early in American history, under the presidency of George Washington, the then-Secretary of State, Thomas Jefferson, went to the Supreme Court and said, in effect, “We need your opinion on a whole series of questions with regard to what it means for the United States to be neutral in the war between Great Britain and France.” And the Supreme Court responded by saying, essentially, “It is not our job to give you opinions this way; indeed, we would be compromising the very integrity of the courts to do this.” More recently, in 1989, in *Mistretta v. United States*,⁸ the Supreme Court said there can be assignment of nonjudicial tasks to the court so long as they are compatible with the judicial function—so long as they don’t interfere with the operation of the court. This then raises the question of what type of assignments *do* cross the line.

8. Legislation that directs substantive results in response to specific judicial rulings. Imagine that you hand down a ruling as a judge, and the legislature then comes down with a new statute as an effort to overturn your decision. This has occurred at both the federal and the state level. When is it permissible and when is it impermissible? The legislature interprets a statute in a particular way and the courts then interpret it a different way. Can the legislature come back and direct a contrary interpretation? If the courts rule in a particular way, when, as to that case, can the legislature take any action?

To me, this is, though not exhaustive, a very comprehensive list of the kinds of statutes I have seen that might be viewed as a threat to judicial independence.

7 See n.3 above.

8 488 U.S. 361, 388 (1989).

This brings me to the final part of my remarks. How should the constitutionality of such legislation be appraised? How can you decide where to draw the line? Let me talk briefly in terms of separation of powers and briefly in terms of due process.

1. Past versus future. In terms of separation of powers, I would highlight for you three important distinctions to keep in mind. The first is a temporal distinction between *past* and *future* cases. It seems to me if the legislature attempts to overrule a decision after it is handed down in a particular case, then that is a violation of separation of powers. The legislature can't overrule judicial rulings as to *particular* cases after they are handed down. But as to the future, the legislature is free to change the interpretation of a statute and also has some latitude to modify the common law so long as it preserves the availability of remedies—so long as it is not directing results in particular cases.

I think often this distinction is overlooked. For example, a few years ago, the Supreme Court decided *Plaut v. Spendthrift Farm*.⁹ *Plaut* involved an earlier Supreme Court decision that construed the statute of limitations in securities cases. In response to that decision, Congress had changed the statute to make clear it wanted a longer statute of limitations. The Supreme Court, in an opinion by Justice Scalia, said that that federal statute was unconstitutional because Congress was changing the result in a particular case.

If the legislature attempts to overrule a decision after it is handed down in a particular case, then that is a violation of separation of powers.

I think Justice Scalia was wrong there. The new federal statute applied only *prospectively*. When the court is interpreting a statute and the legislature disagrees with the court's interpretation of a statute, the legislature should be free to reenact the statute prospectively to reflect the legislative will. I think that Justice Scalia ignored this distinction between the legislature's inability to overturn *past* results and its ability to control *future* interpretations of the statute.

2. Discretion versus jurisdiction. A second important distinction is between discretion and jurisdiction. It seems to me legislatures do have a good deal of authority to limit the discretion of courts so long as they don't interfere with the essential function of the court. Thus, I agree with the Supreme Court's near-unanimous decision in *Mistretta* that sentencing guidelines are constitutional, even though they limit the discretion that is judicially invested in federal judges, because this is an area that is assigned to the legislature. There is nothing in the Constitution that requires that judges have this discretion.

Similarly, with regard to jurisdiction, legislatures have a good deal of authority to specify, even to restrict, the jurisdiction of the courts. But there is a point with regard to both discretion and jurisdiction when legislatures go too far. I think it is the point at which the legislature interferes with the essential functioning of the courts. There is a very famous law review article, one of the most famous ever, by Henry Hart in the 1954 *Harvard Law Review*,¹⁰ in which he wrote, "Congress should have the authority to limit

9 115 S.Ct. 1447 (1995).

10 See Chemerinsky paper, n.49.

the discretion and the jurisdiction of the federal courts so long as Congress does not undermine the essential functions of the federal courts.” Well, if Congress were to say that no federal court could hear abortion or school prayer cases, that *would* undermine the essential function of the courts. It would prevent the federal courts from enforcing the Constitution. It would prevent the courts from ensuring that states are in compliance with the Constitution, and, thus, it would undermine their essential functioning.

3. Procedure versus result. Third, and finally, I offer to you the distinction between legislation controlling procedure and legislation directing results. The legislature can

always have control over many of the procedural aspects in courts. It is the point, however, at which the legislature is directing results in a category of cases, either directly or by controlling the procedure, where the legislature has simply gone too far.

The threat to judicial independence in the United States will be the slow, incremental erosion of the independence of the courts.

It is extremely important for judges to proclaim that judicial independence shall never die in this country.

For if it ever dies, then our Constitution is lost.

4. Due process. I think due process is very compatible with the separation of powers principle. Due process requires that a court be available to make sure that the government’s action isn’t arbitrary whenever the government takes away a person’s life, liberty, or property. The United States Supreme Court has made it clear that legislation that prevents people from vindicating their common law rights is a violation of due process. Thus, your task in evaluating legislation is to make sure that there is available a judicial forum that can provide an adequate remedy whenever there is a violation of rights.

WHO PROTECTS RIGHTS?

Sometimes when I teach constitutional law, on the first day of the semester I have my students read not only the United States Constitution, but also the Stalin-era Soviet constitution. I ask them to compare them, and they are always shocked to see that the Stalin-era Soviet constitution had a far more elaborate statement of rights than the United States Constitution does. Of course, the point of the exercise is that what makes the United States Constitution and all of our rights—common law, statutory, constitutional—special is that *there are independent courts to protect those rights.*

I don’t believe the threat to judicial independence in the United States will ever come in the form of a despotic monarchy or legislature that completely eliminates the independence of the courts. I believe that the threat to judicial independence will be much more insidious. It will be the slow, incremental erosion of the independence of the courts. And, thus, I think it is extremely important for you as judges to speak out about judicial independence—for you as judges to be heard and proclaim that judicial independence shall never die in this country. For if it ever dies, then our Constitution is lost.

COMMENTS BY PANELISTS

HONORABLE MARY ANN G. MCMORROW

PROFESSOR STEPHEN WERMIEL

MARK BEHRENS, ESQ.

EUGENE I. PAVALON, ESQ.

HONORABLE MARY ANN G. MCMORROW

I am very happy to be here for several reasons, the most important of which is that this forum and this topic has raised, for me at least, a consciousness of the increasing attacks on the judiciary, and very importantly for all of us (and make no mistake about it), it has made me think about the ability and the ease with which judges can be removed from office for a single decision. There are many examples of this, some of which I will relate to you.

This forum has very practical aspects and impacts for us that we should be aware of and certainly fight in an appropriate way. Many of the cases involving judges who were removed from office were referred to earlier today. There are one or two, however, that were not mentioned and I did want to call them to your attention because they illustrate, again, the ease with which judges can be removed from office for one decision.

One that has not been mentioned did not involve a decision by the court, but it is one of the earliest examples of a concerted political effort to punish judges for unpopular decisions. That was the successful campaign by proponents of capital punishment in 1986 against the retention of three California Supreme Court justices, including Chief Justice Rose Bird. The justices had participated in a series of decisions overturning the imposition of capital punishment. They were the target of ads promising voters that voting against the retention of these three justices was the equivalent of three “yes” votes on the court for the death penalty. That doesn’t follow, of course, but the electorate doesn’t know that.

Based upon the success of this campaign, similar types of political action have been employed in numerous other states where the judicial elections have focused on “hot button” issues, such as abortion and the death penalty:

- In Mississippi, Justice James Robertson was defeated in 1992, after he was attacked for authoring two dissenting opinions in death penalty affirmances. Ironically, when both cases were reviewed by the United States Supreme Court, the majority agreed with Justice Robertson’s dissents and reversed the convictions. But he was defeated. He was removed from office.
- In 1992, Florida Supreme Court Justice Rosemary Barkett was targeted by pro-death penalty advocates because she joined in a dissenting opinion in one death penalty case, even though she had voted to affirm more than 200 death penalty appeals during her previous nine years on the court. And although she won retention to the court, the death penalty issue resurfaced in an effort to defeat her 1994 appointment to the United States Court of Appeals for the Eleventh Circuit, and persuaded then-presidential candidate

Bob Dole to place her on a list of Clinton appointees labeled as the “judicial hall of shame.”

■ A similar campaign was launched against Justice Penny White of the Tennessee Supreme Court. She was appointed to the court in 1995 and she participated in only one death penalty decision. In it she joined all of the other justices on the five judge court in reversing a death penalty judgment in June of 1996. They didn’t reverse the *conviction*. They merely reversed the death penalty *sentence* and sent the case back for a new sentencing hearing. That is the only death penalty case she ever participated in. But by coincidence, she was the only justice on the ballot two months later, and she was denounced by political opponents as a judge who was soft on the death penalty and weak on victims’ rights. The campaign against her was effective and she was removed from office after failing to gain enough votes. Immediately after the election, Tennessee Governor Don Sundquist asked rhetorically, “Should judges look over their shoulders about whether they are going to be thrown out of office?” His answer was, “I hope so.”¹¹

POLITICIZATION OF JUDICIAL SELECTION

The politicization of the scrutiny of judges extends to their activity before they have been confirmed as judges, and sometimes before they have even been nominated. This was addressed very eloquently by Professor Chemerinsky, but I am going to make you listen to it again.

In both appointed and elective schemes, there seems to be less concern with judges’ qualifications and more concern with their politics and legal philosophy.

In recent years, there has been a change in the focus and the process by which judges are elected. This change can be characterized generally as a shift in the relative degree of scrutiny given to judges’ qualifications on one hand and to their legal and political views on the other.

In both appointed and elective schemes, there seems to be less concern with the judges’ qualifications and more concern with the judges’ politics and legal philosophy. In appointive schemes, such as in the federal judiciary, the increased politicization can be seen both in the way in which judges are confirmed and in the way the confirmation process affects the persons whom the presidents nominate. Those who are able to get confirmed and even those who are nominated are typically candidates with no strong legal or political opinions. Moreover, they typically do not have a paper trail, which might include statements of ideas that could threaten a nomination. Justice David Souter would be an example of this. This bias operates to exclude some candidates who, while being very qualified, have taken positions with which some people disagree, which then serve to disqualify them. At the same time, there is a decreased focus on the question of whether a candidate is qualified to hold judicial office.

11 Anthony Lewis, *Menacing the Courts*. NEW YORK TIMES, March 28, 1997, at A29.

In his well-deserved reputation for thoroughness, Professor Chemerinsky enumerated several instances in which legislatures encroach upon the arena of judges. Some of these are rather subtle and some are very blatant, but the subtle ones are the ones that disturb me, because they are part of what he described again as “the slow, incremental erosion of judicial independence.” In that vein, there are two very recent cases that I would like to mention to you.

CLASS ACTION BY FEDERAL JUDGES

Since it will never come before the court on which I sit, which is the Illinois Supreme Court, I feel free to comment on a class action that was filed recently in a federal court. I think it is something you should be aware of. It was filed on behalf of all federal judges, and it was brought by twenty federal appellate and trial judges from throughout the United States, twelve of whom are present or former chief judges of their respective courts. They were seeking to restore a cost-of-living adjustment, a “COLA,” that was approved for judges and virtually all other federal government employees, and that was promised to them with the passage of the Ethics Reform Act in 1989. The judges had not received a COLA or other pay adjustment since January 1993, and they alleged that Congress violated the Constitution by denying payment of those COLAs.

What I found especially interesting about the case is that the judges indicated, repeatedly and very clearly, that what was at issue was not really the pay raises that they had been denied by Congress, but rather the imposition upon the independence of the judiciary by Congress in not giving them what they had been promised. That theme appears throughout the briefs and the memos concerning this particular case, including the press release. The judges were joined (or will be joined) by many bar associations throughout the United States, which collectively include more than 125,000 lawyers. The amicus brief that is being filed by the bar associations in support of the judges’ cause of action also emphasizes that the failure of Congress to give the COLAs to the federal judges affects a right of the public—not a right of the judges, but a right of the public—so the public has very great interest in the independence of the judiciary. This is the real issue in the case that is pending, and it should be interesting to watch that case.¹²

There are several instances in which legislatures encroach upon the arena of judges. The subtle ones are the ones that disturb me, because they are part of what he described again as “the slow, incremental erosion of judicial independence.”

¹² Summary judgment was granted to the judges in this case, *Williams v. United States*, 48 F. Supp. 52 (D.D.C. 1999) (Ethics Reform Act of 1989 entitled judges to “Employment Cost Index” (ECI) adjustments, and that an appropriations measure that prohibited expenditure of funds to increase salaries of federal judges, without express authorization of Congress, was not permanent legislation and had no effect on such adjustment.).

THE ILLINOIS “TORT REFORM” DECISION

The second case is a very recent decision of the Illinois Supreme Court, of which I was the author of the opinion, which discussed and ruled upon tort reform in Illinois. Inasmuch as this case is concluded and I am only relating now what has already been stated in the opinion—and I am, and I want to make sure you understand this, in no way giving any indication of how I would rule on any issue, even similar to what was raised in this case, in a future case—I would like to present this to you.

Professor Chemerinsky explained in his paper that one of the ways in which the legislature may threaten judicial independence is by enacting legislation that restricts the remedies that can be imposed by the courts. He noted that

many state legislatures have attempted to impose limitations on damages in particular types of cases, abolish joint and several liability, or abrogate the collateral source rule. If the effect of such legislation is to prevent the courts from providing an adequate remedy, or to create other obstacles to access to the courts, the judiciary is crippled in its ability to perform its core function. Certainly, a right without a remedy is but an illusion.¹³

The case to which I refer is *Best v. Taylor Machine Works*,¹⁴ but for brevity, and for clarity's sake, I will refer to it as the “tort reform case.” I think this case represents a practical illustration of an unconstitutional attempt by the Illinois legislature to restrict the remedy that the court may impose.

The legislation involved in the case was extremely broad. Among other things, it imposed a cap on noneconomic damages. It abolished joint and civil liability. It altered principles of contribution among tortfeasors. It essentially eliminated any privacy in medical records for plaintiffs involved in medical malpractice discovery, no matter how old those medical records may be. It permitted the defense attorney to go back to the plaintiff's childhood, if necessary, and discover medical records, even though they were totally unrelated to the issue in the case. The legislation also altered products liability law. It changed jury instructions. And it made other changes. Those are just a few of the changes it made in Illinois law.

Essentially, the legislation fundamentally altered many core judicial functions, and it would have overturned more than 70 appellate and supreme court decisions. The bill was passed in haste in the legislature. I don't think that is a consideration in evaluating its constitutionality. I think it may account for the way the bill was put together, but it never was any basis whatsoever for the court's decision in the case. What was significant was that several of the provisions were internally inconsistent with each other. They contradicted each other. For example, one provision abolished the doctrine of joint and civil liability, while another provision retained it.

The case was resolved by the Illinois Supreme Court, with the majority of the court holding the entire act unconstitutional. We did not even discuss some of the provisions of the act, because, on the basis of severability, we believed, and we held, and I wrote, that those provisions that were struck down by the court were the very

13 See Chemerinsky paper, section III.5.

14 689 N.E.2d 1057 (Ill. 1997).

core and the very heart and the very purpose of the legislation and the issues. The other parts of the legislation, which we did not consider, really would not have survived without those core provisions.

The case really provoked very strong reaction even before the opinion was filed—and this, I think, is unusual. One of our justices, in what we call a “single judge motion,”¹⁵ denied leave to file one particular amicus brief. Because of that, the Illinois Civil Justice League, which is a “tort reform” organization, took out full-page ads in all the major newspapers, complaining that the court had denied leave to file amicus briefs. Therefore, it argued, the court was predisposed in this case, or the court was not being fair to both sides, or the court would not hear both sides. (In all, thirteen amicus briefs were filed.)

I have been asked to describe to you how I feel about the case—my personal thoughts about it. In doing so, though, I have to point out to you that after the case was decided, the same Civil Justice League, which had taken out the ad in the newspapers, and which had participated as an amicus in the case, indicated very publicly (and it was published again in all the papers) that caps on noneconomic damages appear to be dead in Illinois as the result of the opinion, and that the only method now of changing the present law would be to change the configuration or the constituency of the court. Targeting for election defeat went beyond just the state supreme court. Before the case got to the supreme court, at least six trial court judges had ruled that the entire legislation was unconstitutional, and then of course the supreme court held the act unconstitutional. The critics indicated that because of what had happened, they were now going to be very directly involved in judicial election and retention campaigns, and that the judges who participated, both at the trial level and at the appellate level, had been targeted for defeat.

What are my feelings about the case, my personal feelings? I never had any doubt whatsoever about the correctness of the decision. I never had any doubt of any sort about the soundness of the analysis supporting the decision. Also, I never questioned the wisdom of the legislation. In fact, the opinion specifically states that the wisdom of the legislation in enacting tort reform is not being considered or questioned in any way. As judges, we know we are duty-bound to enforce laws whether we like them or agree with them or not. The opinion very clearly stated that it was decided solely on constitutional grounds that the legislation was clearly in violation of the special legislation clause of the Illinois Constitution, and also of the separation of powers clause.

I listened to the comments that were made at some of the discussion groups this morning. Criticism *is* hard to take, especially when it is unjustified, but I think as judges we should not be thin-skinned. We should be able to accept deserved criticism. Accepting *deserved* criticism, in my opinion, would entail accepting, *without comment*, any criticism that points to an improper analysis of the legal issues, or that points to

Criticism is hard to take, especially when it is unjustified, but I think as judges we should not be thin-skinned.

¹⁵ In Illinois we have motions that must be considered by the full court and other motions which we call “single-judge” motions. A petition to file an amicus brief is what we call a single-judge motion.

a lack of knowledge of particular issues. Justified criticism, appropriate criticism, in my opinion, is better left unresponded to. Professor Chemerinsky, again, at one of the discussion sessions, asked *who* we are responding to when we respond to criticism, or *to what* are we responding. I think we must be careful in our responses and not jump into the fray every time we are criticized. This is part of our job. As we are complimented, so, too, we might be criticized.

We are not like the medical profession, where teams of doctors work together. They work as a group. They work toward a common effort. They support each other. In contrast, we judges are part of an *adversarial* system, the complete opposite from the doctors' system. We don't work for a group effort. We have competing interests, and no matter how a judge rules or how a court rules, one side is going to win and the other side is going to lose. So, *if* our opinions (and this is a big "if"!), particularly those on the courts of review, adequately state the grounds for our decision, the analysis that we employ, the law that we employ, and our reasoning in connection with the application of the law to the fact, then I don't think we need to respond to criticisms of our process.

I think it's fine that some states have bar associations and special press officers responding, provided we don't lose our credibility with the public. It would just make things worse if we have the public saying, "Every time a judge is criticized, this group is going to come in and defend the judge." I think any response should be limited to those instances where it is appropriate and after it is very, very carefully considered.

PROFESSOR STEPHEN WERMIEL

Professor Chemerinsky, I think, did a wonderful job of defining the issues that concern us, and I agree really with all of his analysis.

I will leave to others the debate over how product liability and tort reform legislation may improperly tie the hands of state and federal judiciaries. Let me, instead, make three observations—two directly related to Professor Chemerinsky's talk, and one related to my own experience.

*Legislative micromanagement
can become a very direct
and deliberate threat
to the judiciary.*

When it comes to legislative threats to judicial independence, there are two threats we don't hear enough about, because they are more subtle and complex than some of the more overt threats. And, again, to refer to Professor Chemerinsky's paper, these may be part of the "slow, incremental erosion" that he was talking about.

LEGISLATIVE CONTROL OF COURT FUNDING AND ADMINISTRATION

The first, which Professor Chemerinsky mentioned in his paper, is the threat to an independently functioning judiciary that comes from the legislatures' control of funding and other vitally important administrative aspects of the functioning of the courts, both state and federal. Of course, no one suggests that the judicial branch should have a blank check to fund its own operations, or that we should do away with the time-honored appropriations processes. However, legislative micromanagement of the number of judges, the construction of new courthouses, the kinds of facilities

available in the courthouses once they are built, and the size of the budget and other administrative matters can become a very direct and deliberate threat to the judiciary.

Let me associate myself with the remarks that New Jersey's Chief Justice, Robert Wilentz, made in 1982, but that I think still ring very true today. He said,

the issue of sufficient funding for the operation of the courts, and the larger issue of the power to administer the judicial system, is the central issue of concern for the judiciary in the 1980s. If we do not have the resources to operate, then we cannot fulfill our constitutional function. If we cannot control our internal administration, then we cannot fulfill our constitutional mandate.¹⁶

JUDICIAL DISCIPLINE AND REMOVAL

Another, perhaps even more complex, issue, which Justice McMorro w talked about, is the role of judicial discipline and removal statutes as a threat to judicial independence and the number of justices who are voted out of office in elections. Again, I certainly don't (and I don't know anyone who does) suggest that there should not be some statutory scheme in the states for handling problems with judicial misbehavior and abuse of judicial authority and tenure. But periodically, and this seems to be one of those periods, those statutes become a tool for the discipline or removal of judges based solely on their decisionmaking, and a perception that particular judgments are sufficiently out of line or out of the mainstream to warrant investigation and discipline. I have seen several examples of that just in the last couple of weeks, just from casually reading newspapers, and I think it is scary. I don't have a solution, but I think it is important to begin with an understanding that this can be—and is—a serious problem. Each time we pick up a newspaper and read about a judge removed from the bench or censured because an opinion was somehow out of line, or because of a series of bench rulings that raised questions about a judge being too prosecutorial or too pro-defense, we ought to pause and reflect on the potential danger to an independent judiciary that rests in that moment.

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THE IMPORTANCE OF EDUCATING JOURNALISTS

Finally, let me offer an observation that I suppose relates to some of the things talked about this morning, but draws on my previous life, in which I spent 20 years as a journalist. Journalists, for the most part, I believe, don't understand this issue of judicial independence. They understand it when the President of the United States and

¹⁶ Robert N. Wilentz, *Separation of Powers—Judicial Independence in the 1980s*, 49 RUTGERS L. REV. 835, 843–844 (1997).

the Speaker of the House and the Majority Leader of the Senate are all commenting on calls for the impeachment of a federal judge accused of issuing too lenient a sentence in a drug case. Anybody could understand that. That is fairly easy to comprehend.

But, by and large, I don't think journalists grasp the importance of many of the more subtle issues discussed this morning and discussed now in the afternoon panel. So, I want to make a suggestion that is somewhat different from the debate this morning about responding to criticism, and suggest that you as judges need to educate the public and the journalists on the importance of these issues. I believe you need to *seek out* meetings with local editors and courthouse reporters on an off-the-record basis, informal conversations aimed at raising consciousness and raising awareness of the importance of these issues—for example, a conversation to explain why it may be a threat to judicial independence when the legislature refuses to fund five more judges, when everybody on the bench deeply believes that those judges are vitally important to be able to carry on the workload of the court. And remind the journalist, if you must, that every time a trial judge or an appellate panel reduces or throws out a libel verdict rendered by a jury, there is an element of an independent judiciary at work in *that* moment.

As Chief Judge Judith Kaye of New York observed last year,

the time has come for the justice system insiders to take a much more aggressive role in the area of public education and public relations. We need to find ways to work with the media, with the public at large, and with the school population.¹⁷

MARK BEHRENS, ESQ.

When I originally read the title of the program, “Assaults on the Judiciary,” I kind of felt like Saddam Hussein being invited to a B'nai B'rith rally. For several years, I

have been involved in tort reform at the state and federal levels.

Today, however, I would like to speak not necessarily as a tort reformer but as a member of the bar, as somebody who has practiced before some of you, at least on an amicus level. For instance, I participated as an amicus in the Illinois Supreme Court case discussed by Justice McMorro.

This is an important program, and I appreciate The Roscoe Pound Foundation's interest in taking up a subject that I believe is really an issue of separation of powers. It goes beyond tort reform. What we are in—and Professor Chemerinsky's paper highlights this—is a debate about who is going to decide American public policy, including American tort law. Will it be the courts, or will it be the legislatures? I submit that it is a job for *both* branches of

government—that there should be mutual respect between the branches of government. As a society, we are not going to benefit if either the legislatures or the courts declare a monopoly on the development of tort law. Where a legislature has acted and engaged in policy making, its decision should be respected.

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about who is going to
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policy. Will it be the courts,
or will it be the legislatures?*

¹⁷ Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 727 (1997).

PAST LEGISLATIVE MODIFICATION OF THE COMMON LAW

Historically, legislatures have been involved in the development of tort law. They have exercised their authority repeatedly, and those decisions have been respected by courts.

An early example dates back to the turn of the century, when legislatures passed workers' compensation legislation. That legislation was much *more* extreme than most of the tort reform legislation being debated now. It abolished compensation for pain and suffering, abolished the right to jury trial, abolished the ability to obtain punitive damages. Yet, the courts recognized that workers' compensation laws were legislative policy judgments, and those laws were upheld as constitutional across the country.

For another example, look at the Uniform Commercial Code (UCC) as it has been adopted in the states. The courts have routinely held those laws to be constitutional, even though the legislatures had stepped into an area that was traditionally state contract or commercial law.

I think what we have now, unfortunately, is increasingly a political battle between the legislative and judicial branches. Rather than talking about "assaults on the judiciary," I would like to give you some thoughts on the *public* perception of the tort reform (or separation of powers) debate, and how that may affect the public's perception of the judiciary.

What we have now, unfortunately, is increasingly a political battle between the legislative and judicial branches.

LEGISLATIVE DELEGATION OF COMMON LAW AUTHORITY TO THE COURTS

As I said, over the past 200 years, at times the legislatures *have* engaged in the development of tort law. In fact, when most territories or colonies became states, one of the first things legislatures did was to pass so-called "reception" statutes. Most of your states probably still have them on the books, although they may not have been used in over 200 years. Through those reception statutes, the states "received" the common law of England, and through them the legislatures delegated authority to continue to develop the common law to the judiciary. As many reception statutes made clear, however, what the legislature delegated it could *retrieve at any time*. So there is precedent, both at the beginning of statehood for most states, and following all the way up until today, for the legislatures' actions in the area of tort law.

In just over the past dozen years, however, there have been over 85 cases where state courts have overturned state tort reform legislation. Just in the 1990s, there have been over 50 decisions by state courts overturning state tort reform laws. At the American Tort Reform Association, we have done some research, and we concluded that this phenomenon of state courts overturning state tort reform legislation is relatively new. It is something of a battleground—and unfortunately, I think, it can affect judicial integrity and the function of the judiciary. I will offer some points.

First of all, the tort reform debate is not about taking away judicial independence. With some exceptions (perhaps including the Illinois legislation), tort reform legislation is just tinkering around the edges of tort law. The vast majority of tort law has been, and will continue to be, and *should* be, developed by the courts in the common law fashion. That is the history of this country. But to say that the legislature should have no role whatsoever in that development, I think, is wrong.

OBSCURE GROUNDS OF DECISION

When one looks at those decisions I referred to, one begins to wonder why they are always decided under provisions of state constitutions. Why not the *federal* constitution?

Furthermore, those 85 decisions often relied upon *obscure* provisions of state constitutions. Professor Chemerinsky talked about the need to uphold due process. Most of the decisions I referred to, however, did not look at the legislation under the due process clause or the equal protection clause. The decisions relied on clauses that most people have no idea even exist—for example, the anti-abrogation provision, jural rights provisions, prohibitions against special legislation, and the right-to-remedy provisions of state constitutions.

*The court decisions
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To many in the public, these tactics are likely to be perceived as “gamesmanship.” When there is what appears to be a national trend toward decisions that are decided under obscure provisions of state constitutions, that cannot be appealed to the federal courts, and that the public does not understand, then that affects the public’s perception of the judiciary. The public’s view is that one side is being shut out of the debate.

Of course, most courts have continued to uphold state tort reform legislation. Those courts have understood that there is a role for the legislatures in the development of tort law. I will just give one very brief example at the federal level, because it is an example that shows that the tort reform debate is not about taking away judicial independence; rather, tort reform is an attempt to legislate policy on a national or statewide level.

THE GENERAL AVIATION REVITALIZATION ACT OF 1994

In August 1994, President Clinton signed a bill that provided an 18-year statute of repose, or “outer time limit,” on litigation against manufacturers of piston-driven aircraft. The law was called the General Aviation Revitalization Act (GARA).¹⁸ The industry had been devastated. It had provided somewhere around a hundred thousand jobs, and within 10 or 15 years, we were down to a few thousand jobs left in this country. Only a few hundred aircraft were being produced each year. The president signed the 18-year limit on litigation. The planes now being made are among the safest in aviation history. There have been over 10,000 new jobs created in that sector of the economy, and the spillover effect has been very positive. Construction of new homes, banks, McDonalds, movie theaters, and so forth in communities with general aviation manufacturing plants has exploded.

18 Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. §40101).

GARA is one example of an instance where the legislature moved in to remedy specific problems that were perceived in the tort system and tried to do so in a balanced fashion; it has worked. GARA is not the type of law that could be developed by the judiciary. The courts, looking at cases and controversies, cannot draw an eighteen-year limit on litigation. But it is not an arbitrary limit. It is based on public policy. At least three courts have declared GARA to be constitutional.

The separation of powers tug of war that is going on should not continue. When a legislature has acted, its policy decision should be respected. Thank you for inviting me here.

EUGENE I. PAVALON, ESQ.

It seems to me that in discussing this topic of judicial independence, what we are really talking about is an example of the difference between *authority* and *power*. Let me give you an example.

The late Justice McReynolds of the United States Supreme Court was known not only as an erudite justice, but also as one who held a penny very close to the vest. He did, however, take his law clerks to lunch at a nearby restaurant once a month. The story goes that one day he was at this lunch with his law clerks and he ordered the Blue Plate Special. After eating it for awhile, he called the waitress over and he asked her for another luncheon roll, to which the waitress said, "I am sorry, sir. Only one luncheon roll per Blue Plate Special." He responded, "Young lady, don't you know who I am? I am Justice McReynolds of the United States Supreme Court!" And the waitress looked at him and said, "You might be Justice McReynolds of the United States Supreme Court, but I happen to be the lady who gives out the luncheon rolls."

What we are really talking about is the difference between authority and power. The judiciary has authority, but it really doesn't have much power.

And so we see the distinction between authority and power. If, in fact, the legislature is going to intrude on the independence of the court and begin to interfere with remedies and rights that have long evolved in our common law, what happens? The judiciary has perhaps *authority*, but it really doesn't have much *power*.

I heard recently a senior member of Congress who came back from a trip to Russia, just a couple of weeks ago. He was talking about it in a speech in defense of our justice system. (Of course, he was speaking to lawyers.) He said, "You know, it was interesting. I spoke to a government official in Russia. I was talking to him about the state of his country and he said, 'You know, Congressman, if you want brilliant ballet dancers, we have thousands of them. If you want nuclear physicists, we have an incredible fund of them. But if you want *citizens*, we really don't have many. And the reason we don't is that we do not have an independent, trustworthy, honest judiciary, and the people of this country have lost confidence in it.' "

I think that really underscores the importance of the preservation of the independence of the judiciary as the separate branch of power that our founding fathers meant it to be. One of the things I thought was important, in addition to the many wise things Professor Chemerinsky said in his paper and in his talk, was the warning he sounded at the end of his oral remarks, when he said,

I don't believe the threat to judicial independence in the United States will ever come in the form of a despotic monarchy or legislature that completely eliminates the independence of the courts. I believe that the threat to judicial independence will be much more insidious. It will be the slow, incremental erosion of the independence of the courts.¹⁹

If he's correct, then we will also lose the rights of people to have unfettered access to the courts, the rights of people to have remedies when wrongs are committed. When you undermine judicial independence, you are really depriving American society and its citizens of fundamental, necessary rights, and it will dramatically alter our democratic society, or at least society as we know it now, in terms of the democracy that we treasure.

Justice McMorrow was very modest with regard to that opinion she wrote. I believe there was only one dissenting judge. Certainly I have a particular interest in that case since my practice, as you know, is largely involved with rights of people who have suffered injuries. The case, of course, is known as the *Best* case, but I like to refer to it as "the Best Case" because I agree so strongly with her opinion. But that case, as Justice McMorrow pointed out so well, really involved a panoply of terrible legislative encroachments on what has long been the common law, and they were dramatic changes in the law. I don't believe there is a court sitting here that would not have arrived at the same conclusion that the Illinois Supreme Court did, with only one dissenting opinion, and it was an extremely well-written opinion. Among other things, Justice McMorrow wrote that "The legislature is not free to enact changes to the common law which are not rationally related to a legitimate government interest."²⁰ The court then found the statute *not* to be in large part related to those legitimate governmental interests. I think the real question that has been framed in the debate in this area is "When does something really involve a legitimate government interest?"

WHERE IS THE LINE?

And as Professor Chemerinsky pointed out in his paper, the problem with all of these issues, whether it is with regard to the process of the court or the funding of the court or dealing with procedure or dealing with legislative encroachments and the substantive rights, is that there is no bright line. So, when is some particular action or some particular conduct really unconstitutional?

Mr. Behrens made a reference to the reception statutes that were adopted early in the statehoods of each state. The fact of the matter is that, thereafter, or contemporaneously, *constitutions* were also adopted. And the constitutions have been changed seriatim over the years. I know that just in my lifetime in practicing in Illinois, we had at least one constitutional convention, and perhaps two, in which dramatic changes in the constitution were submitted to the voters as required, and they were accepted. So I don't

19 Chemerinsky paper, p. 70 *supra*.

20 689 N.E.2d at 1057, 1077.

consider, for example, a provision in a state constitution that guarantees a remedy for a wrong, to which Mr. Behrens referred, to be so “obscure.” I think it certainly would not offend anyone’s conscience or anyone’s sense of justice or equity if I were to ask you, “Do you think that such a provision in a state constitution is wrong?”

HOW MUCH CAN THE LEGISLATURE LIMIT RIGHTS?

So, while Justice McMorrow pointed out that the Illinois Supreme Court’s decision on the tort reform statute was really not hard to reach because of the way the statute had been written and because of its breadth and scope, the real question is what a legislature can do in terms of qualifying or limiting the rights of individuals who suffer wrongs. Certainly, there may be smarter people than I who could really identify them *specifically* so that we *would* have such a bright line, but I don’t think that will ever happen. And I can’t help wondering how the court would have ruled if the many changes to Illinois tort law that were embodied in the statute had been brought up *incrementally*.

In conclusion, in my 45 years of practicing law I have been privileged to see an evolution of the common law with regard to injuries suffered by people. The evolution really began earlier, because the courts, in expanding the rights of individuals and interpreting the common law, were relying on decisions that were handed down almost a hundred years ago—cases like *MacPherson v. Buick Motor Co.*²¹

I remember when I was in law school, for example, one of the hallmarks of legal jurisprudence and scholarship was Professor William Prosser’s “Assault Upon the Citadel” article,²² in which he described all the exceptions that had been recognized to the “privity of contract” defense in product liability cases. Eventually, of course, we had *Henningsen v. Bloomfield Motors, Inc.*,²³ in which the New Jersey Supreme Court adopted strict liability.

We also saw the erosion or abolition of governmental and charitable immunities. There *were* appropriate legislative responses to the abolition of governmental immunities, when most states passed so-called tort claim acts, in which essential, legitimate government interests and functions were recognized and protected by qualifying and limiting some causes of action against the government. Sometimes those statutes went too far, and sometimes they didn’t. But the judiciary was able to handle that. And I believe most state governments, including the authorities in Illinois, are very, very satisfied with their tort claim systems, including the way the courts have interpreted those laws.

If a court were to allow a legislature, with one fell swoop, to eliminate all of these hard-won rights—which, in the case of Illinois, as Justice McMorrow pointed out, would have overturned over 70 state appellate and supreme court decisions, not to mention almost 100 years of slow evolution of rationally thought-out decisions—then the judiciary would be mere handmaidens of the legislature and really would be functioning as surrogates of the legislature. And I believe that if the legislatures were allowed to eliminate the same rights in an *incremental* fashion, the result would be the same.

21 217 N.Y. 382, 111 N.E. 1050 (1917).

22 69 YALE L. J. 1099 (1960).

23 32 N.J. 358, 161 A.2d 69 (1960).

RESPONSE BY PROFESSOR CHEMERINSKY

Very briefly, I think the question is, “When do legislative actions cross the line and unconstitutionally violate judicial independence?” There never will be a bright line test to answer that question. But that doesn’t mean there is *no* line. Let me take one example from each of the speakers and give my thoughts on whether it crosses the line.

Justice McMorrow said that perhaps aggressive questioning and evaluation of judicial nominees based on their ideology might cross the line. Though I agree with almost everything she said, I don’t see any problem in terms of separation of powers there. I think it is the role of any body that is confirming a judicial nominee to make sure that they assent to that person’s being on the bench. So, at the federal level, I think it is completely appropriate for the president to have an ideological test in picking judges, or for the Senate to have an ideological test in reviewing them. I don’t think that keeps the judiciary from performing its core function, and it is a core function of the *legislature* to decide whether or not to confirm judicial candidates.

In terms of the example **Professor Wermiel** gave of judicial discipline, I confess that I usually think of judicial discipline as separate from legislative functions and so I didn’t put it on my list. But his comments give me reason to think that judicial discipline sometimes *can* be tied to the legislative process, and so that could be a violation of separation of powers. Just yesterday the Utah Supreme Court issued a decision that members of the legislature could not serve on judicial discipline committees because that would violate separation of powers.²⁴ If I understand the holding correctly, I would agree with that because for the legislature to discipline sitting judges would be a violation of separation of powers.

*Legislatures certainly can,
by statute, overrule the
common law—so long as
they do not violate the
constitution.*

Mr. Behrens says the important question with regard to tort law is who will make it in the United States. I strongly disagree that that is the key question. In the absence of statutes, courts make tort law *as part of* the common law. If legislatures want to, they certainly can, by statute, overrule the common law—*so long as they do not violate the constitution*. To me, the important question with regard to tort reform legislation is: When does tort reform legislation violate separation of powers or due process or any other provision in a state or a federal constitution? So it is not a question of a need for the judiciary to completely defer to all legislative policy choices. The question rather is:

When do the legislative policy choices violate the constitution? When they do, they must be struck down.

That leads me finally to **Mr. Pavalon’s** comments on the essential functions of the court. I believe that, above all, the essential function of the court is to be there whenever a person alleges that a common law or statutory or constitutional right is violated. The beauty of our system of justice is that the individual can bring the most powerful government or the largest corporation in to *your* court, and stand on an equal footing with that entity there. If, at any point, the legislature keeps that right from being available, then there is a violation of separation of powers, and that’s what due process of law is all about.

²⁴ In re Young, 961 P.2d 918 (Utah 1998). *But see* contrary decision rendered on rehearing, In re Young, 976 P.2d 581 (Utah 1999).

Luncheon Remarks by Professor Mickey Edwards

I am delighted that I was able to get up here after you ate, because, as a lawyer, I can tell you there is nothing I would hate worse than keeping over a hundred judges from eating. That would be a terrifying prospect.

When I was in law school and when I first became a lawyer, I was very intimidated. If you all think back to when you started practicing law, and recall the first time you went before a judge, probably the only words you could ever blurt out were “Your Honor” this and “Your Honor” that. The first time I gave a speech in the House of Representatives, “Tip” O’Neil was in the chair and instead of calling him “Mr. Speaker,” I said, “Your Honor.” Other people laughed at me. He was flattered, I think. You know, I think he kind of wished that it were true.

Some critics are attacking not specific judges, but the system itself.

SUPPORTING THE JUDICIARY

I am here in a particular role and there’s something I want to tell you about, because I think it is important to you as well as to me, and to the American people. We have started a new organization that I will talk a little more about as I go along, called Citizens for Independent Courts. It is something that is important to a lot of us on different sides of the political spectrum.

We have a broad group of people, a great, diverse group of people involved in this issue. As I tell you about it, about our commitment to trying to preserve the ability of judges to act objectively, impartially and in defense of the law and the Constitution, I want you to know that there is a role that you can play in this.

We have a lot of people involved—law school deans, former Justice Department officials, former members of Congress, a lot of former federal judges—a great variety of people. And there’s a role for you. Obviously, as sitting members of courts, you cannot get actively involved as we take positions on issues. But we need information. We need ideas from you, not only about how we ought to prepare our mission statements, our statements of principles as we look at these issues, but also factual information about what is happening in your states. For example, I am going to mention some things that are happening in Oklahoma, my own state. And the more of these things that we learn about that will enable us to step forward and preserve the integrity of the judicial branch of government, the more effective we will be. You can play a very big role in helping us do that.

Our purpose, quite frankly, is to protect *your* freedom to do *your* jobs without living in fear that you are going to be punished if you uphold a citizen’s constitutional rights because that may not be the popular political position of the moment.

Earlier this week, David Broder published an article in *The Washington Post* in which he said, “when the apostles of democracy visit China or the nations of the former Soviet Union, they teach that an unintimidated court system is every bit as important as a popularly elected legislature in guaranteeing the rule of law.”¹ I know that, when I was a member of Congress, I traveled frequently to other nations. I traveled to nations that did not have the same kind of democratic heritage that we had in this country. When we would sit and talk, as I did in what was then the Soviet Union, with members of the Politburo and with the editors at *Izvestia*, I would tell them, and others would also, about the essentials of a democratic system of government—including not only a freely elected legislature, but also courts that are not intimidated, either by the government or by groups of citizens, and that could rule fairly and impartially in defense of citizen rights.

Now, coming back here and looking at what is happening here, I understand that it is not only in China or Ukraine or Belarus that we need to remember the importance of an impartial and objective and free and unintimidated legal system, but also in this country.

“OUT OF ORDER”

On June 2, 1998, the Manhattan Institute’s Center for Judicial Studies had as its speaker a reporter named Max Boot, who was talking about his new book, *Out of Order*.² Now, of course, there are arrogant judges and corrupt judges and incompetent judges, just as there are arrogant, corrupt, and incompetent congressmen and arrogant, corrupt, and incompetent reporters (although I hesitate to say that in case there are any here).

The problem with Max Boot’s book is that he draws generalities to attack not individual judges, but the court system itself. He claims that judges have acquired growing political power at the expense of elected representatives. That is a little ironic, because Mr. Boot’s newspaper, *The Wall Street Journal*, which apparently, in this case, is concerned about protecting the powers of the legislative branch, has been using the same kinds of generalities to *attack* the legislative branch, and to support things like term limits and the line-item veto, which would *take away* from the legislative branch even more power than they think *you* all are taking from it! I don’t get it.

I am going to mention some examples of my own where you will see my own biases. But the problem in what Max Boot and others are saying is that these are attacks not on specific judges, but on the system itself. I actually am feeling pretty good about our legal system and about the bench, and I think—I will get political here for a minute, I suppose—nothing has more clearly demonstrated the importance of our impartial court system, how well it works, than all of the variety of decisions that have been surrounding these controversies involving the president of the United States.

1 David S. Broder, *Beware the Court-Bashers*, WASHINGTON POST, July 5, 1998, at C7.

2 MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION AND INCOMPETENCE ON THE BENCH* (1998).

A WHITEWATER SAMPLER

The federal courts have been on the hot seat. The politicians and the public have all chosen sides. Many people appear to decide whether a judicial decision is good or bad based on whether it defends the president or attacks the president, whether it upholds Kenneth Starr and his Office of Independent Counsel or tears them down. People have come to political conclusions, regardless of what the law may or may not be.

I think what we have seen throughout this process is a court system that stands for principles and not politics. For those who think that the president is being unfairly hounded by an overzealous modern-day Javert, the persistent cop in *Les Miserables*, there have been some pretty great victories on principle recently.

- Susan McDougall was shackled and thrown in jail because she would not testify against the president. The court said that was wrong.
- Web Hubbell was tripped up on a fishing expedition that went well beyond the legitimate scope of inquiry. The court said, “No, that is wrong.”
- The special prosecutor attempted to secure the testimony of a lawyer who was consulted by Vince Foster. The court came down on the side of a citizen’s right to tell a lawyer secrets and know that those secrets will not be revealed after the client dies.

In every one of those cases, you could, if you look at things politically, claim that the courts simply came down on the side of the president. But at the same time, the courts also held that

- As a private American citizen (regardless of what you thought about her case and ultimately the decision that there wasn’t much of one), Paula Jones had the right to sue another American citizen, even if that other American citizen was the president of the United States, because in our country, nobody—*nobody*—is above the law. A proper decision.

- Members of the Secret Service must be compelled to testify if called as witnesses, because people who work for the federal government owe their loyalty to the people of the United States, not to a particular individual.

So those were decisions that you might say were won by the people who are *against* the president.

I think we have seen a court system that stands for principles and not politics.

FOLLOWING THE RULE OF LAW

Well, the courts looked at these not as cases *for* the president or *against* the president, but rather as cases that raised the questions, “What is the law?” “What is the Constitution?” “What are the bigger principles?” regardless of whether, politically, we like the outcomes or not. So, I think that the courts have actually done themselves quite proud recently.

The problem is that there are a lot of pressures developing to take away that freedom to make decisions that don't take into account the political pressures of the moment. There is a bill now in the House of Representatives, H.R.1252, the Judicial Reform Act of 1997. I am sure you are familiar with it. It would actually limit the power of federal judges to enforce the Constitution in prisons and jails—limit the power of judges to protect rights guaranteed by the Constitution. You wonder what kind of people come up with things like that.

During congressional debate, Tom DeLay, the majority whip in the House, has said, "Judges need to be intimidated." That is a direct quote. "Judges need to be intimidated." And he said he had a list of judges that he wants to see impeached.

Well, we all remember people who have lists of people who they said should be impeached or whatever—not for corruption, not for ineptitude, not for senility, not for taking bribes, but because their rulings about what they thought the Constitution and the law said displeased the political powers of the moment.

There are a lot of pressures developing to take away the freedom to make decisions that don't take into account the political pressures of the moment.

David Broder, in that column I talked about, mentioned a growing pattern of politicizing the judiciary. Robert Bork has now argued³ that all court decisions should be subject to being overturned by a majority vote of Congress—which, of course, would change the entire nature of the American system of government from one that protects individual rights to one that merely imposes the will of the majority on every citizen.

I know people here are going to be on all different sides of these kinds of issues and I understand. I am a conservative Republican.

Yet I did not support Mr. Bork's appointment to the Supreme Court because I thought he misread the Constitution when he claimed that the American people have only those rights that the Constitution gives them, which I thought was sort of a reverse reading of what the Constitution does.

FORMATION OF CITIZENS FOR INDEPENDENT COURTS

Those are some of the reasons why Lloyd Cutler and I, working with the Twentieth Century Fund and funded largely by the Soros Open Society Institute, started Citizens for Independent Courts, which, as I said, is a very broad and diverse coalition of organizations and individuals from every part of the political system. All of us are committed to the belief that the Constitution should not be subject to the whim of a temporary public majority. There is no rule of law unless there are courts that are free to rule without threat or intimidation.

I have to put in the *caveat* that we don't think judges should be free from criticism any more than members of the legislature should be immune to libel actions. (Of course, when I was actually in Congress, I thought *we* should have been free from criticism!) We have a task force that is devoted to studying what distinguishes legitimate criticism from intimidation.

3 See ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICA* 117 (1996) (quoted in Professor Chemerinsky's paper, n.50).

It doesn't mean that we oppose the legitimate role of the legislative branch in setting jurisdictions and powers for the courts. It doesn't mean that every presidential nominee to the bench is supposed to be confirmed. We are not saying that. But it does mean that there has to be a serious attempt to understand the boundaries of legitimate criticism and to understand when limitations on the courts inhibit the protection of a citizen's constitutional rights.

In my own home state of Oklahoma, business groups have set up an organization called Oklahomans for Judicial Excellence, which rates judges by whether or not they are pro-business or anti-business. Other people rate judges as pro-abortion or anti-abortion or pro-gun or anti-gun or pro-death penalty or anti-death penalty. But what we really need is to be able to distinguish between judges who incorrectly interpret the law and the Constitution in order to get a desired outcome, and those who follow the law and the Constitution and just let the results fall where they may. There is a distinction between legitimate criticism on the one hand and on the other, intimidation to try to force judges to come up with rulings that will be politically popular.

When we started Citizens for Independent Courts, it was out of concern for a variety of things—political pressure, threats of impeachment, manipulation of funding for the courts (which includes your salaries), and holding up judicial appointments—not by voting against the nominee, which is perfectly legitimate (the legislative branch has the right to vote against a nominee), but by not acting at all. I know that inaction affects your workload, but actually it is not your workload per se that we are concerned about in this instance. Our first concern has to be that that inaction also punishes *citizens* (who are entitled to a speedy resolution of their claims), because there is such a workload, and such a backlog of cases. How many *citizens* are being punished? This is important, because, as of today, there are 33 federal judicial nominees on whom no hearings have been held and no action taken at all. They are not voted against. Nothing is happening. The vacancies just sit there.

When we held our press conference that announced Citizens for Independent Courts, Lloyd Cutler and I were joined by Senator Alan Simpson, a conservative Republican from Wyoming, and Mario Cuomo, a liberal Democrat from New York. And I say that to show you this is not a partisan issue. *All* Americans have a vested interest in preserving the integrity of the courts.

In our mission statement, we said that the cornerstone of American liberty lies in the power of the courts to protect the rights of the people from the momentary excesses of political majorities. Again, the American court system is based not on imposing the will of the majority, but on protecting the rights of every citizen.

This is not new. There have been attempts before, as you know, to try to bend the courts to the will of the moment. Thomas Jefferson tried to get Samuel Chase impeached as a member of the Supreme Court. Franklin Roosevelt tried to pack the Supreme Court. During the first half of this century, the political left attacked the

The American court system is based not on imposing the will of the majority, but on protecting the rights of every citizen.

courts. Since the Earl Warren days, the political right has been attacking the courts. So this is not new. Some of the criticisms of the courts over the years have been well justified. The problem is the extent to which the threats of impeachment and intimidation have *grown* recently.

JUDICIAL ACCOUNTABILITY

The American Bar Association's Commission on Separation of Powers and Judicial Independence issued a report last year⁴ and called the principle of judicial accountability an indispensable part, a counterbalance, of judicial independence. We agree. But it is essential that all branches of government not only are accountable and show restraint, but also are protected in their ability to do their constitutional duty. In the conclusion of its report, the ABA's commission said,

While the current state of federal judicial independence remains essentially sound, a number of politically serious problems exist that, if left unremedied, could degenerate into real threats to judicial independence. Those who value judicial independence must stand ready to protect it.⁵

That is the challenge I want to leave you with. That is the challenge that we accepted in our group—not for you, not for you as judges, but for the people themselves, whose very liberties depend on a system of justice that is impartial and free from fear. We have a great number of people involved in our group, people from all walks of life and all political views, who are committed to preserving the integrity of an impartial and independent judiciary.

But *you* are there in the states. *You* know the issues. *You* see these challenges as they are mounting. *You* see the threats of impeachment. You see the cases in states like Oklahoma, where judges are rated not on competence but on whether or not they are coming down with rulings that the political majority of the moment will support. And we need *your* help. You can contact Citizens for Independent Courts here in Washington,⁶ or you can contact me at the Kennedy School⁷ if you have things that you think we should include in our statements, if you have things that you think we should issue public comment about, if you have information that will help us mount a public awareness of the danger of judges' being intimidated and threatened for doing their job.

This is something we are in together. Those of us who held the inaugural press conference of Citizens for Independent Courts (Mario Cuomo, Al Simpson, Lloyd Cutler, and I) really need your help with this one—not just for you, but for all of the American people.

4 AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY (1997), <<http://abanet.org/govaffairs/judiciary/report.html>>.

5 AN INDEPENDENT JUDICIARY, Conclusion, <<http://www.abanet.org/govaffairs/judiciary/r7.html>>.

6 Citizens for Independent Courts may be contacted at 1755 Massachusetts Avenue, NW, Suite 400, Washington, DC 20036. Phone: (202) 387-0400. Its Internet site is <www.faircourts.org>.

7 Professor Mickey Edwards, John F. Kennedy School of Government, Harvard University, 79 John F. Kennedy Street, Cambridge MA 02138. Phone: (617) 495-1100.

The Judges' Responses

Participants in seven discussion groups were invited to consider a number of standardized questions¹ related to the papers and oral remarks. Their discussions led the judges to afford some of the questions more attention than others, and to consider several related topics as well.

Remarks of judges in the discussions are excerpted below, arranged according to topic, edited for clarity, and summarized in the *italicized* sections. Asterisks divide comments of different participants. Paragraphing within comments and footnote content have been provided by the forum reporter.

The excerpts are individual remarks, not statements of consensus. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but all of the viewpoints expressed in the discussion groups are represented in the following discussion excerpts.

1 The questions used in the discussion groups were presented as follows:

1. Have you observed negative campaigns at work during judicial elections? During executive branch elections citing “bad” judicial decisions? Have you observed impeachment or recall campaigns against judges that you feel were unjustified?
2. Have you observed negative publicity campaigns directed against judges through the news media stemming from a single decision or a track record of decisions?
3. In your state, is the court system held up to ridicule or unfair criticism? If so, is it done by particular organizations/political parties/individuals? To what extent have you observed misinformation about the justice system? Have you reached any conclusions about motivation, agendas, etc.?
4. To what extent are judges in your jurisdiction free to respond to criticism? To express political views?
5. Are there any limits in your state on freedom to attack judges?
6. Should judges comment more on legal matters in public (e.g., on television and the radio)?
7. Have you encountered any of the other types of legislative action discussed by Professor Chemerinsky:
 - Threatened or real deprivation of adequate funding for the courts;
 - Legislation that dictates the result in particular cases;
 - Legislation that dictates court procedures in particular cases and classes of cases;
 - Legislation restricting court jurisdiction, to prevent courts from entertaining entire disfavored classes of litigation;
 - Legislation limiting available remedies;
 - Legislation limiting judicial (including juror) discretion in finding facts and devising remedies;
 - Legislation assigning the courts nonjudicial tasks; and
 - Legislation changing substantive law in response to particular decisions?
8. Do you believe any of them would be unconstitutional in your state?

1. JUDICIAL SELECTION, ELECTION CAMPAIGNS, JUDICIAL CONDUCT, AND PERFORMANCE

1.1 APPROACHES TO JUDICIAL SELECTION AND TENURE

Several judges saw elective systems as a threat per se to judicial independence. Others felt strongly that it is only proper for voters to have a role in judicial selection and retention. Still others felt the details of the system by themselves did not produce good judges or bad judges.

DISCUSSION EXCERPTS

I think a lot of what a judge does depends on who the judge is. I think there is no question that an elected judiciary probably has less *independence* than an appointed judiciary. But there also is no question that an appointed judiciary has less *accountability* than an elected judiciary.

*A lot of what a judge does
depends on who the judge is.*



To me there is a contradiction between judicial independence and an elected judiciary, no matter what kind of elections you have. As long as the press, individuals, and groups can attack a judicial officer and have an effect on an election, then it is a foregone conclusion that that is an attack on the independence of the judiciary.



Some say the best protection of judicial independence is lifetime tenure. I don't accept that, although there has to be some kind of a reasonable compromise. I know a lot of people who are more than a little restive with the notion of the members of the federal judiciary serving for life once they have been confirmed.



If it's a choice between merit selection and being elected by the popular vote, I prefer the popular vote. I would not have become a judge at 30 years of age in my state if I had to rely on the government appointing me to that position.



I don't accept the appointment system as being less political. In order to get appointed, you have to know the right people, and that is political. I would rather trust the people, especially to get a diverse group of lawyers to become judges. Their likelihood of being appointed is so slim that I think the majority of them would accept the elective process. I am willing to bet the farm that if we ever had a constitutional convention in the United States, the first thing that would go is life tenure for federal judges.



In terms both of independence and the quality of judges, you get good judges and bad judges out of both the election system and the appointed system. The same thing goes for retention. You lose some people you ought to lose and you lose some you shouldn't lose.



I don't think any system itself makes judges. I have had life tenure for many years. I think there are a lot of better elected judges than me, and I have seen them.



The process of selecting judges has always been political. If you want an independent judiciary, you have an equally good chance to get them through the election process as you do with the "merit" process. "Merit," I think, is a misnomer. I believe in merit, but I believe in merit selection by the people. "Merit" selection in my state would in reality mean selection by a privileged few, rather than the public. It would mean that the law factories would dominate the process, as they have with our federal courts.



In our state, an appointive system has been put before our voters a couple of times and they have turned it down decisively. They want their say.



In our court we get a lot of international visitors, and they always want to know about the independence of judges—especially visitors from the countries that are trying to establish new "rule of law" systems. I always have to tell visitors from other countries that we have not yet, in this country, decided what is the best way to select judges because we have got every imaginable method of doing it. And that is very baffling to them.



Once in awhile you will get a judge who will bend to the will of the public through some election, but, overall, I don't think that I can point to an appointed judge or an elected judge and say that the quality of justice under one is better than it is under the other.



1.2 JUDICIAL ELECTION PRACTICES AND CAMPAIGN FINANCE

A number of judges were dismayed by the prominent role money plays in elections, as well as by the frequently low voter-interest level, and the great resultant influence of groups opposed to all incumbents.

DISCUSSION EXCERPTS

I have a friend on a certain state supreme court who ran for re-election two and a half years ago against opposition, and he spent \$2.5 million in keeping his seat. I have another friend there, who was retained, and it cost him a million and a half.



In our state, the only thing the voters really care about is whether you are tough on crime. You tell them, "I am a tough judge." As a woman, I used to get that when I was much younger. They never asked me if I was going to be *fair*, but they always wanted to know if I was going to be really tough on crime.



The only thing the voters really care about is whether you are tough on crime. They never asked me if I was going to be fair.

In our state, two of our trial judges were defeated by negative campaigns put on by lawyers who disagreed with their philosophy or their opinions. Attorneys actually wrote letters to clients and put on a negative campaign, and as a result the judges were not retained.



In our western state, when we started holding retention elections about six years ago, the first statewide judges on my court that ran were able to get 75 percent “yes” votes. Two years later, the next candidates got an average of 72½ percent. Two years after that it went down to 70. Two years after that it went down to 67½. So, it has been going down 2½ percentage points [on] average every year.



One of the things that colors these issues is the trend toward organizations that are single-issue-oriented. It is a very subtle, insidious way of getting involved in a campaign, and it is coming under a lot of scrutiny from the reporters, who are asking who is funding the organizations. A single-issue group can subtly influence a campaign, whereas even the candidates themselves might be reluctant to do that.



In our western state, right now, in my opinion the judiciary is completely dependent upon the large financial interests in the state, including the newspapers. I find it to be a very, very dangerous situation.



It is not going to happen overnight, but I think one way of cleansing it is absolute total disclosure of every penny that comes into every campaign. As is, there are too many ways of getting around the disclosure rules.



In our western state it now requires five to six hundred thousand dollars to run a judicial race. I think when I got elected 18 years ago, I spent about \$90,000. My largest contribution, I think, was \$500, and now you see contributions of \$25,000.



The climate is changing tremendously. The negative campaigning by the special interest groups has been phenomenal.

In our state, about 30 percent of the voters, in every election, just vote “no.” And only about 65 percent of the voters even vote at all on judges.



In our western state we have “nonpartisan” elections, but in recent years they have been contested and highly politicized—not on a party basis, but at the individual level, based either on philosophy or the old guard versus the reformers. We have tried three times to get the appointment and retention system, and three times it has been defeated by our voters.



In our midwestern state, the climate is changing tremendously. The negative campaigning that is taking place by the special interest groups has been just

phenomenal. All of us have probably participated in thousands of decisions, and there is always a spin that can be put on a decision that can present a pretty negative image. I think that is a tremendous threat to the independence of the judiciary.



I have gone through two different nominating commissions. I have been appointed by two different governors filling vacancies, and I found that there is politics in all of this and anybody that thinks that there isn't politics in appointments must believe in the Easter Bunny. The question is *whose* politics is this going to be. Is this going to be the politics of some blue ribbon panel? Is it going to be the politics of the governor's office? Or is it going to be the politics of the people?



We may not be able to *stop* the political parties from endorsing candidates. If a party wants to do it, it can do it, it seems to me. The more pertinent question would be whether the judge *solicits* the endorsement.



When you really come right down to it, most of the money in judicial election campaigns comes from the bar.



In our state we named a "blue ribbon" committee. If somebody complains about a campaign practice, the blue ribbon committee looks at it and makes a statement, and that is the end of it. The committee members don't have any teeth; there is nothing they can do, but it worked very effectively recently this year and many candidates were frightened of what this committee might say.



One of our justices is running for re-election, and the chief justice (who is well known all over the state) proposes to go around with the candidate and sort of introduce him around to the area. And there is a big hullabaloo about whether that is appropriate or not. The incumbent is a great fellow, the opponent is a great fellow, and as far as I know the chief justice is a great fellow. I don't know whether it is an appropriate thing or not.



In our state we have to run for retention every ten years. We regard that as kind of part-merit selection and part-election in this sense. We have to get a 60 percent "yes" vote. Ten years ago, there was a badly planned campaign that urged people to "Vote 'no.'" I was running then, and it got me out speaking to the Kiwanis, to the Lions, to the Rotary, to the senior adult groups. I went into more churches than I had ever been in in my life before talking to people, familiarizing those people with our system, the way the courts had hoped to work. I found that experience to be very, very positive.



When you really come right down to it, most of the money in judicial election campaigns comes from the bar.

In our eastern state, the two people last year who ran for the supreme court and raised the most money lost! I want to tell you, many people, myself included, were thrilled.



Max Cleland said about money one time, "It is tainted. 'T ain't mine, and 't ain't enough." It is a real problem today in all elections. If you are running in a statewide race and you are not known, even in a small state like ours, the only way you win those elections is by getting on television. That takes lots of money. We have a thousand-dollar limit on campaign contributions, and we have a bar against any kinds of corporate contributions. So, we find lots of lawyers contributing lots of money in judicial races. I didn't think it tainted the process. I was able to raise some money and I don't think there is one of us in the room that wouldn't hesitate to rule against somebody who gave us money. You rule on issues. You don't rule on who the people are. I think the whole money issue is a red herring.



1.3 NEGATIVE CAMPAIGNS

The judges voiced concern about the negative nature of many judicial election campaigns, whether brought about by other candidates for office or by outside groups and individuals. They expressed particular concern about the vulnerability of judges to attack, especially at the very end of a campaign, when it is difficult for the candidate to respond.

DISCUSSION EXCERPTS

During elections in our jurisdiction, we cannot comment on issues. We have some articulate professional people prepare ads of us and our dogs or our shotguns or our children and grandchildren, and whoever is with the right political party at the time and has the best-looking dogs, well, they win. Golden retrievers and "Labs" are big right now.

We have some articulate professional people prepare ads of us and our dogs or our shotguns or our children and grandchildren. . . .

Golden retrievers and "Labs" are big right now.

running *against* some other person. You are just running against groups that are against you.



In our state, the only way we can respond to attacks during elections is if we have “organized” opposition. But you may not get “organized” opposition until the weekend before election day, so you would have no chance in the world to respond to it.



There is a feeling of the electorate—or a portion of the electorate—that if you are an incumbent, you must be bad.



In our western state, the last four supreme court campaigns have been incredibly negative. It has really eroded the respect for the judiciary. Just the fact that the criticisms are made means they are taken seriously. But also, people react negatively to the negative campaigns themselves. So it has been very destructive.



In our state we have an intervention committee. If a judge starts to get a little out of hand with campaign conduct, somebody from the intervention committee will go look at his ads or call him to task for it.



We had a race for our court recently in which one of the candidates ran television ads showing a picture of the other candidate with piles of money on a plate in front of him and people circling around who were supposedly trial lawyers giving the money. I think that kind of thing is indigenous to the system if you have partisan elections. There’s no way around it.



What about *not seating* a judge who gets elected by making false accusations about an opponent?



Our state’s code of judicial conduct now applies to judicial candidates, even before they become judges, so they can be disciplined.



In our western state, we get criticized by everybody—by the plaintiffs bar, by the defense bar, by consumer interest groups, by business interest groups. Our court doesn’t handle criminal cases, but we still get hammered on the death penalty, because there is some sort of bleed-over criticism. It is very political.



In our state one of our candidates for the supreme court became an issue in an executive branch election, with our incumbent governor making a particularly vicious attack on him for one particular decision.



Whenever we have one of those nasty, tough elections *between* members of the judiciary, we *all* drop to the lowest common denominator, and whatever good you do is almost erased.



1.4 GRIEVANCE, DISCIPLINE, AND EVALUATION OF JUDICIAL PERFORMANCE

The judges agreed that it is important for there to be an institutional mechanism for discipline and, if necessary, removal of judges who misbehave, but they expressed concern about legislative and executive incursions into this function. They found the judicial evaluation process to be subject to political abuse.

DISCUSSION EXCERPTS

I think that the existence of our state's commission on judicial conduct, but for the occasional gaff, *has* enhanced public confidence in the judiciary. Confidence is still at a low level today, but it would be even lower if there weren't a body to remove some of our dear colleagues who are guilty of misconduct.

Whenever we have one of those nasty, tough elections between members of the judiciary, we all drop to the lowest common denominator, and whatever good you do is almost erased.



The idea of performance measures came from the National Association of State Legislators conference two years ago. It is happening nationwide now. What they are doing is they are telling your court, for example, that they want civil cases that are on the docket already decided within twelve months, and then from the date of submission of later cases, within eight. Whatever the formula is going to be, they are setting that up and then you are going to complain and say "separation of powers!" just as we did. And they said, "Well, that is fine. We will raise judicial salaries, first of all, from \$60,000 to \$110,000." The screaming went down a little bit. Then you say, "Well, but then, you know, I have got only one and one-half staff members." So they tripled the staff. So, now we are very well funded, and very well paid, but we are looking at a question of whether or not the legislature is dictating how fast we have to think. And their answer is, "Well, you don't have to think any faster, because you have got three times the salary and three times the staff."



We wrote into the rules of our evaluation process a provision that we could respond to judicial evaluations. Several of us did choose to respond to the evaluations, and that has worked out fine, but what we found is that the public has paid absolutely no attention to the evaluation. They simply could care less. It was a one-day story when the evaluations came out. To the extent that it was intended to educate the voters about judges' records as a whole, I would have to say the evaluation system has been a failure.



I have been called to appear before our state's judicial conduct authority, and it has always been for something I *said*, never for something I *did*.



A couple of administrations ago in one court in our state, there was a presiding judge who sent out a monthly flyer that showed the names of the judges and the number of cases under submission for more than 30, 60, 90 days. Oddly enough, the same names kept appearing on the 90-day list over and over again, but that is a subtle reminder to get matters off this list.



In our state we have a judicial review council, which receives complaints of judicial misconduct. But the vast majority of the complaints that are received are not about misconduct but about judges' decisions! The review council statute gives it no jurisdiction over decisions. After all, you have the right of appeal. But there are so many of those complaints that the council didn't even send judges notification that someone filed a complaint. They just dismiss the complaints. But the legislature is entitled by law to get from the judiciary review council the information on complaints against judges. That includes complaints about decisions, and it doesn't make any difference whether they were dismissed or why they were dismissed. And some legislators claim a right to consider a high number of complaints, dismissed or not, when it comes to confirmation. So, in line with what Professor Chemerinsky said about the slow erosion of judicial independence, this strikes me as an example of that.



I don't think the answer for every jurisdiction is to have lifetime tenure or to totally remove review of judicial performance. Really, an election *is* a review. We may want to alter the *form* of review, but it seems to me that knowing that some judges are, in fact, removed from office based on their performance relieves some pressure from the public. In our state, in order for the supreme court to have a merit retention system, a trade-off was made with the legislature to place the appellate judiciary under an evaluation system. The governor and legislature are two different parties, and the legislature was worried that the governor was going to have too much control since he was going to appoint. So, the members of the legislature left it to themselves to appoint the members of the evaluation commission. Four of them had to be laypeople. The one element that our evaluation commission could not figure out how to evaluate was *quality*, so they didn't! They evaluated simply on the speed of disposition, number of decisions written, etc.



In our state we have a judicial evaluation commission. I was really against something like that because when they first thought of the concept, they spoke of having advocacy-type groups or governmental groups on the commission. I thought we'd have people from single-interest groups on the commission, and judges would be looking over their shoulder to see how they are going to deal with whatever kind of case those groups are concerned about. But that didn't turn out to be the case. And when we had an election where two trial judges lost their retention because they couldn't get a 57 percent "yes" vote, I began to think that, if the people are going to perceive or react to a judicial candidate in that way, they might as well have before

them some type of recommendation from a kind of a neutral group. So, I think it is probably a good thing to have.



In our western state we have a judicial performance commission, and its membership now is more laypeople than judges. There are only three judges on it, and the laypeople can outvote the judges. Last week they voted to bring formal charges against a court of appeals justice who dissented in an opinion from a case in which our state has a very peculiar rule that allows the litigants to stipulate to judgments and, in effect, reverse the trial court. The judge said that he was no longer going to sanction that process. So, they brought him up on misconduct charges on the basis that he was refusing to perform his judicial duty, etc. This was an expression in a dissent! This is quite ominous, because it is the first time that the commission has looked at the verbiage in an opinion or a dissent, and taken action based on the language the judge used in the opinion.



If we get rid of our conduct commissions that are supervised by the state supreme courts, we may get a body set up by the legislature. That's the evil, I think.



Just as a footnote, we have judicial evaluations in our midwestern state, but we call it a judicial "development" evaluation, because it is confidential under the supreme court rules. It is only between the judge being evaluated and a facilitator, and it is not made public.



*The only way we can
really handle criticism is
to avoid criticism.*

I have been a judge for 25 years, at all levels of the courts of our state, and if I had to pick one thing that I think has done more to inhibit judicial independence than anything else, I would say it was the creation of the "judicial conduct commissions." As a result of this trend I think judges today are very much afraid of what they say, both orally and in writing.



I have found that the only way we can really handle criticism is to *avoid* criticism. We avoid criticism by not writing or speaking unless in the formal courtroom or at a bar meeting or at the high school when asked to give a speech or at one of our many bar associations.



2. ATTACKS ON THE JUDICIARY AS A WHOLE

The judges were concerned about apparently organized efforts by special-interest groups to influence judicial decisions, and to intimidate judges whom they cannot influence.

DISCUSSION EXCERPTS

I wonder if the dialogue has changed, and it is no longer the fringe that is attacking the courts. Is our obligation now somehow changed or different because the criticism is legitimized and we can't slough it off as being the radical fringe? How do we respond to that?



Our court just declared a victims' rights constitutional amendment unconstitutional. The amendment had been created through an initiative process. The press tended to agree with our decision, and I think it helped that the opinion was unanimous. But the response from the victims' rights people bordered on the vicious. The threat to judicial independence comes, increasingly, directly from the public in the form of initiatives. If you overturn one of those initiatives, you are asking for criticism. The fact that the public can get them on the ballot and get them passed means they have a certain amount of potential voters directed against an individual judge even if the court's opinion is unanimous.

*It is no longer the fringe
that is attacking the courts.*



In our western state, for about ten years the movement to politicize the races in the appellate courts has come from the victims' rights groups.



In our southern state we had a reversal in a death penalty case. The victims' rights groups, police groups, sheriffs, etc. all said that the majority that reversed the conviction will no longer be around—because of a single opinion. And it actually looks like soon we will have lost every judge who participated in that decision. And now they have headlines that say "Death Sentence Reversals Decline," with the implication that they got what they were after.



In the appellate court races in our state, the "pro-business" pressure groups have their candidate and the plaintiff lawyers have their candidate. It is that way in every race. Recently, my clerk came to me, and she said we just got a call from someone who wanted copies of all of the opinions of the justices on our court over the last few years. I later found out in the course of the political campaign that it was a group from another state!



Last year during our retention elections, for the first time noticeable, signs appeared on lawns within a week of the election saying, "Vote 'No' on All Judges." There was no way to trace the source of the funding for those signs. It was very carefully done, whoever did it. And it was done just before the date for the retention election,

which suggests to me, again, that there is some very carefully crafted political thought going into a lot of these efforts.



*I don't think judges
anywhere simply vote
along party lines.*

I don't think judges anywhere simply vote along party lines. Now, the perception of the people is that they do. But it's not as simple as parties' being conservative or liberal. In our state, some Democrats are as conservative as most Republicans are.



In our midwestern state I saw a *billboard* with a message trying to link the state supreme court and the trial lawyers and money. I only got a glance at it, but it was a huge board and it was all print.



I went out and bought Max Boot's book *Out of Order*, and I would encourage all of you to read it. It is a scurrilous attack on the judiciary and he uses much the same techniques that they used in the tort reform battle of the mid-eighties, in that he uses examples where he takes aberrational examples from across the country and then seeks to generalize those examples to the entire judiciary. It is a frontal attack on the judiciary. Robert Bork wrote a foreword to it. It is absolutely anarchy. He says the biggest problem that we have in this country is that we have got a written constitution, and that we have judges who independently can exercise power and control over the citizenry. Coming from a judge who came within a whisker of being on the United States Supreme Court, it is the most outrageous thing that you will ever read. There were those of us in the mid-eighties who felt like the original tort reform movement was an attack on the entire civil justice system, and I view this as sort of the final assault. I mean, you know, first it was the greedy plaintiffs' trial lawyers, then it escalated to runaway juries and jury verdicts. And now it is corrupt and power-hungry judges. So, it is the final assault, in my opinion, on the civil justice system.



3. ATTACKS ON INDIVIDUAL JUDGES

3.1 LIMITS ON THE FREEDOM TO ATTACK JUDGES

The judges did not question the right of the press and the public to criticize judges, although they felt some restrictions on lawyers are justified in view of their status as officers of the court and their potential to affect the administration of justice.

DISCUSSION EXCERPTS

I don't like it, but it is probably the right of the press and of the radio to question a judge's opinion if that is what they want to do. That is what they call freedom of the press. But what we are seeing more and more is something different: special interest groups getting into judicial arenas. In our state we have a pro-business, conservative group that "rates" judges as to whether or not we are perceived to be friendly to business. It is chilling.



There are grievance processes to deal with lawyers who impugn the integrity of the administration of justice, and the problem is drawing the line as to whether a judge wants to get into a public discussion, but in most states, I think a private grievance process is far superior than a public denunciation of each other as to who is the worse snake. To approach each one of those situations with a formal judicial response, I think, would be throwing fuel on the fire.



I don't think there should be any restrictions on the public or the press. In general, I think there should be some limitations on the judges, and perhaps on the lawyers, but not on the public and the press.



There should be some limitations on the judges, and perhaps on the lawyers, but not on the public and the press.

3.2 NEGATIVE PUBLICITY CAMPAIGNS BASED ON A SINGLE DECISION OR A LINE OF DECISIONS

Most of the judges had observed negative campaigns stemming from judicial decisions—sometimes as a result of misunderstanding, but other times as part of single-issue campaigns or more general hostility to the judiciary.

DISCUSSION EXCERPTS

We all are very vulnerable with every decision we file because we never know what is going to “tick somebody’s clock.” We can sit around worrying about it, but the thing you may not worry about may be the case that is the death of you.



There are two separate types of attacks. Judges are attacked because elements of the populace disagree with them philosophically. There is nothing wrong with that. That is democracy. If the majority of the people in an elective state disagree with the philosophy of the judge, the judge is voted out of office, the same way they vote out their legislators, members of congress, and their senators. The difficulty I have is with the other type of attack—criticism of court decisions that are correct under the law but are unpopular. Who is supposed to defend the judiciary when it comes under this type of attack?



In our state a special interest group is challenging one judge’s record on the grounds that he “stretches the law.” Some of its members held a press conference, and they were asked by a very incredulous media, “Give us examples of how he ‘stretches the law.’” The group could not come up with anything. The next day, it was on the front page above the fold! “Stretching the law” is a sound bite that is going to appeal

to an electorate that by and large has no idea what we do. All they know right now is that we are sitting around stretching the law. And while this is happening, the bar is as quiet as a tomb.



When I was a trial judge, I made a ruling in a custody case, and the paper wrote an editorial criticizing me because I made the ruling *quickly*! They said I approached serious matters in a casual manner.



Attacks on judges aren't just based on the opinions and decisions you issue. So many bar associations and special-interest groups now send judges questionnaires, and if you don't adhere to their particular line of thinking, they're against you. You have so many disparate, single-issue groups that you really can't take a position without alienating one of them somewhere along the line.



We have generally just thrown the interest groups' questionnaires in the waste can. All of us have agreed—and I think even the attorneys who run against judges—and have generally just agreed that no one is going to answer them. That has been pretty effective in our state.



*Criticism of specific court
decisions should be
defended by the bar.*

Criticism of specific court decisions should be defended by the bar. But then there are the philosophical campaigns by “pro-life” or “pro-death penalty” groups for candidates of like mind.



I wrote an opinion that found that the selection of a jury leaving off men by use of peremptory challenges was unconstitutional because it was gender-biased. I thought women would be thrilled to hear how that came out, but I got a message from somebody that said, “You are treading on very thin ice with that!” So do what you have to. You don't know what is going to happen, and that is why you can't even think about who is going to regard it this way or that, because there is no way of knowing. You have to do your job and when you have done your job, you have done it and that is all.



We have a popular radio station that covers several counties, and they have a format where they broadcast criticism of judges' decisions on a regular basis. They will track your decisions and talk about them as if they were wrong. It creates a totally negative picture of the judge and the decisions.



Several years ago when I was running, there was a newspaper that had previously criticized me very, very severely on a decision I wrote involving a hot-button issue. The newspaper attacked me personally. Then when I ran for re-election, they *endorsed* me. But they said it was an endorsement with faint praise, because they said they were endorsing me because they felt I had done a good job, “even though we disagreed with

him” in that earlier decision! So everybody who was against me remembered, “Oh, yes, that is the judge who wrote that decision!”



We have an appointive system in our state, and other judges tell me that must be utopia. But we had a situation recently where the legislature let a judge’s term expire without reappointing him. There was a special-interest group behind the scenes that spread totally untrue claims, absolutely false, through the newspapers, that the judge let a child rapist go free. But the legislature said it didn’t make any difference whether the claims were true or false, because this judge was *perceived* as having done that. So, I think on balance I prefer open combat with a known opponent over unknown politics that are sprung at the last minute, and you don’t even know who your enemy is and you can’t grapple with them. So it is not utopia to never face the electorate.



If lawyers take a proactive stand, it really helps to squelch this idea of attacking a judge on a specific decision.



3.3 FREEDOM TO RESPOND TO CRITICISM

The judges felt keenly the limitations often placed on them as to responses to criticism. Some felt certain that judges should have more freedom to respond to unfair attacks. Others felt such responses often are ineffective, and several feared that the judges most likely to use such opportunities are the judges least likely to make a responsible reply.

DISCUSSION EXCERPTS

I am a public official. I have to rule one way or rule the other way, and, you know, there is always going to be somebody that is going to be dissatisfied with what I do. I don’t need to come out as a hero. I did what I had to do and I did what I thought was right and if you don’t like it, well, don’t elect me again. I took the job because I really wanted to serve and I really felt that I could be fair. If you want to criticize what I did, if it is constructive, if I missed something on a legal issue, I am very happy to hear about it. If I am wrong, I am wrong.



The bar has to respond. Of course, the reputation of the bar is at the same low level as the reputation of the judiciary, so the public doesn’t listen with awe and affection when the bar comes to our defense. But I think we do have a greater degree of flexibility to speak out than we have been exercising. That is a lesson I am taking from this conference.



I am a public official. I have to rule one way or rule the other, and there is always going to be somebody who is going to be dissatisfied with what I do. I don’t need to come out as a hero.

I don't mind being empowered, but I am no match for people who want to come after me who are mad enough to do it and are willing to spend money. I mean, it is not a question of me having the freedom to go out on the front steps and say what I think. When you enter that fray, judges are singularly ill-defended in that arena. We don't have PR people. We don't have a spokesman like every other candidate does. Our court doesn't have any PR people. We are at the mercy of some pretty big fighters in an arena that they are accustomed to fighting in.



Some judges are reluctant to talk about decisions publicly, but they have become less reluctant now that they see that it has worked for other judges.



You called the shot. You saw it like it was. You did what you had to do. Even if the court system does defend you, you look bad. What more could we do? We are not social workers. We are not psychologists. We are judges.



I spent 16 years in our western state's legislature, and I got attacked by people all the time. Judges need to grow a thicker skin to some extent. If you don't like the statements that are made about the judicial officers, wait until you feel what legislators feel.



Around our southern state I think most judges probably feel that if you see something in the newspaper once it is generally over with, but if you respond it is going to be in the newspaper twice. But I am also concerned with the fact that you don't see these things until the end of the term. We have to run in partisan elections, and you never see these things until the end of the term, when it is time for you to face re-election.



I think you have to analyze who is criticizing you and what they, in fact, are saying in order to determine how you will respond. A letter to the editor from a disgruntled voter within the district who didn't like the result, I would suggest, does not politically justify a response, and it is going to merely keep the issue alive. On the other hand, a misstatement by a newspaper as to the contents and substance of ruling of your decision in my opinion warrants at least a phone call and an effort to try and educate them, and an offer to sit down and explain the basis for your ruling. They may not in the end agree with it, but I would like to believe that they are not so malicious that they are printing misstatements intentionally. I would like to think that I can explain the legal basis for my ruling, which should, in fact, be sound, and that with an understanding of that, at least you may generate a neutral response.



The problem with the institutional judiciary response is that they are perceived to be just protecting their own. And the lawyer groups—and some of them have articulated this—feel that they will be perceived as trying to curry favor with the judge that they are defending. So I think it really does devolve back upon the individual judge to make a conscientious determination about whether he or she should respond and not

wait for some committee to have what amounts to a due process hearing to see whether or not the committee will get involved.



It is somewhat ludicrous that we as judges are supposed to be chief protectors of the First Amendment right of free speech and yet we are the least able, the least entitled, to invoke that right for ourselves. I think that we are going to take the risk of speaking out in our own defense and defend ourselves and our positions. I know it is going to be a matter of balance, but we deal with that every day in our judicial decisions—just how far we can go within the constraints of our constitutional duties to educate the public and to attack these detractors, or at least to defuse them.



I came here full of vim and vigor for the judge's right to speak out. I have come around almost full circle—not because of anything that was said here today, but as I contemplated, I don't think I want many of my colleagues to speak out on a given case. I think many people don't know what to say and what not to say, or don't think about what they say in a press conference or a statement. I think taking the education approach, or letting someone else speak for us—a bar association or someone who is trained to do it—is the better way to go. Judges have supreme egos, and judges think they know it all. And when they get a chance to talk, they can put their foot in their mouth just as well as anybody else. That is going to go to the detriment of all of us.

We as judges are supposed to be chief protectors of the First Amendment right of free speech and yet we are the least able, the least entitled, to invoke that right for ourselves.



When you make a decision that gets everybody upset, fellow judges treat you as if you have a contagious disease. So, even if there is a mechanism in place for the judges collectively to respond, everybody is running for cover.



One of the problems I have with judges' speaking out when they are attacked is that the very judges who have probably done inappropriate things will also be *speaking* inappropriately, if I know them.



When you hear these stories, you believe them, even though you're a judge. When they are printed in the press about another judge, without knowing everything that happened, without being there (and all of us know that you can't tell from the news media what really took place), you have a tendency to believe the story. It is incredible to me how many judges will believe the worst of their colleagues without ever saying to the judge, "Well, what happened? What really took place? Did you really do that? Is that really your opinion? What was it based on?" They never do. They just believe it and say, "Oh, my God, did you hear this? That was an awful

decision.” And we believe it and we run for cover and hope that the media doesn’t turn their eye on us.



If the response doesn’t come from the person involved, there is really no response. That is the reality of it. We like to think we all speak with the same voice, but we don’t.

We don’t take any courses in law school that qualify us to engage in public relations.



Not all of us run and hide when our neighbor is criticized. Perhaps some obligation should be imposed on judges to *not* do that.



We don’t take any courses in law school that qualify us to engage in public relations. I think a lot of judges aren’t equal to the task, and it can result in disaster. The bar association, perhaps, should be the *last* spokesperson, because the bar is perceived by the public as part of the problem.



How is it that the judicial branch of government remains forever silent?



3.4 JUDGES’ EXPRESSION OF POLITICAL VIEWS

Judges were particularly concerned about the potential impact this form of expression can have on the public’s perception of impartiality. But they also insisted that judges should not be inert as citizens, so long as they do not suggest how they might rule in future cases.

DISCUSSION EXCERPTS

In our southern state, judges can go anywhere they want to and say anything they want to, as long as they don’t talk about their views on capital punishment or abortion or things of that nature, but judges certainly can mingle among the citizens.



People always come up to you when you are running for office and they ask you, “What is your position on this? What do you think of that?” I would say, “Whatever the law says, I would enforce the law.” The public doesn’t understand that.



Quite often you receive inquiries regarding substantive matters of the application of the law to a particular set of facts or some vague set of facts. When I’m about to be tackled, I always like to “lateral” and say, “You know, that is a policy question and that is something that should be addressed by the legislature.” If you can lateral to the legislature, that ends the discussion and it puts the matter squarely in somebody else’s football field.



I sit on our state's judicial discipline board. We had a case recently where a judge wrote an article for a newspaper on a monthly basis, and in that article he criticized some legislative efforts, saying they were inspired by a particular industry. He made some very derogatory remarks about the industry, but they basically were his opinions. A charge was filed against him, saying that that was a violation of the code of judicial conduct, in that he basically was projecting what he would do with any case involving that subject that came before him. We heard that case, and we determined that the remarks were not made in the context of his daily role as a judge. They were made in the context of an article that he submitted to the paper, albeit under his title, and the fact that he was expressing opinions didn't warrant disciplinary action. But it was a very close call.



I stirred up a bit of controversy myself when I had just become a judge. It was the fifteenth anniversary of *Roe v. Wade*. Without identifying myself as a judge, I listed myself with several hundred other people in an advertisement saying, "Happy birthday, *Roe v. Wade*." Suddenly somebody filed a complaint against me for signing the ad. They asked me for my response and I said, "Well, next year is the anniversary of *Brown v. Board of Education* and I fully intend to say, 'Happy birthday, *Brown v. Board*.'"



If we want to find examples of judges' getting involved, there's Justice Scalia, who goes about the countryside telling audiences (in a very charming and erudite way) that *Marbury v. Madison* was wrongly decided. Or Chief Judge Posner of the Seventh Circuit, who has written on everything from the desirability or undesirability of pornography to everything else. So there are some examples of judges regularly commenting on issues of great public concern. I think we *should* be involved. We may not be involved at that level, but the fact that one does it certainly doesn't mean one is unfit to be a judge.



What should a judge do about a pending case in another jurisdiction, especially one that is especially offensive? We don't have to go back too far to find an example of such a case. What if we had some sort of a controversy in the Middle East, and some group of people or legislators, and maybe some judges endorsing them, began to incarcerate Iranian nationals here, just as we did with the Japanese not so long ago, which led to the *Korematsu* decision in the U.S. Supreme Court? Should a judge in Rhode Island or Kentucky have said, "What are those people doing in Washington, sanctioning the internment of Japanese citizens?" The next thing you'll hear is "Oh, you can't say that, judge. What were you trying to do—undermine the national will?"

So, I don't think these questions are crystal clear. I think maybe from time to time we

What should a judge do about a pending case in another jurisdiction, especially one that is especially offensive? I think maybe from time to time we should say, "Hey, wait a minute. It is wrong to do that." Maybe we should say that to the Supreme Court as it scraps the Fourth Amendment in order to get at the drug problem.

should say, “Hey, wait a minute. It is wrong to do that.” Maybe we should say that to the Supreme Court as it scraps the Fourth Amendment in order to get at the drug problem, so that, at the end of fifteen years of shrinking the Fourth Amendment, we still have a drug problem and we have no Fourth Amendment. Should we be silent about that? I don’t think so. We don’t have to be arrogant about it, but whether we like it or not we have a certain influence that remains, despite all these attacks.



I don’t think judges have a charter to roam across the political spectrum making statements of their choice. Certainly you should avoid statements that impugn one’s impartiality, but there is a very difficult line to draw between First Amendment rights and the point at which your impartiality comes into question.



4. RELATIONS WITH THE PUBLIC

4.1 PUBLIC CONFIDENCE IN THE JUDICIARY

Judges expressed great concern over the evident lack of public confidence in government in general, and in the judiciary in particular. They also felt that the courts have a limited ability to become more “user-friendly” entities like private businesses or other government agencies, but thought more could be done to alleviate the public’s uninformed cynicism about them.

DISCUSSION EXCERPTS

We did a poll last year on the perception of the public of the judiciary and attorneys in general, and there was an unfortunate negative perception, but legislators and the executive branch fared even worse. Elected officials in general are held in low esteem, at least in our western state. But I think it is a national trend. The purpose of the poll was to try to assess the perception of the judiciary and attorneys in general. There are some recommendations coming out on “user-friendly” courts, more help to *pro se* litigants, better instructions to the jury panels, and so on and so forth, but the system seems to be working well.

We had a very scientific survey made on the public’s perception of our administration of justice.

The results were just staggering. Just for openers, a little over 7 percent believe that judges and lawyers are honest.



In our western state, whether you are at the grocery store, if you are in a cab, wherever you go, you hear that the government is corrupt, the citizenry has no participation in the selection of the judges, and part of the selection process is even done behind closed doors. That shakes the people’s faith in the judiciary. So, I don’t know what the answer is, but I can tell you that the people believe down to their toes that government from top to bottom is corrupt.



In our western state we had a very scientific survey made on the public’s perception of our administration of justice. The results were

just staggering. Just for openers, a little over 7 percent believe that judges and lawyers are honest. Sixty percent believe that politics play a role in every decision a judge makes. Sixty-five percent thought the complete system ought to be overhauled—a complete overhaul of the system. Where do the people come up with these perceptions? Perhaps the public is going to lose confidence in the system if they keep hearing it over and over again. The people think of the courts as a foreign territory. We use strange language that they don't understand. There is too much secrecy. It is a closed society. It is the least democratic branch of our government, and the people don't understand how it works. If they don't understand it, they are fearful of it. So, I think the situation is much more serious, and much broader, than simply responding to particular attacks on judges.



I am not shocked that 7 percent find us honest.



I think we cast ourselves in the defensive position, and we shouldn't be defensive. There are fads. I have watched them over forty years as a judge. One of the fads right now, which fans the flame with the help of television, is that judges are supposed to be a commodity. We have to be "user-friendly." I submit to you that we are not a product that people "use." We are a profession. We are the third branch of government and we do ourselves a great injustice when we set up "user-friendly" committees and the like. I have had the luxury recently of listening to the talk shows and they fuel the "user-friendly" fad, saying "the judge should have done this, or done that." They are trying to characterize courtrooms as someplace where everybody is going to get what they want. You know they are not. That isn't justice. Somebody is going to win and somebody is going to lose.

*For a variety of reasons,
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decisions are political
decisions.*



For a variety of reasons, people believe, or prefer to believe, that judicial decisions are political decisions. If judges accept that and do nothing institutionally to respond to that, then we really are shirking an important part of our responsibilities.



Just for the heck of it, one day during a jury indoctrination I explained to the jurors what judges do when they are not on the bench. I had people come up to me all day long, saying, "We thought you guys just drank coffee!" They were impressed when they found out what we actually did. So, a lot of it is that they just don't know. I think it is important, because they are not automatically our enemies. A lot of it is based just on lack of familiarity.



We like to think that the civil justice system is strong. But people have to wait two years to get a trial date because resources are insufficient and there aren't enough

judges to handle cases, and then they are assigned at random to a decision maker whom they may not have any confidence in. So there is no mystery as to why people are going to private justice systems, to varieties of alternative dispute resolution, and the jurisdiction of our trial courts and the civil justice system is evaporating into the private justice system. That is a way for people to express a lack of confidence in the present judicial system—their willingness to pay more than \$500 an hour to have private adjudicators resolve cases instead of waiting forever to get a trial date.



We can't forget about the litigants' need for confidence that justice will be administered *impartially*. And we can't be letting trial judges defend themselves if it means coming out on public issues and making statements that may appear to commit them to positions on an issue that is going to come before their court. So, it is important that we have rules out there that impose restraints on the judiciary to the extent that their comments may interfere with public confidence in the decision making process.



I think we have to understand that, with some of our critics, no matter what you say to them, they are still going to keep the same thoughts. They are close-minded. They want to be critical, somewhat like the press. The press is not interested in good works. They are interested in criticism of the judges. They are interested in criticism of the system. This is what sells newspapers. What people like to hear is sensationalism, really.

I always bring the juries back into my chambers when a trial is over and explain to them what was going on when had breaks in the trial, and why certain things had to be heard outside of their presence. One of the things that I always ask is, "Did you enjoy your service as a juror?" Invariably, 98 percent would say, "I didn't want to serve, but now I would never refuse or try to get out of it again." They all enjoy seeing how the system truly works because that is the real life. That is not what you see in the movies or television, which is really distorted.



4.2 PUBLIC EDUCATION ON THE WORK OF THE JUDICIARY

A number of judges felt that much more can and should be done to educate the public about the workings of the judicial system, as a means of countering public disaffection with it. They described initiatives that have been used in several states.

DISCUSSION EXCERPTS

Without an institutionalized public education effort, in addition to the public information, I don't know if we are going to make much headway in this. We have civics education from grade four to postgraduate studies in political science, and there is very little informed instruction about what judges really do. If we leave it to the political science professors and high school teachers, we are not going to get very far. I think the judicial branch in each state ought to have a fundamental role in addressing that problem, however they can do it, and however limited the budget.



In our state we had term limits for judges on the ballot last election. A group of judges got together, and they went around speaking to various groups and were very active, and the measure was defeated decisively. They used slogans on TV like “Do you want the judge to be the least experienced person in the courtroom?”



We actually started televising the proceedings of our court. I thought at first nobody would watch us, only insomniacs and people that were really bored. But it is amazing the response that we get, and it is a public education function that counteracts the bad stuff people hear about the judiciary. They see us in operation. They say, “Hey, you guys actually ask intelligent questions. These issues really are tough. This is harder than I thought.” And people we run into at public gatherings will say that to us.



How about if we had an open house of the court, usually a weekend day, when we invite people to come in and we put on a seminar and we especially target issues the public doesn’t understand, like “How does the judicial system work? Who are the providers of legal services?” They could ask the judge the question, removed from the particular case, and hopefully some of that will go toward mitigating the suspicion or feeling of disconnection that many people have in connection with judges and the court.



Our western state’s courts have been “holding court” around the state in high schools, particularly out of the metropolitan areas, and we have found that that has been enormously helpful. We always have the press there, and the high school students and their parents are invited to attend as well. We have oral arguments, we have lawyers appear. We have a lot of rural areas and lawyers kind of like it, because they don’t have to come to the state capital to argue their cases. We go to them. But the best thing about it is that it introduces a lot of people to the court system. They see it firsthand, people who otherwise only read about it occasionally in our newspapers.

Our chief issue is not independence, it is public trust and confidence.



Most people never talk to a supreme court justice. They say, “You mean, this is what you do?” They don’t know us, because we are generally fairly comfortable in our chambers. I think we use the excuse, “Oh, I can’t comment on this,” to avoid perfectly reasonable dialogue.



Our chief issue is not independence, it is public trust and confidence.



4.3 ACCOUNTABILITY OF THE JUDICIARY TO THE PUBLIC

Judges appeared to agree that they have a duty to be accountable to the public. In that effort, they felt it is extremely important for judges to be both visible to the public and sensitive to its concerns.

DISCUSSION EXCERPTS

I don't think you can talk about judicial independence without talking about judicial accountability. The two go together hand in hand, inseparably, and there is always a tension between them. Judges make me nervous when they go out on the hustings and talk about judicial independence. It sounds to people like they are saying, "Okay, the state constitution says I have to submit myself to the electorate. You may not like my decisions, but you can't do a damn thing about it. You can go to the voting booth and vote against me for that reason, and you are operating contrary to the spirit of our basic law. You are thwarting judicial independence."



I have been a judge for ten years, and I think it is just a new day for judges. I think everybody needs to realize that we are not going to have the same type of judges that we had the last fifty years and that judges are going to have to be more responsive to the community. It is not an ivory tower anymore where you can do and say anything you want to. Judges have to be more responsible to the community that elected them and they have to realize that they aren't the "end all" of the world.

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Some judges can't find their way to vote to affirm the application of the death penalty. Don't the voters have a right to turn out of office judges who refuse to apply the law of their state?



The public is more sophisticated, has more information, and, frankly, is demanding accountability from all public officials. And we are public officials. And I think we need to be able to respond to that need, because the more we can do it (not in connection with a specific case or a specific attack), the better.



I am a big believer in the pendulum theory, and I really do think at this point in time it is our time to be in the crosshairs of the public scrutiny. In the early part of this decade, the legislature was really in the focus of the public's discontent and there were movements for term limits, and some of that is ameliorated now. Now it is our turn. We are paying the price for some of those past sins, like arrogance and secretiveness. That is why I think we have to really be proactive in educating to get through this period of time without doing severe damage to the judiciary.



There are a couple of million cases every year, between the federal and state courts, and if one or two of these cases go astray, that ain't too shabby.



I don't think the line between the independence and accountability concepts is so blurred that distinctions can't be made. Even today it is a controversial example, but there was the Rose Bird election in California in 1986, in which Chief Justice Bird and two others on the supreme court, two of her colleagues, were defeated in a retention election. I think that was a perfect example of a system *working*. The voters decided that she was imposing her own view on public policy, notwithstanding what had been determined to [be] the law by the democratic process. I think that is a very *poor* example of an abridgement of judicial independence. That is an excellent example of a system that has an external check procedure working.



I think one of the problems with our part of the profession is that when people get on the bench, for some reason or another, they decide to go into the cave and be hermits. They forget about their horizontal life in society. One of the things that strikes me as a contradiction is that, although we should get more *horizontal* in our communities, there is a movement among judge groups to make us more *vertical*, restricting our rights as a citizen in the community and confining our activities. It seems to me that is self-defeating for us. We have to come back to our horizontal life in society and touch bases with all types of people. I go to political gatherings just to stay in touch with people. It is part of our job to keep "level" with them.



5. RELATIONS WITH THE NEWS MEDIA

5.1 RESPONDING TO MEDIA INQUIRIES

Judges were divided on the proper approach to take to media inquiries. Some felt it is both possible and desirable to respond to reporters' questions, while others felt such involvement is not part of their duties and often results in inaccurate reporting.

DISCUSSION EXCERPTS

Roscoe Pound said that the distrust of the system was caused by public ignorance of the workings of the court due to the ignorant and sensational reports in the press. Roscoe Pound said that a hundred years ago. So, it is no different today.



I have had court reporters call me every day on cases that I make decisions on. There is just no comment. That is the end of it.



My feeling is, whenever a reporter calls you, it's like you are in a boxing match. Recently, our court elected a new chief justice, and a reporter called and asked me if I was the swing vote. I said, "What if I was? Is there anything wrong with being the swing vote? And what is your point?" It appears to me that reporters, when they call a judge, they just focus on one point. They don't want to hear anything else,

anything that explains the process or decision. They almost interpret that as a form of apology or excuse.



One thing that hasn't been mentioned that, it seems to me, is very important is the appearance of impartiality. When you become an advocate on one side or another in public—and I think that goes along with explaining matters in the middle of a trial—it appears that you are favoring one side or the other.



The idea, when an attack is made in the midst of a trial, for the judge to take affirmative action outside the process to hold a news conference or talk to a reporter or whatever seems to me fraught with danger. You don't want to have this mini-trial, with the judge out justifying actions (for instance, why you granted a motion to suppress in the middle of a trial), either talking to the press or explaining your rulings. That is trouble coming. In the midst of a trial, if bad things happen, that is when the institutional process should jump in, as opposed to the individual judge.



I don't think it's the job of judges to educate people. I don't think judges should be holding press conferences.

One of the things that has always concerned me about holding a press conference is that unless you have a friendly news reporter, only so much of what you say is going to be carried, and usually it is the controversial part. And that is generally taken completely out of context.



I don't think it's the job of judges to educate people. I don't think judges should be holding press conferences.



We have a press committee that establishes guidelines and does a response, and at the supreme court we do have a public information officer as well. We actually televise the supreme court's proceedings gavel to gavel, and our public information officer maintains a Web page. So if there is a question about proceedings, the Internet site can be used, giving the public access and opinions that way.



There are some judges now that have never seen a camera they didn't like, and they are having reporters in before they make their announcement as to what the sentence is going to be. The old rule that we just kept our head down, kept our mouth shut, and let our integrity maintain the day isn't being observed as much. They are making sure they are on television. They are in the newspaper. They are calling reporters. They are making comments.



I was a trial judge for seventeen years. I can't imagine a trial judge ever speaking after a pendency of a case even if the state judicial code didn't directly prohibit that.



Not all the media is inhibited from defending the rule of law. There are journalists who are supportive, and we have to sit down with them. It is very time-consuming, but those of us who are in leadership positions on the bench have an obligation to do that.



5.2 INSTITUTIONAL PUBLIC RELATIONS AND PRESS OFFICERS

In an effort both to be responsive to public interest and to avoid some of the pitfalls of dealing with the news media, some courts employ experienced public information officers. Such measures are similar to those typically used by the executive and legislative branches. Not all court systems, however, have the resources to support such services.

DISCUSSION EXCERPTS

If a reporter calls to talk with me about a case, my standard response is, “A judgment is not final in the case. I can’t talk to you until it is. When there is a final judgment, if you still want to talk to me, call me back.” That seems to divert them reasonably for the moment. We are free to talk to whomever we choose, but we do have a press officer and it is easier just to refer the matter to the press officer.



In our northern state we have a court information officer with a journalistic background, and we have taken a rather proactive approach with some training, a manual for judges [on] how to respond, etc. Most of the reporters will go through the court information officer before calling one of us, so we have a heads up.



We had a case where an individual was let out on bail by one of our very best judges, and he then committed a very serious crime, and the local news was saying essentially, “These judges have lost their common sense completely.” Our court information officer got information on the case and found out that the judge’s decision had been recommended by both sides. The chief judges of all our courts then sat down and discussed how it would be explained, and they used one of our district court chief judges to explain how the process works. We said, “This is every judge’s nightmare.” It tended to defuse the situation.



In this era of spin doctors, generally, judicial systems do not employ spin doctors, but yet the executive branch employs a spin doctor, the legislative branch employs a spin doctor, and all the pressure groups have spin doctors. I think in the next century, courts are going to have to take a more public view. We have got to put a

In this era of spin doctors, generally, judicial systems do not employ spin doctors, but yet the executive branch employs a spin doctor, the legislative branch employs a spin doctor, and all the pressure groups have spin doctors.

spin on what we do and take advantage of our triumphs, which we have not historically done. Historically, we have stayed away from the press as an institution. But I think we are all going to have to do that.



6. RELATIONS WITH THE LEGISLATIVE BRANCH OF GOVERNMENT

6.1 ADEQUATE FUNDING AND STAFFING FOR THE COURTS

Judges recounted numerous difficulties in securing adequate funding for their court systems. Judicial branch budget requests frequently become political footballs, and court budgets sometimes are held hostage when other branches of government are aggrieved by court decisions. Some courts have resorted to legal proceedings to obtain adequate support, with mixed results.

DISCUSSION EXCERPTS

I think the effort *can* come from the judiciary to talk candidly with the members of the legislature about funding and about authorizing positions and salaries in a straightforward way. But we can't sit back and just assume that this is going to be at the top of the legislative agenda, because we are going to get beaten out by welfare reform every single day of the week.



Our legislature won't bring a judicial pay raise to the floor unless the governor has indicated in advance that he is going to approve it. Otherwise, they consider they are committing political suicide. But in part that is because they always give themselves a raise when they give us one. We are the good guys. They are the bad guys. They say, "We had to do this for the judges." But there are advantages and disadvantages to that linkage. They can give themselves an expense account increase every two years, which is in effect a salary increase for them, and then give us a pay raise every decade whether we need it or not.



Our legislature is not particularly willing to increase the number of judges or staff. I have decreased my budget every year for the last five years or so.



In our state we have a commission that is composed of lawyers and law professors and the like that considers salaries for all state offices, governors, senate, the house and the judiciary. It makes a recommendation to the legislature, and both houses must consider it, and if either house says "yes, there should be a raise," it passes. Both houses have to say "no" in order to defeat the raise. And we are happy to have our salaries tied to those of the other officials, let me tell you. We always got a raise, and the reason we got a raise is because they wanted to give the governor a raise and they wanted to give the legislature a raise. But that is the *only* way you want to be tied to them.



In our southern state, we were blessed until recently with being able to offer our budget to the legislature and they had no option but to fund it. There are attacks on that every year, as you might suspect, so we fight it out every year.



In our state we have had a couple of times when we had to order the local governments to fund the courts. We haven't had any trouble with the state.



In our midwestern state, we asked the legislature for more money for appellate public defender services. When we didn't get it, we had to bring in all the big, fancy, silk stocking law firms and asked them—told them—they were going to do some pro bono work. The legislature got a little uncomfortable about all that, so they came up with some money.

But we did, nonetheless, have about 40 firms doing pro bono appeals, as well as the legislature's putting about a million or two million dollars into the pot.

In our state we we had to order the local governments to fund the courts.



In our western state, historically, judicial salaries have always been the battleground. In the session before last, we were finally able to get a bill through, and we did an interesting thing. We just tied our salaries to the average of the salaries of the contiguous states. So, this automatically increases or decreases according to what the surrounding states' salaries are.



Our budget has started to be a political football. The first time we had a governor who showed some independence, he put our budget in to the legislature as presented. Prior to that, both Democratic and Republican governors would "edit" our budget before it got to the legislature.



This last year in our state, the legislature refused to fund a jury budget for trial courts. The chief justice then issued a letter and sent it to the legislature and the governor, indicating that we would have to close our courts three months early and impanel no more juries, and that that was going to congest the courts. Those things are drastic, you know, but basically the chief justice had to put his foot down and say, "We are going to close up the courts. We are going to walk."



One of the indirect routes the legislature has used periodically in our midwestern state is to underfund the public defender's budget. I think that is probably universal around the country. That has a real indirect impact.



We are all feeling the budget crunch. In our state a legislative committee came out and agreed that there would be a 14 percent cut in the budget of every state agency, and they wanted to apply the budget cut to the courts as if we were a state agency. We have to try to educate them that we are an independent branch of government, not a state agency.



We have not had new judges added to our court for about twenty years, and we found that the legislature simply wasn't going to give us new judges. That was it. So, we have gone the *staff* route and we have added staff. Each of us has two attorneys

and then we have some staff attorneys. But the problem we are seeing with that now is that the bar is convinced that the staff is doing the opinion writing and not the judges. So, the backlash we are getting now is not about independence. It's more like, "You guys don't have your hands on the wheel anymore."



Court funding is an access to justice issue. If the courts are underfunded, you are depriving the citizens of your state of their constitutional right of access to the courts.

Our staff attorneys are incredibly underpaid. At one time we could hire the best and the brightest out of law school, and it was an honor to come to work for appeals judges for a few years and then go on. Now it has got to where we don't even get applications.

People won't even apply to work at our courts anymore. Our salaries are about \$27,000 a year for an attorney. It was a joke, and the legislature wouldn't give us any more money. So we commissioned the state university to do a study, and they examined our staff attorneys, the number of years, and the type of work they are doing, compared with similar attorneys working in the executive and legislative branches. Then we had all these figures and said, "Hey, look, there has got to be some parity here. And this study isn't coming from us. It's coming from the university." So we got a substantial pay raise for all of our staff attorneys—their first raise in ten years. I think that was accomplished because of the way we handled it. Instead of arguing about it with the legislature ourselves, we brought in a third party.



Court funding is an access to justice issue. If the courts are underfunded, you are depriving the citizens of your state access to the appellate courts, which they have a constitutional right to. The answer may be you need to get a good lawyer.



In response to growing caseloads and the failure of their state governments to provide sufficient judicial personnel, some courts have narrowed the right of appeal and reduced or eliminated opportunities for oral argument as a right. Some judges voiced concern that this response in essence limits access to justice.

DISCUSSION EXCERPTS

A number of years ago in our state, the legislature, with the agreement of the court, passed a law to allow *discretionary* review of cases that fall into certain areas. If we think there is a possibility of a reversal, then we will grant the review. If not, that is the end of it. You don't get a full review. That has grown to about 13 categories. Then several years ago we took control of oral argument. Instead of giving a right to oral argument for every appellate case, we just felt that we were wasting so much time hearing poor arguments that we would have the lawyers ask permission to orally argue. If they gave a good reason why oral argument was going to advance our understanding of the case, we would grant permission.

But now I am hearing all of this discussion at the forum, and I am thinking maybe what we are doing is losing our independence by limiting the access to the court of appeals. So, my question is are we playing into the hands of those who want to underfund the judiciary, because we don't have enough judges? Or is narrowing review and limiting oral argument something that we simply have to do so as to provide adequate review to the cases that really warrant it?

We may be losing our independence by limiting access to the court of appeals. Are we playing into the hands of those who want to underfund the judiciary?



We have a pre-argument conference program where retired justices and judges of our court hold conferences on appellate cases, and they get rid of about 45 percent of our cases. And it is successful because these people have been there and done it. They don't write memos, but they will pull out the cases and point out why they suggest a certain resolution.



I absolutely agree about the dangers of discretionary review. I have tried to convince my colleagues that when we deny these applications, we should always give the reason and show the parties that there is no way that they are going to win. If you lay it out, then if we are wrong about it, they can file a motion for reconsideration and tell us we missed the whole point. At least give them an explanation. But we do not have that practice yet. I don't think it is a fight between the legislature and the judiciary, except that we are reacting to the refusal of the legislature to provide a sufficient number of judges to take care of all the direct appeals we would have to consider if we allowed direct appeals.



In our court we traditionally have thirty minutes for oral argument. We have cut it back to twenty minutes, and the bar screamed and howled because our chief judge did it unilaterally. The fuss lasted about two weeks and then it stopped, because twenty minutes really is plenty of time. And for those few cases in which lawyers want more time, they ask for it and they get it. Sometimes there's a howl before the program is implemented, and once it is implemented, the lawyers find out there's nothing much wrong.



All of us who are on appellate courts have seen cases where you first think there is not much to a certain case, and by the time you are finished with it, you are writing a reversal pretty strongly. If we move to discretionary review generally, a lot of those cases are going to disappear. It may be fine for the highest court to do that, because everybody still has at least one appeal as a matter of right. And there is nothing that is below our notice. But if you say that some folks who have got a judgment against them are just stuck with this and have no place to go, I don't think you are going to build public confidence and respect.



6.3 LEGISLATION INTENDED TO CHANGE PRIOR COURT DECISIONS

The judges were divided in their opinions about the right of legislatures to overturn past court decisions through statutes. Some felt that such action can deprive citizens of constitutionally protected rights, while others believed the legislature can and should have a free hand to make policy.

DISCUSSION EXCERPTS

Over a third of our state house of representatives would have allowed the legislature to overrule the state supreme court in its interpretation of constitutional issues. The function of the courts in upholding individual rights would have been susceptible to legislative redirection according to that resolution.

Our response was really twofold. A lot of us who knew legislators went over and said, "What are you doing? Why would you sponsor this kind of resolution? Do you understand what this means, and how silly this really is?" So, we personalized the response.



I am not sure what my reaction is to the argument that the legislature perhaps could not change the common law. I always operated under the assumption that common law evolved because there was no statutory law.



I think the issue is whether there's a constitutional provision that may guarantee the remedy or a question of access to the court systems. It's much like the challenges to the workers' compensation systems when they were adopted. There, there was a quid pro quo. You may have reduced what you could recover, but you were no longer required to prove liability.



In our western state we have damage caps on medical malpractice cases. The medical lobby was stronger than the lawyers lobby. And the state supreme court upheld them. But it is a shameful thing. Two hundred and fifty thousand dollars is not enough for noneconomic damages. Even a prominent defense lawyer went on record saying it is a pernicious thing, and it is.



What do you mean the legislature can't change the tort law? Of course they can.

What do you mean the legislature can't change the tort law? Of course they can.



How about the old doctrine that you can't sue the king? We had no tort liability of the state, so the legislature changed the law and created it. Now, does that mean they can't "uncreate" it?



To me the fascinating question about the argument about a guaranteed remedy for injury is, when the court doesn't recognize a right or doesn't provide an adequate remedy, has *the court* violated the constitution? If the guarantee runs both to the court and to the legislature, how then is it enforced as the common law develops? And why, if it is not enforceable against the courts, does it become enforceable against the legislature?



I was fascinated by the comments on the Illinois decision² that one of the reasons for overturning the statute was that to have followed the legislative dictate would have overruled 110 prior supreme court and court of appeals cases. If the court itself had overruled that many cases, nobody would be making any argument that it was any kind of an infringement on the judiciary.



There are a whole host of fascinating questions that are presented by the remedy clause and there is a dangerous circularity. It can't quite work that simply.



The common law function that courts perform *is* a policymaking function. Yes, there are constitutional inhibitions on how that function can be performed, but ultimately the court is making policy choices about standards of proof and the nature of relief available through the courts and so on. When the legislature does it, it is making policy choices too.



When courts would write decisions about developing strict liability, the decisions would be premised on the different factors that they weighed as a policy matter. For instance, it is appropriate to recognize a remedy without requiring that there be negligence on the part of the manufacturer. When they wrote the opinions, the courts

2 See comments of Justice McMorrow, *supra* pp. 74-75.

went through that very exercise of striking a balance, saying this is now the appropriate policy based on our understanding of how the law has developed to this point. The courts have to make their reasoning explicit. But the legislature is *not* obliged to have a reason under the due process clause for what it does. It is *not* required to state its reasons. It is allowed to enact legislature that embodies whatever policy choices it makes. It is just a matter of the different institutions going about the same policymaking role in different ways.



Several of our state’s laws restricting remedies and things of that nature were enacted to overrule decisions of our highest courts, and the legislature was not afraid to say so.



I was struck by the observation that about eighty-five pieces of tort reform legislation have been overturned in the course of the last two years. That’s a precise example of the kind of problem we face. Here is one of the areas where judges are really getting skewered for making decisions in particular cases with particular issues, and then coupled with these “obscure” constitutional provisions. I mean, if lawyers don’t raise obscure constitutional provisions when they help their clients, they are not doing their job either. But that seemed to be left out.



6.4 LEGISLATION LIMITING JUDICIAL DISCRETION IN SENTENCING

Most judges who commented resented the intrusion of legislatures into the sentencing function, and some were able to point to incongruities in results. Several noted the serious consequences of mandatory sentencing on prison crowding and corrections budgets.

DISCUSSION EXCERPTS

I resigned a judgeship many years ago over mandatory sentencing. I held it to be unconstitutional as a violation of separation of powers. I said that there is no question that the legislature has the right to establish penalties, but that the imposition of sentence was always—historically and otherwise—a judicial function. When the legislature passes mandatory sentencing, they are not only establishing penalties, but are also imposing the sentence. The case was appealed to our supreme court, who said I was wrong and mandated me to send the defendant to prison for the stipulated mandatory sentence. I said, “Let somebody else do it. I quit.”



In our western state the legislature has gotten on its bandwagon about how lenient judges are turning everybody loose. Yet the sentencing guidelines were specifically passed because we were filling up the jails so fast that we were going to have to raise taxes to build new jails or start releasing people. Three-fourths of the convictions now have resulted in mandatory probation and *lower* sentencing than what they received before. But the legislature is not saying that. They are saying, “We have to take the decisions away from the judges because they are just too weak, and we are tough.”



It seems to me it is purely a legislative matter. If they want to give us guidelines that we have to follow, we have to decide whether or not to resign. If they want to make these enhancements of sentences, whether they want to consider the other side of the equation or not is their problem. But it certainly has caused a mess in our court.



In our state the sentencing commission has gotten the word from the legislature that they are to make individual judge reports on each one of us to see how we sentence.



A lot of our discretion is being taken away, and I regard that as taking away our powers. That it is an indirect attack on us. However, I don't see any reason why they can't do it.



I personally would not use the sentencing guidelines in every instance. For two years in our state we had no guidance. The supreme court of our state hadn't spoken, so a lot of us were hanging out for two years. I had a case of the proverbial theft of a tube of toothpaste at a minimarket, which would have qualified the defendant for twenty-five years to life because it could have been the third "strike." So I would strike one or more of those earlier "strikes" when it was appropriate. The D.A. would rant and rave and sometimes I would give it back, but usually not. The supreme court finally decided about a year and a half ago that that intruded on the discretion of the court and that it did violate the separation of powers, and the court *could* strike "strikes."



I believe mandatory sentencing in our midwestern state was an adverse reaction to judicial discretion. In retrospect, when I looked at those cases, I think they would have gone to jail anyway. So the discretion overlapped with what the legislature mandated anyway. But I think most judges feel that mandatory sentencing is probably an intrusion into judicial discretion for sentencing. Sentencing, as I understood it, was designed to accommodate a particular offender in his offense. It isn't a one-size-fits-all proposition.



The other side of the coin that has occurred in our midwestern state is that in our inner-city areas, where young minorities were being targeted for sales of minor amounts of crack cocaine, when they were going through the system the judges all wanted to appear tough on drugs. So, they were sentencing all those individuals to prison time. And the state legislature took a look at what the prison population looked like and said, "Hey, we have a whole class of people that we have now incarcerated for relatively small sales of crack cocaine." And they went in and rewrote the sentencing guidelines to create a *fifth*-degree felony that carries a presumption of probation for sales of crack cocaine under ten grams!



It seems to me it is purely a legislative matter. If they want to give us guidelines that we have to follow, we have to decide whether or not to resign.

It is a sad state of affairs when the largest growth industry today by far in the United States, supposedly the freest country in the world, with the most constitutional rights, is building prisons. There is something wrong.



6.5 EXPANSION OF JURISDICTION, UNFUNDED MANDATES, AND IMPOSITION OF NONJUDICIAL TASKS

Judges were concerned over legislative attempts to impose additional caseloads on them, often without affording them additional resources. They also resented legislative and executive “requirements” to maintain records, respond to administrative surveys, and so on, feeling that such requests confuse the judiciary with executive branch government agencies.

DISCUSSION EXCERPTS

While our chief judge has been fighting tooth and nail to try to get two more judges and not getting anywhere, the legislature keeps adding more jurisdictional matters for the court of appeals, to the point where we are backed up against the wall.



Our state supreme court gave our trial courts some duties relating to keeping statistics on the placement of children, and tracking kids to make sure they didn't get lost. It was supposed to be the judge's responsibility to track these kids. I think that's improper. I was a trial judge at the time and I just said, "I'm not doing it. That is the department of welfare's responsibility."

*Our legislature sees us as
an agency of the state
rather than as a third
branch of government.*



Our legislature fails somewhat to see us as a third branch, but rather as an agency of the state, and we have various administrative duties they impose on us. For example, they want us to fill out a survey, four pages long, on things like the locations where we provide a place where women working at the court can breast-feed. It is an important issue, of course, but we spend more time filling out forms. So an interesting question, at least for me, is at what point are they giving us additional duties that interfere with the institutional functions of the court? Are they impinging on my ability to be a judge and not be an administrator?



In our state, about ten or fifteen years ago when they gave the judiciary a pay raise, the legislature tacked on to it a time-recording system and prescribed the form we needed to use and how we had to keep it. A few judges refused to keep records, but I have always kept mine.



The legislatures want us to decide everything. For instance, right-to-life issues, when to pull the plug, etc. Should that be a medical decision or a judicial decision? They want us to solve all of the domestic violence problems by putting responsibilities on us concerning protection from abuse. These are important things, but 50 percent of what

the legislatures are asking us to do is not strictly a judicial function, and it is also an unfunded mandate. In effect, they say, “Let the judges solve this. We won’t give them any personnel or manpower, but let the judges solve this societal problem.”



6.6 BETTER RELATIONS WITH THE LEGISLATURE

Judges thought more can and should be done to improve relations with their legislatures, and regretted poor current relations in a number of areas. They attributed some of the difficulty to the decrease in the number of lawyers in state legislatures.

DISCUSSION EXCERPTS

The judiciary isn’t a very good player in the political process. We don’t understand the morals of the political arena, where there is a lot of give-and-take, and exchanges like, “If I do this for you, what is in it for me?” That has placed us at a disadvantage when we go in and want to make big changes, or want a big pay raise, that sort of thing, because institutionally we lack the currency to go in and conduct a political fight. So we end up losing, and it is hard sometimes to distinguish whether a problem is a legitimate separation of powers issue or whether it is just plain, old everyday politics.



I hear a lot of rhetoric about judges and legislatures in “we” and “they” terms. There are far fewer lawyers in the legislatures now, and so we don’t have the responsive understanding of the legal system in the legislature that existed fifty years ago. And we have lost some of the personal rapport and contact we used to have with people who serve in the legislature. It seems to me we have got to get beyond the “we”/“they” mentality and start selling our product to the legislature. We need to have outreach programs to let the local druggist or the real estate guy or the teachers who are in the legislature understand what the appellate judges are dealing with and what the trial judges are dealing with, and actually have everybody understand why we need to have discretion and why we need to be able to do the things that we feel constrained about now.



The notion that our lay legislators have is that most state judges think they are better than the legislators, because they don’t see the judge. The legislators don’t see the judges when they are at the courthouse. The only time they hear us is when we are asking for more money for our salaries or more personnel.



The judiciary isn’t a very good player in the political process. We don’t understand the morals of the political arena, where there is a lot of give-and-take, and exchanges like, “If I do this for you, what is in it for me?”

In our western state, at least within recent memory, we have more or less agreed that only the chief justice would speak to the legislature. He speaks as the head of the state judicial system, which includes every judge. He runs the show statewide.



It seems that the legislatures have become decreasingly composed of lawyers, and some of the hostility, I think, that has been generated between the two bodies is a result of nonlawyers in the legislature.



We have a trial court–level program where judges invite legislators into the courthouse. They don't all come. We give them a tour of the jail, which most of them have never seen. We have them sit right next to us on the bench and we will do a sentencing and give them the presentence reports and, you know, ask them what they would do with the case (after the decision was made), and that is one program that I recommend for everybody. Familiarity doesn't always breed contempt. Sometimes it breeds good sound education and advice.

Who is driving the legislative wagon right now? It is not the legislators. It is the special interest groups.



In our midwestern state we have a judge's association and we have lobbyists, and we pay the lobbyists to present our position on any legislative subject.



I think one problem we are seeing is who is driving the legislative wagon right now. It is not the legislators. It is the special-interest groups.



We have a day when we invite the legislature down to our courtroom to find out a little bit about how we administer the law. *Three* of them came down. *Three* of them were interested, and, of course, when they came down, their interest was immediately sharpened to a point—"What about this case? What about that case?" They wanted to talk about specific cases that were of concern to their constituents. They didn't know about our systemic problems, nor did they care.



We have tried to sit down and talk to people, but we have also tried to do some other things that I think are useful. We have tried to build a bridge by talking about legislative intent. We had a problem in discerning what the intent of the legislature was in passing a statute. So we got together with members of the legislature and had one of the deans in the law school act as a moderator of this program. The judges of the court talked about the frustrations and difficulties in discerning legislative intent, what the legislature could do to help us out and give us more materials, give us a better preamble to a bill, and make findings so that we have an idea of what you are trying to do. The legislators, on the other hand, said, "You know, we have concerns about how you interpret what we do and why you do it." But it was an attempt to develop a dialogue on an issue of mutual concern that built bridges rather than tossing bombs at one another.



In our southern state, the state bar has three paid lobbyists, and so far we have been able to convince the state bar to take on the judicial issues and they go to bat for us. We have a judge sitting on the legislature committee of the state bar, so the committee members know exactly what it is we want. Thus far, we have been able to get it.



You can't have enough lobbyists.



6.7 SEPARATION OF POWERS—THE ULTIMATE QUESTION

Judges saw conflicts over the separation of powers doctrine as posing a considerable threat to government, especially when the limits of the doctrine are frequently unclear.

DISCUSSION EXCERPTS

Separation of powers is a two-way street. The courts have to recognize the legislative prerogative just as the legislature has to recognize judicial prerogative. To say that the legislature can't, within the bounds of the Constitution, pass statutes to limit or abolish remedies, I think, is baloney. You go back deep into the roots of the common law. The parliament could change the common law by statute at any point in time it chose to do that. The overlay of the American system has been the written state constitutions that limit to some extent the legislative capability to alter certain rights. But I think that the separation of powers notion is a two-way street and it "constitutionalizes" everything, whether it is tort law or whether it is certain aspects of substantive criminal law. I just don't think the argument has any historical basis.

Separation of powers is a two-way street.



We had a problem with legislatively mandated audits of our state supreme court. The legislature appointed an auditor general who indicated he had the authority to go in there and audit the supreme court and its spending practices. The legislature's action was struck down by the court as a violation of separation of powers, but I think that is one other way of controlling what the courts are doing.



In our western state, we have a rather unusual situation. The supreme court has had to rule four times in the past four years that our governor has violated the separation of powers doctrine. Coincidentally, the legislature has passed very generous pay increases for judges for the last two years, and both of those pay increases have been vetoed by the governor.



I came to the forum thinking a lot of things were separation of powers problems, but I am leaving the forum understanding that there also are a lot of things that are not.



Points of Agreement and Closing Comments

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it could be achieved—on the issues raised by the standardized questions, and to characterize their groups’ discussions in a few sentences, to be announced at the closing plenary session. The questions, the moderators’ informal summaries of their groups’ discussions, two questions from the floor, and closing comments by Professors O’Neil and Chemerinsky follow. All of this material has been edited for clarity.

MODERATORS’ REPORTS

HAVE YOU OBSERVED NEGATIVE CAMPAIGNS AT WORK DURING JUDICIAL ELECTIONS? DURING EXECUTIVE BRANCH ELECTIONS CITING “BAD” JUDICIAL DECISIONS? HAVE YOU OBSERVED IMPEACHMENT OR RECALL CAMPAIGNS AGAINST JUDGES THAT YOU FEEL WERE UNJUSTIFIED?

Most of our group had had experiences with negative campaigns.

Few judges in our group had not observed negative campaigns during judicial elections, often instigated by special-interest groups.

Criticism is most wide open when elections involve endorsements by political parties.

Judges feel that campaigns by single-issue groups and other unwarranted personal attacks are very difficult, if not impossible, for them to defend against.

The election process is polluted by a great deal of negative advertising in the judicial races.

Vigorous enforcement of campaign rules is essential.

Races in the executive branch still feature criticism of the courts and sometimes of particular judges.

An integral part of a response to an attack during an election campaign is the judge’s personal right to speak out in the judge’s own behalf, but it has to be tempered by the responsibility not to take a position on an issue likely to come before the judge in court later on.

Campaigns by single-issue groups and other unwarranted personal attacks are very difficult, if not impossible, for them to defend against.

HAVE YOU OBSERVED NEGATIVE PUBLICITY CAMPAIGNS DIRECTED AGAINST JUDGES THROUGH THE NEWS MEDIA STEMMING FROM A SINGLE DECISION OR A TRACK RECORD OF DECISIONS?

Many in our group had had experiences in their states where there had been negative publicity by the news media.

Judges who have life tenure tend to get less criticism, and judges who are subject to election get more.

Especially in those states that have capital punishment, one case can threaten the position of any judge.

TO WHAT EXTENT ARE JUDGES IN YOUR JURISDICTION FREE TO RESPOND TO CRITICISM? TO EXPRESS POLITICAL VIEWS?

In our group, the judges were really struggling with the issue of whether and how judges should respond to criticism and speak out.

The judge's most effective strategy is to educate the public regarding the role of the judiciary *prior* to the event rather than after.

Most of our group had not spoken out publicly on personal attacks, and felt it was not wise to do so. There was consensus that others should defend against attacks, on the judiciary, such as a court spokesman or the bar association.

Judges need to have thick skins, but they also need neutral assistance in the form of a judicial information officer or public information officer who can carry out several functions: public education, public information on procedural issues in particular cases, and assistance to judges who need advice on whether they should respond to personal attacks, and, if so, how.

A minority of judges in our group felt that, often, when responses were needed, it would be very helpful to have friends in the media, people with whom one could communicate on issues who could then respond and present the facts to the public and help educate them.

As to institutional spokespersons, the executive branch has "spin doctors," and so does the legislative branch. Why should the judicial branch not have similar resources?

More active participation by the state bars in defending judges and the courts as a whole from unwarranted attacks would bring a lot of comfort.

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Judges themselves cannot respond to attacks effectively after the fact, because by the time a case is over and motions for a new trial have passed, the judge has no more control over the case, and the damage is done. So there is a need for someone, or some other group, to be available to speak out on behalf of a judge who is wrongfully attacked, but who should it be? A bar association may be suspect because it is made up of lawyers, but the judges would like to see some type of a response program.

Judges felt they could benefit from bar association intervention against unjust criticism, as long as the intervention was offered in a nonpartisan manner. In other words, a legal organization shouldn't support a judge only if the judge has come down on one side of an issue or another.

In all cases, those who felt there could be a response felt that it should be a *measured* response, and that some criteria had to be examined to determine how to respond in a given situation. Some of the criteria suggested were (1) whether it was an individual criticism (for example, just a letter to the editor of a newspaper), in which case perhaps no response should be made; (2) whether it was an organizational criticism or a campaign by an important media commentator, in which case, even then, one would have to decide whether responding would increase attention to the criticism because one communication would lead to another; and (3) whether the situation for trial court judges is different from that for an appellate court judge. Judges felt that an organizational or institutional response might be better for appellate judges, if one was needed.

Avoiding the appearance of impropriety is a constant consideration. Appearances vary depending on whether the judge is in the midst of a trial, in the midst of an appellate procedure, or in an election campaign, or is simply engaging in public education.

Avoiding the appearance of impropriety is a constant consideration.

We had a governor in our state who was quite a popular governor, but one day a lady approached him when he was addressing a group of citizens and said, "You are a lousy governor and an SOB." And he looked her right in the eye and he said, "Then pray for me, will you?" That may be the only answer we have.

ARE THERE ANY LIMITS IN YOUR STATE ON FREEDOM TO ATTACK JUDGES?

The public should be permitted to speak out as long as they don't violate libel and slander laws.

Lawyers should be permitted to speak within the bounds of their codes of ethics.

SHOULD JUDGES COMMENT MORE ON LEGAL MATTERS IN PUBLIC (E.G., ON TELEVISION AND THE RADIO)?

Some judges make it a practice to speak to the public every chance they get—going into schools or other organizations *outside* of bar associations—so they can help the public to understand the judicial process and what the court system is all about.

In some states the judiciary attempts to bring the courts to the public. In some states, appellate arguments are brought to schools or to other public places around the state, and the public is invited to attend. They also give speeches in various public places so that the public can be better educated about the judicial system and, particularly, can hear from judges themselves.

There is a need to speak out about the system, both as to how it works and what the courts provide.

HAVE YOU ENCOUNTERED ANY OF THE OTHER TYPES OF LEGISLATIVE ACTION DISCUSSED BY PROFESSOR CHEMERINSKY? DO YOU BELIEVE ANY OF THEM WOULD BE UNCONSTITUTIONAL IN YOUR STATE?

(The types of legislation were: threatened or real deprivation of adequate funding for the courts; legislation that dictates the result in particular cases; legislation that dictates court procedures in particular cases and classes of cases; legislation restricting court jurisdiction, to prevent courts from entertaining entire disfavored classes of litigation; legislation limiting available remedies; legislation limiting judicial (including juror) discretion in finding facts and devising remedies; legislation assigning the courts nonjudicial tasks; and legislation changing substantive law in response to particular decisions.)

Every judge in our group had experiences with the legislative acts Professor Chemerinsky listed, including budget restrictions.

Many of our group knew of retaliatory actions by legislatures, ranging from the important to the petty, but they felt that the greatest legislative threat to judicial independence is lack of adequate funding. The best solution to that is to educate legislators, particularly in this era when there are fewer lawyers in the state legislatures.

In several states there is substantial concern that the legislature controls the purse strings of the judiciary too tightly, making it almost impossible for them to meet family needs and other personal needs—much less have an effective, modern judicial system in their states.

The best solution to the lack of adequate funding is to educate legislators.

Some dastardly things have been done to the courts by their state legislatures—not only *threatening* to cut off funding, but *actually* cutting off funding in response to various decisions.

There should be a better dialogue with the legislature. One problem is that there are fewer lawyers in the legislatures currently than there used to be, and perhaps there is a problem of accessibility. But we must improve the dialogue with the legislature if we are to avoid the kind of funding problems that the judges are seeing.

Perhaps we need to pray for more lawyers in the legislature.

GENERAL COMMENTS

Credibility with the public is a key issue for all the judges.

There was a feeling in our group that, to some extent, the judiciary is paying the price of “past sins.” The judiciary has been too secretive, too isolated from the public at large.

In our group there was some consensus that judges are caught up in an era in which the executive and legislative branches have both lost public respect, and the silence of the judiciary has caused it to suffer the same loss of respect, if only by association with the rest of government. How can judges get beyond that? What can judges do to change the criticism and change the negative impact that the rest of government creates?

Accountability to the views of the overwhelming majority of the people might not be all bad.

Several members of our group told us they think judges should *not* have lifetime tenure, and that the election process is, in fact, beneficial.

We live in a different, more difficult, day. There are no longer any safe harbors or ivory towers, not even for judges.

Judicial independence must be accompanied by judicial accountability.

Judicial independence must be accompanied by judicial accountability.

QUESTIONS FROM THE FLOOR

PARTICIPANT: I tend to agree with the idea of outreach by the courts, but one of the things I have learned is that you can be judged by the conduct of our colleagues. I worry sometimes about some of the activities of those who really don't know some of the proprietary boundaries. How would you address that? How would you deal with that?

MR. STEWART: I will note that we trial lawyers also are judged against the activities of the least of our members. We suffer a similar fate in that regard.

PROFESSOR O'NEIL: That is also surely the case in the academic profession. One of my extracurricular activities for the past seven years has been chairing the Committee on Academic Freedom and Tenure of the American Association of University Professors. And that is a process through which I get to see both the worst of academic institutions and sometimes the worst transgressions on the part of my colleagues across the country—transgressions on the basis of which there is a high risk that the public will generalize from the conduct of individuals and institutions, and judge the entire academic profession by them.

One of the worrisome features in the current climate is that the occasional aberration or miscue or simple misunderstanding by a judge does get magnified in ways that reflect both the vastly wider dissemination of the information and a lower level of tolerance on the part of critics for simply learning the process. One suspects that these examples, not always but often, involve those who are relatively new to the bench and are simply in the learning process. It seems to me that is classically a situation in which someone within the judiciary ought to be able to admonish the transgressor, but also to explain the rules and the boundaries within which judges must operate. I think the comments Paul McMasters made on the capacity of someone to be the point person or spokesperson under those conditions are particularly germane in this situation.

PARTICIPANT: My question is whether an institutional voice might be more appropriate in certain circumstances than hearing from particular judges, given all the hot water and problems judges encounter when they personally take on the task of responding to criticism.

JUSTICE FLANDERS: My own reaction is that there are some circumstances—and Professor O’Neil, I think, has alluded to this in his paper—where it is simply essential to hear directly from the judge who is challenged on a personal basis. In those circumstances it may enhance the response to hear from the judge directly. But it may be helpful, and in most cases I think it is *desirable*, to also have some sort of an institutional representative—a retired judge, perhaps, or a bar association president or spokesman—to provide a broader perspective. But there are certain occasions where the attack is so hostile and so personal that I don’t think that approach is adequate. I think judges, at least, have to have the freedom personally to step up to the plate when their character is challenged.

To go back to the earlier question, I think that, unfortunately, the only thing the public sees is the weakest links in the chain. And the best and the brightest hide their light under a bushel and never step forward. The impression the public gets is formed solely by the people they actually see. Unfortunately, I think that totally distorts their idea of the quality and the character of the bench as a whole.

It is essential that judges have the freedom to speak out when they need to.

So I do think it is important that we have spokespeople and ombudsmen and others to explain the role of the judiciary and give some context, but I also think it is essential that judges themselves have the freedom to speak out when they need to. And I think it is *doubly* important that the best and the brightest and the most representative of judges, the real leaders of our profession, step forward and take public positions when they can do so, consistent with their other obligations.

CLOSING REMARKS BY PROFESSOR O’NEIL

Several issues that were at least latent in our discussion this morning became more substantial during the course of the day. First, there seemed to be a lot of agreement on the importance of finding new and creative educational approaches—a sense that the function, the basic role, and the concept of the judiciary is poorly understood, not only by the average citizen, but also by people like journalists, legislators, policy makers, and even many practicing lawyers who ought to know better but for a variety of reasons don’t. So, if I were to focus on solutions, some of which Paul McMasters, I think, developed for us in his comments this morning, education is certainly a key.

Second, I felt there was agreement on the balancing process, that delicate balance between the need for judicial restraint—not only propriety but the *appearance* of propriety—on the one hand, and on the other hand, the need to inform, to explain, and occasionally to justify and defend. This morning I may have insufficiently emphasized the critical importance of a judge’s responsibility, and the responsibility of the whole judicial system, for *fairness in fact*, for *genuine* due process—in the sense in which a comment that might otherwise sound innocuous or relatively harmless could not only create the appearance but also the reality of genuine prejudice to the fairness of a pending case. I simply wanted to underscore with appreciation my own sense of the importance of that issue.

The third transcendent theme that I noted in the groups that I observed was the importance of structure, that we seem to come at these issues as a legal system with remarkably little structure in place to handle the sometimes critical challenges. We have very elaborate structures by which to select judges. We don't always like what they are or how they work, but at least the structure is there. We have fairly elaborate structures in most (probably all) states for reviewing judges' performance and handling complaints of judicial misconduct. Some would say those structures sometimes may be too elaborate or at least too susceptible of being punitive in their process. What we *don't* have, which it seems to me we made a commendable start at formulating today, is a structure or a set of structures that will also enable us better to respond to some of the kinds of challenges on which this conference focuses.

Finally, as a long-time student and teacher of First Amendment law, I am always looking for new and interesting issues to pose to my students. They tend to think that most of my hypotheticals (and I suspect Professor Chemerinsky has had much the same experience in creating exotic hypotheticals for his students as I have) are the tormented or demented figments of an overworked law teacher's imagination. So, it is useful every so often to identify a couple of real issues, and two of those came to me during the day and I think they are marvelous First Amendment questions, to which I have no easy answers.

One is the extent to which candidates seeking election to the bench ought somehow to be subjected to the same restraints as is the incumbent during the course of the campaign, thus creating a kind of parity between incumbent and challenger. Having identified the issue, I recognize that crafting the solution would be difficult, but it does pose some very intriguing, complex First Amendment issues. The other First Amendment question is one that I gather is actually under scrutiny in several states, and that is the extent to which a ban or prohibition on partisan endorsement of judicial candidates is or is not consistent with First Amendment values.

There is a great deal more, but I do take away from today's experience those absolutely fascinating hypotheticals for the next school year, and this will be the thirty-seventh year that I have been teaching constitutional law of speech and press. Once again, I thank you for the honor and the opportunity of sharing this day with you, and I hope to appear before you in the future only as a friend of the court.

CLOSING REMARKS BY PROFESSOR CHEMERINSKY

If you look at the literature on judicial independence, I think you will find it very unsatisfying. It is filled with platitudes. It is generally very abstract. It gives little guidance as to what judicial independence is or what threats to it should be regarded as unacceptable.

If we are going to talk about judicial independence in a meaningful way, it has to be much more concrete. It has to be focused on *particular* problems and *specific* solutions. What we did today, both in the plenary sessions and the discussion groups, was to focus on some of those specific threats to judicial independence and to talk about solutions. As I went from group to group, and as I listened to the plenary discussions, I identified three main types of threats to judicial independence you talked about, and I have some thoughts about solutions with regard to each.

POLITICAL THREATS TO JUDICIAL INDEPENDENCE

One threat could be called the political threat. The reality, as many speakers mentioned today, is that judges are being targeted increasingly for specific rulings. You heard the story about what happened in places like California, Nebraska, and Tennessee. Additionally, I and other speakers talked about how the mounting costs of

judicial elections are creating a real threat to judicial independence. I heard one judge in a discussion group say that in Texas now in contested races, it is costing as much as \$2 million to run to be a judge. Where is that money coming from?

The reality is that judges are being targeted increasingly for specific rulings.

What are the solutions? There are no easy ones. There is a real need for judges to argue forcefully for merit selection of judges. This isn't a new concept. Merit selection has been an important theme of groups like the American Judicature Society throughout this century. There is still hope for moving to merit selection of judges. We heard this morning how Rhode Island has moved recently to a merit selection system, but there is a need even in the context of some *electoral* review to bring merit into the system.

With regard to the money problem, this is something that has largely been ignored. You can't find many law review articles that discuss how raising money is a threat to judicial independence. I think there is a need to assess whether there might be room for campaign finance reform specifically geared to judicial elections. For instance, even under *Buckley v. Valeo*,¹ the leading supreme court case, might it be argued that judicial elections are different from other elections, and so expenditure limits there should be constitutional, because judges are different from all other officeholders?

CRITICISM FROM THE PUBLIC

A second threat to judicial independence that we've discussed today is untoward criticism from the public. As others have said throughout the day, the reality is that all of the institutions of American government are suffering from a loss of legitimacy. So it is not surprising that the courts are suffering as well. All the courts have behind their rulings is their legitimacy.

Much of the very operation of courts, including the robes you wear, is done to preserve legitimacy. So steps need to be taken to increase, and to enhance, the legitimacy of the courts. A lot of what you have talked about today is the way to respond to harsh and unfair criticism of specific rulings. I would just say to you that, if that is all you take home today, that is not enough. By the time the unfair criticism surfaces, it is too late. You need to think about ways of *building legitimacy for your courts and the judiciary's institutions* before you are ever criticized.

If you are trial judges, legitimacy can come from the way you explain matters to the jury and talk to the jury when the case is over. If you are judges at any level, it can come from going to the high schools or community groups and explaining the legal system to them. Also, it can come from your ability as judges (assuming state law allows it where you are) to go out and hold your court proceedings in high schools or colleges or law schools so that what you do can be seen and explained in public.

1 424 U.S. 1 (1976).

I don't minimize the need to respond to harsh and unfair criticism, but there I would draw a distinction for you between *descriptive* responses, that is, explaining the law, and *normative* responses that explain the desirability or appropriateness of a ruling. With regard to description of the law, I think that is an appropriate role for court information offices. If, for example, there are questions about exactly what the ruling was or what the law is, without talking about its desirability, you can have public information officers do that for you. However, when it comes to defending the normative desirability of a ruling, then I don't think that is an appropriate function for the court; the court should defend its ruling through its written opinions. But *others* can defend your rulings. There is no reason why you can't speak to law professors and lawyers and have them defend your ruling. There is no reason you can't speak to reporters off the record and defend the desirability of your ruling. But it seems to me your on-the-record defense of your cases should be found only in your written opinions.

STATUTORY THREATS TO JUDICIAL INDEPENDENCE

The third and final set of threats to judicial independence is the statutory threats to judicial independence, the ones that my remarks this afternoon focused on. Without repeating anything that I said in my remarks, I just want to draw one conclusion from them.

When it comes to judicial independence, the jurisprudence on separation of powers and due process is scarce. There are scattered opinions, but little in the way of sustained development of analysis. There really needs to be, in your opinions and our law review articles, development of the idea of when legislative actions interfere with the essential function of the courts. What does due process require in terms of access to the courts? The more your opinions can develop this, and the more our law review articles discuss this, the better courts can be protected from these statutory threats.

Our society is deeply and bitterly divided right now. They are divided between the haves and the have nots. We are in a time of prosperity, yet I saw an article in yesterday's newspaper that said that a third of all children in California live below the poverty line. We are deeply divided along racial lines, and pretending it is not so isn't going to make it otherwise. We are deeply divided ideologically. We only need to look at Congress and what goes on in Washington, DC, to see it.

The only forum that exists right now that is a neutral forum, available to everybody on all sides, rich and poor, black and white, conservative and liberal, is the courts. And you are the guardians of that institution. When you go on the bench each day, you are not just deciding the particular cases before you, you are protecting the very institution that is essential to our freedom.

The only neutral forum that exists right now that is available to everybody on all sides, rich and poor, black and white, conservative and liberal, is the courts. . . . You are protecting the very institution that is essential to our freedom.

Appendix A: Participants' Biographies

PAPER PRESENTERS

Professor Robert M. O'Neil is the founding director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia. He teaches courses in "the constitutional law of free speech," "church and state," and "free speech in cyberspace" at the University of Virginia. He is the author of several books, including *Free Speech: Responsible Communication Under Law* (1972), *Classrooms in the Crossfire* (1981), *The Rights of Public Employees* (2d ed. 1993), and *Free Speech in the College Community* (1997), as well as numerous articles in law reviews and other journals. Following service as law clerk to U.S. Supreme Court Justice William J. Brennan, Jr., Professor O'Neil began his law teaching career at Berkeley. He continued law teaching, but also entered the field of academic administration, at the University of Cincinnati and Indiana University, eventually serving as president of both the statewide University of Wisconsin system and the University of Virginia. In addition to directing the Jefferson Center and teaching, he serves in volunteer positions as president of the Virginia Coalition for Open Government, as a trustee of Virginia Public Television, the Piedmont Council for the Arts, the Council for America's First Freedom, and the Commonwealth Fund, and as a member of the American Bar Association's Conference Group of Lawyers and Media Representatives.

Professor Erwin Chemerinsky teaches constitutional law, civil procedure, federal courts, and professional responsibility at the University of Southern California Law School in Los Angeles. He is the author of *Constitutional Law: Principles and Policies* (Aspen Law & Business, 1997); *Federal Jurisdiction* (Little, Brown & Co., 2d ed. 1994); and *Interpreting the Constitution* (Praeger, 1987). He is also the author or co-author of over 70 legal articles and book chapters, and of numerous other articles and book reviews. He has been engaged in substantial *pro bono* litigation and other legal work for the American Civil Liberties Union, the National Association for the Advancement of Colored People, People for the American Way, and other voluntary organizations. He is beginning his second year of a two-year term as a member and chair of the Elected Los Angeles Charter Reform Commission.

LUNCHEON SPEAKER

Mickey Edwards, a former Member of Congress from Oklahoma, now serves as a Lecturer in Public Policy at the John F. Kennedy School of Government at Harvard University. He is the author of two books, writes a weekly newspaper column, and is a weekly commentator on National Public Radio. During his 16 years of service in Congress, he chaired the House Republican Policy Committee, the fourth-ranking Republican leadership position in the House of Representatives. After leaving Congress, Representative Edwards was a guest scholar at the Woodrow Wilson Center for Scholars in Washington, DC. He is a former national chairman of the American Conservative Union, chairman of the annual Conservative Political Action Conference, and was one of the three founding trustees of the Heritage Foundation. Most

important for the forum's topic, Representative Edwards is co-chair of a new organization that made its debut in June 1998, Citizens for Independent Courts.

PANELISTS

Honorable Robert G. Flanders is a member of the Rhode Island Supreme Court where he chairs the User-Friendly Courts Committee. He also chairs Rhode Island's Continuing Legal Education Committee. Before his appointment, Justice Flanders was a litigator who won recognition from his peers as one of the "Best Lawyers in America" for business litigation. Before his legal career, Justice Flanders demonstrated great athletic prowess, winning all-Eastern League baseball honors at Brown, while also starring as a halfback on the football team. He was drafted as a pitcher-outfielder by the Detroit Tigers after college. Instead, he attended Harvard Law School, while playing minor league ball for the Tigers.

Mark S. Mandell will be the president of the Association of Trial Lawyers of America at the conclusion of this convention. He is the senior partner in the Providence, Rhode Island, law firm of Mandell, Schwartz & Boisclair. A National Board of Trial Advocacy-certified Civil Trial Specialist, Mr. Mandell is a former president of both the Rhode Island Trial Lawyers Association and the Rhode Island Bar Association.

Paul McMasters is the First Amendment Ombudsman at The Freedom Forum in Arlington, Virginia. In this capacity, he attempts to represent the public's interest when First Amendment issues arise in the policy making and legal arenas. Mr. McMasters previously served as executive director of the Freedom Forum's First Amendment Center at Vanderbilt University. He is a journalist of long-standing, a former national president of the Society of Professional Journalists, former associate director of the editorial pages of *USA Today* and former managing editor of the *Coffeyville Journal* in Kansas.

Thomas L. Jipping is Vice President for Legal Policy and Director of the Center for Law & Democracy at the Free Congress Foundation, where he also directs the Center's Judicial Selection Monitoring Project. He co-hosts a weekly program called "Legal Notebook" on America's Voice, a satellite and cable television network. A leading conservative voice on legal and judicial issues, Mr. Jipping is a consultant to the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention, and sits on the Advisory Council of the Northstar Legal Center and on the Board of Directors of the National Legal Foundation.

Honorable Mary Ann G. McMorrow was the first woman elected to serve on the Illinois Supreme Court. Before that service, she presided as a judge on the Circuit Court of Cook County and on the Appellate Court of Illinois. Her career has seen a number of firsts for women in the legal profession in Illinois, including being the first woman to prosecute a major felony in Cook County and the first woman elected chair of the Executive Committee of the Appellate Court. She is a past president of the Women's Bar Association of Illinois and a Master Bencher of the American Inns of Court. She is the recipient of many awards, including being selected in 1996 as one of "Chicago's 100 Most Influential Women" by *Crain's Chicago Business* and receiving the Catholic Lawyers Guild's "Lawyer of the Year" award in 1993.

Stephen J. Wermiel is wrapping up an appointment as a Research Fellow at the Woodrow Wilson International Center for Scholars and will be a visiting professor this fall at Washington College of Law at American University. For the past six years, he served as an Associate Professor of Law at Georgia State University Law School and before that at William & Mary's law school. From 1979 to 1991, Professor Wermiel was the Supreme Court correspondent for the *Wall Street Journal*. He is currently finishing a more than decade-long project, an authorized biography of U.S. Supreme Court Justice William J. Brennan, Jr.

Mark A. Behrens, Of Counsel to the Washington, D.C. law firm of Crowell & Moring, has extensive experience in product liability law, defense litigation, and liability reform. He is co-counsel to the Product Liability Coordinating Committee, the principal coalition of business interests seeking federal product liability reform legislation, and the American Tort Reform Association. He has written about tort law issues in a variety of law reviews and other legal publications and has taught advanced product liability courses at American University's law school.

Eugene I. Pavalon is a partner in the Chicago law firm of Pavalon & Gifford. His many other activities include service as a member of the Visiting Committee of Northwestern University School of Law, the Board of Overseers of the RAND Institute for Civil Justice, the Illinois Supreme Court's Rules Committee on Civil Discovery Procedures, and the Editorial Board of Shepard's Illinois Tort Reporter. He is a past president of the Association of Trial Lawyers of America, a past president of the Illinois Trial Lawyers Association, a founder and past president of Trial Lawyers for Public Justice, and a lifetime fellow and past president of The Roscoe Pound Foundation. A former Captain in the United States Air Force and member of the Judge Advocate General Corps, he has authored multiple articles and lectured frequently on tort law. He is the author of two books, *Your Medical Rights and Human Rights and Health Care Law*.

DISCUSSION GROUP MODERATORS

Allen Bailey practices law in Charlotte, North Carolina. He is a fellow and trustee of The Roscoe Pound Foundation, as well as its secretary. Mr. Bailey is a sustaining member of the Association of Trial Lawyers of America and a member of its Board of Governors. He is a past president of the North Carolina Academy of Trial Lawyers.

Kathryn Clarke is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation, and has briefed scientific evidence issues in both state and federal courts.

Sidney Gilreath practices law in Knoxville, Tennessee. He is a fellow of The Roscoe Pound Foundation. He is a member of the American College of Trial Lawyers, the International Society of Barristers, the International Academy of Trial Lawyers, and the American Board of Trial Advocates. Mr. Gilreath is a life member of the Association of Trial Lawyers of America and is a member of its Board of Governors.

Rosalind Fuchsberg Kaufman practices law in New York, New York. She is a supporting fellow and trustee of The Roscoe Pound Foundation. Ms. Kaufman is Editor-in-Chief of the *Bill of Particulars*, a quarterly publication of the New York State Trial Lawyers Association, and is a sustaining member of the Association of Trial Lawyers of America.

Mary A. Parker practices law in Nashville, Tennessee. She is a fellow of The Roscoe Pound Foundation. Ms. Parker is a past president of and serves on the board of Trial Lawyers for Public Justice, and she is a sustaining member of the Association of Trial Lawyers of America.

A. Russell Smith practices law in Akron, Ohio. He is a fellow and trustee of The Roscoe Pound Foundation, as well as its treasurer. He is certified as a Civil Trial Advocate for the National Board of Trial Advocacy, and is a sustaining member of the Association of Trial Lawyers of America and a member of its Board of Governors. He is a past president of the Ohio Academy of Trial Lawyers.

Kenneth M. Suggs practices law in Columbia, South Carolina. He is a supporting fellow of The Roscoe Pound Foundation. He is a past president of the South Carolina Trial Lawyers Association. He is a member of the American Board of Trial Advocates, the American Inns of Court, and the American College of Trial Lawyers. Mr. Suggs is also a sustaining member of the Association of Trial Lawyers of America.

MODERATORS OF PLENARY SESSIONS AND LUNCHEON

Michael Maher is from Orlando, FL, where he practices law at the firm Maher, Gibson & Guiley. He is currently vice president of The Roscoe Pound Foundation, having previously served as its treasurer. He is a past president of the Association of Trial Lawyers of America, and a past president of the Academy of Florida Trial Lawyers. He is a fellow of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

Program Chair **Larry S. Stewart** is from Miami, Florida, where he practices law at the firm Stewart, Tilghman, Fox & Bianchi. A fellow and trustee of The Roscoe Pound Foundation, Mr. Stewart is a past president and sustaining member of the Association of Trial Lawyers of America and a member of the American Law Institute.

Appendix B: Judicial Attendees

ALABAMA

Honorable Reneau P. Almon, Justice, Supreme Court
Honorable Mark Kennedy, Associate Justice, Supreme Court
Honorable Ralph D. Cook, Justice, Supreme Court
Honorable Eddie Hardaway, Jr., Presiding Judge, Seventeenth Judicial District
Honorable Tennant M. Smallwood, Circuit Judge, Jefferson County

ARIZONA

Honorable Robert D. Myers, Presiding Judge, Maricopa County

CALIFORNIA

Honorable Gary E. Strankman, Administrative Presiding Justice, Court of Appeals
First Appellate District, Division One
Honorable Robert K. Puglia, Presiding Justice, Court of Appeals, Third Appellate District
Honorable James M. Sutton, Jr., Judge, Superior Court
Honorable Thomas I. McKnew, Jr., Judge, Superior Court

COLORADO

Honorable Gregory Kellam Scott, Justice, Supreme Court
Honorable Howard M. Kirshbaum, Retired Justice, Supreme Court

CONNECTICUT

Honorable E. Eugene Spear, Judge, Appellate Court

DELAWARE

Honorable Randy J. Holland, Justice, Supreme Court

DISTRICT OF COLUMBIA

Honorable Vanessa Ruiz, Associate Judge, Court of Appeals
Honorable Ron Garvin, American Judges Association

FLORIDA

Honorable William A. Van Nortwick, Jr., Judge, Court of Appeal, First District
Honorable Mario P. Goderich, Judge, Court of Appeal, Third District
Honorable Bobby W. Gunther, Judge, Court of Appeal, Fourth District
Honorable Murray Goldman, Judge, Circuit Court, Eleventh Judicial Circuit

GEORGIA

Honorable Dorothy T. Beasley, Judge, Court of Appeals

HAWAII

Honorable Ronald T.Y. Moon, Chief Justice, Supreme Court
Honorable Robert G. Klein, Associate Justice, Supreme Court
Honorable Walter G. Kirititsu, Associate Judge, Intermediate Court of Appeals

ILLINOIS

Honorable Mary Ann G. McMorrow, Justice, Supreme Court
Honorable Charles E. Freeman, Chief Justice, Supreme Court
Honorable Calvin C. Campbell, Presiding Justice, Appellate Court
First District, Division One
Honorable Robert Chapman Buckley, Justice, Appellate Court, First District, Division One
Honorable Thomas E. Hoffman, Justice, Appellate Court, First District, Division Four
Honorable Jill K. McNulty, Presiding Justice, Appellate Court, First District, Division Five
Honorable Allen Hartman, Justice, Appellate Court, First District, Division Five
Honorable Alan J. Greiman, Presiding Justice, Appellate Court, First District, Division Six
Honorable Morton Zwick, Justice, Appellate Court, First District, Division Six

INDIANA

Honorable Brent E. Dickson, Justice, Supreme Court
Honorable James S. Kirsch, Judge, Court of Appeals, Second District
Honorable Robert H. Staton, Judge, Court of Appeals, Third District

IOWA

Honorable Rosemary Shaw Sackett, Acting Chief Judge, Court of Appeals
Honorable Terry L. Huitink, Judge, Court of Appeals
Honorable Gary Wenell, Judge, District Court

KANSAS

Honorable Richard Ballinger, District Judge, Eighteenth Judicial District
Honorable Gerald T. Elliott, Judge, Johnson County District Court

KENTUCKY

Honorable John William Graves, Justice, Supreme Court
Honorable Martin E. Johnstone, Justice, Supreme Court
Honorable Sara W. Combs, Judge, Court of Appeals
Honorable William L. Knopf, Judge, Court of Appeals
Honorable Thomas J. Knopf, Judge, Jefferson Circuit Court
Honorable Gene Lanham, District Judge, Daviess District Court

LOUISIANA

Honorable Harry T. Lemmon, Justice, Supreme Court

MAINE

Honorable Paul L. Rudman, Associate Justice, Supreme Judicial Court

MICHIGAN

Honorable Marilyn Kelly, Justice, Supreme Court
Honorable Martin Myles Doctoroff, Judge, Court of Appeals
Honorable William B. Murphy, Judge, Court of Appeals

MINNESOTA

Honorable Esther M. Tomljanovich, Associate Justice, Supreme Court
Honorable Paul H. Anderson, Associate Justice, Supreme Court

MISSISSIPPI

Honorable Lenore L. Prather, Chief Justice, Supreme Court
Honorable Chuck R. McRae, Justice, Supreme Court
Honorable Bill Waller, Justice, Supreme Court
Honorable Leslie King, Judge, Court of Appeals
Honorable John Whitfield, Circuit Judge, Harrison County Circuit Court, Second District
Honorable Patricia D. Wise, Chancellor, Fifth Chancery Court District
Honorable Forrest Al Johnson, Circuit Judge, Sixth District
Honorable Shirley C. Byers, Circuit Judge, Washington County Circuit Court
Honorable Jannie M. Lewis, Circuit Judge, Holmes County Circuit Court
Honorable Larry Buffington, Chancery Judge, Thirteenth Chancery District
Honorable Billy Joe Landrum, Circuit Judge, Eighteenth District
Honorable John S. Grant, III, Chancery Court Judge
Honorable Clarence E. Morgan, III, Altala County Circuit Judge, Fifth District

MONTANA

Honorable Jim Regnier, Justice, Supreme Court

NEVADA

Honorable Miriam Shearing, Chief Justice, Supreme Court

Honorable Charles E. Springer, Justice, Supreme Court

Honorable Robert E. Rose, Justice, Supreme Court

NEW MEXICO

Honorable Gene E. Franchini, Chief Justice, Supreme Court

Honorable Joseph F. Baca, Justice, Supreme Court

Honorable Patricio M. Serna, Justice, Supreme Court

Honorable Dan A. McKinnon, III, Justice, Supreme Court

Honorable Rudy S. Apodaca, Judge, Court of Appeals

Honorable Richard S. Bosson, Judge, Court of Appeals

NEW YORK

Honorable Ernst H. Rosenberger, Associate Justice, Supreme Court, Appellate Division,
First Department

Honorable Stephen G. Crane, Judge, Superior Court

Honorable Joan B. Lefkowitz, Judge, Supreme Court, Westchester County

NORTH DAKOTA

Honorable Dale V. Sandstrom, Justice, Supreme Court

OHIO

Honorable W. Scott Gwin, Judge, Court of Appeals, Fifth District

Honorable Edward A. Cox, Judge, Court of Appeals, Seventh District

Honorable Dana A. Deshler, Judge, Court of Appeals

Honorable Shirley Strickland-Saffold, Judge, Cayuga County Court of Common Pleas

OKLAHOMA

Honorable Joseph M. Watt, Justice, Supreme Court

OREGON

Honorable George A. Van Hoomissen, Justice, Supreme Court

Honorable Rex Armstrong, Judge, Court of Appeals

Honorable R. William Riggs, Judge, Court of Appeals

Honorable Paul DeMuniz, Judge, Court of Appeals

PENNSYLVANIA

Honorable Chester T. Harhut, Judge, Court of Common Pleas, Forty-Fifth Judicial District

Honorable Linda K.M. Ludgate, Judge, Burkes County Court of Common Pleas

Honorable James Knoll Gardner, President, State Trial Judges Association

RHODE ISLAND

Honorable Victoria S. Lederberg, Justice, Supreme Court

Honorable Robert G. Flanders, Jr., Justice, Supreme Court

Honorable Florence K. Murray, Retired Justice, Supreme Court

Honorable Stephen J. Fortunato, Jr., Associate Justice, Superior Court

SOUTH DAKOTA

Honorable Janine Kern, Judge, Seventh Circuit Court

TENNESSEE

Honorable Frank F. Drowota, III, Justice, Supreme Court

Honorable William C. Koch, Jr., Judge, Court of Appeals, Middle Grand Division

TEXAS

Honorable Nathan Hecht, Justice, Supreme Court

Honorable Priscilla R. Owen, Justice, Supreme Court

Honorable Mack Kidd, Justice, Court of Appeals, Third District

Honorable William J. Cornelius, Chief Justice, Court of Appeals, Sixth District

Honorable Richard Barajas, Chief Justice, Court of Appeals, Eighth District

Honorable William R. Vance, Justice, Court of Appeals, Tenth District

Honorable Robert J. Seerden, Chief Justice, Court of Appeals, Thirteenth District

Honorable Paul C. Murphy, Chief Justice, Court of Appeals, Fourteenth District

UTAH

Honorable Richard C. Howe, Justice, Supreme Court

VIRGINIA

Honorable Johanna L. Fitzpatrick, Chief Judge, Court of Appeals

Honorable Norman Olitsky, Judge, Circuit Court

WASHINGTON

Honorable Charles Z. Smith, Justice, Supreme Court

Honorable Gerry L. Alexander, Justice, Supreme Court

Honorable Philip Talmadge, Justice, Supreme Court

WEST VIRGINIA

Honorable Elliott Maynard, Justice, Supreme Court of Appeals

Honorable Larry V. Starcher, Justice, Supreme Court of Appeals

WISCONSIN

Honorable Ted E. Wedemeyer, Jr., Presiding Judge, Court of Appeals, District One

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