



# “FAIR AND INDEPENDENT COURTS: A CONFERENCE ON THE STATE OF THE JUDICIARY”

*Fair and Independent Courts: A Conference on the State of the Judiciary was a two-day conference chaired by United States Supreme Court Justice Stephen Breyer and retired Justice Sandra Day O'Connor. Co-sponsored by Georgetown University Law Center and the American Law Institute, the Conference took place September 28 and 29, 2006 on the Georgetown University Law Center campus at the base of Capitol Hill in Washington, DC. The Conference included participants from the corporate, media, education and non-profit sectors.*

## SUMMARY OF SMALL GROUP DISCUSSIONS

Conference participants took part in small group working sessions to formulate a series of recommendations for action to support and enhance the functioning of the judiciary at the Federal and State levels.

The discussion groups identified problems and recommended strategies and solutions in eight general categories:

*Public Education*

*Primary and Secondary School Education*

*Media Education*

*Reform of the Judicial Selection Process*

*Improvement of the Court System*

*Judicial Compensation*

*Improvement of Interbranch Relations*

*Institutionalizing Advocacy to Strengthen the Courts*

## NATURE OF THE PROBLEM

Judges have always been criticized for their decisions, but some believe that recently these attacks have become more virulent. The attacks have diminished public approval of the judiciary, because too few Americans understand how courts work and how judges judge. Criticism of the courts by the political branches lack civility; both political branches have the incentive to attack court decisions, but their canons of ethics severely constrain the ability of the judges to respond.

Although some reporters have a sophisticated understanding of the judicial process and specific decisions, more often the media underreports or inaccurately reports court decisions. Judges are generally confined to the four corners of their opinions to explain themselves. A polity unfamiliar with concepts of precedent and stare decisis cannot always understand the reasons for their rulings. At times, some judges may lack what Chief Justice Roberts has recently termed “judicial modesty”—that is, deciding cases along narrow lines.

Because a disturbingly large amount of money is being poured into state court elections, the appearance of a conflict of interest results when judges must adjudicate the cases of those who have made donations to their election campaigns.

Corporations have grown frustrated with the tedious civil discovery process and an unpredictable tort law system, which can result in what many in the business community see as crippling punitive damage awards.

Finally, many litigants find the court system too confusing and expensive. Surprisingly, data shows that their opinion of the process does not improve when they come to court as litigants or jurors and experience the justice system first-hand.

## THE CONFERENCE PROPOSES SOLUTIONS

Conference participants looked at these problems, and formulated proposals for change. The educational arena received the most attention. Education of the public, the media, and schools at the elementary and secondary levels were all recommended.

### ❖ EDUCATION IS THE FIRST PRIORITY

#### *Primary and Secondary School Education*

Conference participants emphasized the need for better education at the primary and secondary school level. New curricula adapted to contemporary learning styles could enhance understanding of the role of the courts. Field trips to courthouses should be encouraged so that students may observe trials. By the end of eighth grade all American students should know the name and function of the three branches of the federal government.



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Conference participants recommended that the Conference co-chairs meet with commissioners of education from across the nation to examine ways to improve civic education. Creation of a high quality documentary on the subject for both middle and high school was recommended.

### *Education of the Public*

The need for improved education extends well beyond school. Several techniques were suggested to accomplish this goal:

- use of the internet and public service announcements
- preparation of a film regarding how the Supreme Court operates
- broadcast of United States Supreme Court arguments
- publication of Conference materials, including distribution of the Justices' remarks in a publicly accessible format
- establishment of a website to continue the conversation begun at the Conference on the Judiciary

While educational outreach to judges and lawyers is still needed, a wider public must join the call for preserving fair and independent courts. Religious leaders, educators, and non-legal opinion leaders should be the subject of outreach efforts as well. The annual State of the Judiciary report by the Chief Justice of the United States currently does not receive the attention it deserves.

At the state court level, conference attendees recommended that each Chief Justice create an education program for his or her state.

### *Media Education*

If the media that reports on the courts understands both the legal process and constraints on the judicial decision-making process, it will be in a better position to explain that process to readers and viewers. Although a few reporters dedicate their entire careers to reporting on courts—and these reporters are indeed expert—there are things that can be done to help all members of the media to be more effective in reporting on the courts. Judges can reach out more to the media, within the constraints of ethical rules. Bench/bar coalitions can foster ongoing communication between courts and the media. Some states have already established “law school for journalists”—short programs on legal essentials—but more should follow suit.<sup>1</sup>

## ❖ THE JUDICIAL SELECTION PROCESS NEEDS STUDY AND REFORM

The judicial selection process received significant scrutiny from Conference participants. It was agreed that the federal appointment process has become too politicized, and that commentary on judicial candidates has become unduly harsh.

The most significant problem identified, however, was at the state court level, with respect to judicial elections. Conference participants recommended consideration of the Missouri Plan of merit selection and retention of judges<sup>2</sup> and separate elections for judges and politicians, so that judicial elections are not on the ballot in November.

### *Campaign Finance Reform is Needed*

There was broad support for campaign finance reform and public funding of judicial campaigns. Non-partisan elections were cited as a means to limit the appearance of conflicts of interests. Conference participants viewed direct solicitation of campaign contributions by judges and those seeking elected judicial office as a negative influence both on public perception of independence and on the actual independence of the courts.

Attendees urged regulation of campaign conduct and campaign advertising, and expressed the hope that the Supreme Court would have the opportunity to re-examine its holding in Republican Party of Minnesota v. White.

### *Civility Is Needed*

Participants cited both self-restraint and regulation as means to limit the vituperation in judicial elections, with suggested solutions ranging from state bar oversight of campaign advertising to “mutual disarmament agreements”—pledges to rein in rhetoric by the respective parties in particular judicial races.

## ❖ THE PERFORMANCE OF THE COURTS MUST BE IMPROVED

For the courts to continue to command the respect of those who use the system, improvements in judicial process are needed. A survey performed in preparation for the Conference by the Annenberg Center for Public Policy at the University of Pennsylvania found that Americans who have performed jury service within the past five years, or who had a family member in court in the last five years, were much more

likely than those with little or no exposure to the courts to strongly agree that the courts favor the wealthy or the “connected”. Conference participants were troubled by this finding and made the following recommendations:

- **Increase Access to Courts.** *Pro se* litigants need more support, including access to materials on the internet; greater funding for legal services; and reduction in the cost of litigation.
- **Streamline Procedures.** The trend to case management using advanced technology should continue.
- **Specialized Courts.** Some advocated creation of specialized court for commercial cases in which only corporate parties are involved.
- **Improve the Experience of Jurors and Litigants.** Several reforms were recommended to make courts more “consumer-friendly.” Conference participants recommended steps at each point in the experience of serving as a juror: an introductory DVD on the process; a “one day or one trial” jury pool system; jury instructions that are easier to understand; better facilities and pay for jurors; and a follow-up survey to facilitate ongoing improvement in jurors’ experience. It was also recommended that citizen advisory committees examine procedures and recommend changes to improve the experience of jurors and litigants.
- **Culture of Civility.** Judges and litigants should refrain from harsh language. Ultimately, incivility leads to diminished respect for the courts.
- **Judicial Accountability.** A major criticism of the courts at all levels is that they are “unaccountable.” To blunt that criticism, several steps were recommended. Fewer *per curiam* opinions should be issued—appellate courts should, in other words, provide written explanations, rather than summary rulings—in more of their cases. Judicial performance reviews should receive more public coverage, and recusals should be more frequent where judges may have an appearance of conflict. Courts should self-police more effectively, said conference attendees. The September 2006 recommendations of the Judicial Conduct and Liability Act Study Committee, A Report to the Chief Justice, chaired by Justice Breyer, provides a good start for improvement of the self-policing function.

#### ❖ COMPENSATION FOR JUDGES SHOULD BE REFORMED

Although the issue of judicial compensation was not a major focus of the Conference, Conference participants from all backgrounds agreed that judicial compensation requires study and reform. Support is needed from groups in addition to the bench and bar. Judicial compensation should be decoupled from congressional

pay raises, said Conference participants. At the State level, judicial compensation commissions should review the adequacy of compensation to state judges and the effect of current compensation levels on the recruitment and retention of highly rated jurists.

#### ❖ STEPS SHOULD BE TAKEN TO NURTURE A MORE CORDIAL AND CONSTRUCTIVE RELATIONSHIP BETWEEN CONGRESS AND THE COURTS, AND BETWEEN THE COURTS AND THE EXECUTIVE BRANCH

The relationship between Congress and the courts, and between the Executive branch and the courts, led Conference participants to call for greater civility. They also recommended establishment of an annual judicial-legislative summit. They called for legislative leaders to temper language about “out-of-control courts.” Finally, they asked Congress to decline to enact jurisdiction stripping laws, and to defer any action on creating an Inspector General for judges until there has been dialogue on the September 2006 report of the Judicial Conduct and Disability Act Study Commission.

#### CONCLUSION: CONTINUE THE WORK OF THE CONFERENCE

- A non-profit Project should be established to collect and disseminate materials on the fair and independent judiciary, including proceedings of the Conference.
- The Project should finance and facilitate long-term education efforts to increase understanding of the importance of judicial independence.
- Leadership of the Project should be bipartisan and diverse. Opinion leaders, business leaders, retired politicians and judges should all be called on as resources to lend expertise on specific subject matter.
- The Project would both advocate for the judicial system, and provide a constructive critique of the judiciary.
- The Project should conduct regional conferences to study issues at that level for state courts.
- The Project should serve as a forum for informal dialogue between the courts, the Congress, the Executive Branch and state governments.
- Conference participants concluded that the work of September 28-29, 2006 should be continued. Several areas need special attention: education, the special challenges posed by state court elections and the relationship between Congress and the courts. Federal and state judges need to continue their dialogue on issues of common concern.

1 Shortly after the Conference, Georgetown University Law Center, a co-host of the Conference, announced the long-planned establishment of a Masters of Studies in Law (M.S.L.) degree program for professional journalists. “It is our hope that the education offered to journalists at Georgetown will provide them with a better understanding of the legal system and enhance their ability to report on legal issues,” said T. Alexander Aleinikoff, Georgetown Law Dean.

2 Under the Missouri Non-partisan court plan, a Non-partisan judicial commission reviews applications, interviews candidates and selects a judicial panel. For the Supreme Court and court of appeals, the appellate judicial commission is composed of the chief justice of the Supreme Court, three lawyers elected by The Missouri Bar (the organization of all lawyers licensed in Missouri) and three citizens selected by the governor. Each of the circuit courts in Clay, Jackson, Platte and St. Louis counties and St. Louis city has its own circuit judicial commission. These commissions are composed of the chief judge of the court of appeals district in which the circuit is located, plus two lawyers elected by the bar and two citizens selected by the governor. All of the lawyers and citizens must live within the circuit for which they serve the judicial commission.

Once the judicial commission meets, it selects a panel of the three most qualified applicants and submits that three-person panel to the governor. The governor has 60 days in which to appoint one of these three panelists to fill the vacancy. If the governor does not select one of these three panelists within the 60-day timeline, then the selection of the new judge goes back to the judicial commission.

The Non-partisan plan also gives the voters a chance to have a say in the retention of judges selected under the plan. Once a judge has served in office for at least one year, that judge must stand for a retention election at the next general election. The judge’s name is placed on a separate judicial ballot, without political party designation, and voters decide whether to retain the judge based on his or her judicial record. To inform voters about the performance of Non-partisan judges, lawyers participate in a judicial evaluation survey in which they rate those judges about whom they have personal and direct knowledge. They evaluate judges on important characteristics such as fairness, legal analysis skills, diligence and decisiveness. The results of this judicial evaluation survey then are distributed to the public via the media and the League of Women Voters. (Source: <http://members.mobar.org/civics/Model.htm>)

