

# A Judiciary That Is as Good as Its Promise:

## The Best Strategy for Preserving Judicial Independence

Kevin S. Burke

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

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

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

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

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

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

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

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

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

### Footnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

visited October 6, 2004).

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

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

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

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

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

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

is no threat to judicial independence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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