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**Georgetown University Law Center &
American Law Institute**

**"Fair and Independent Courts: A Conference on the State of
the Judiciary"**

**PANEL:
Improving the Judicial System**

**Panelists:
HELAINÉ M. BARNETT, PRESIDENT,
LEGAL SERVICES CORPORATION**

RICHARD SCRUGGS, SENIOR PARTNER, SCRUGGS LAW FIRM

RANDALL T. SHEPARD, CHIEF JUSTICE OF INDIANA

**LARRY D. THOMPSON, FORMER DEPUTY ATTORNEY
GENERAL OF THE UNITED STATES**

**Moderator:
PETE WILLIAMS, JUSTICE CORRESPONDENT, NBC NEWS**

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**GEORGETOWN UNIVERSITY LAW CENTER
HART AUDITORIUM – MCDONOUGH HALL
WASHINGTON, D.C.**

PETE WILLIAMS: Thank you very much and good morning. We've heard so far in this conference from people who study the courts, who run the courts, who criticize the courts, who report on the courts. Now we'll hear this morning from some people who give the courts a strenuous workout, representing plaintiffs and defendants alike, and in public service representing the government. And while the lawyers would like to have the arena all to themselves, we'll also hear from somebody in charge of one of the highest

courts of the 50 states, who's been at it a remarkably long time despite his comparatively young age. (Laughter.)

All of our speakers this morning have an impressive list of honors and distinguished backgrounds, and I will dispense with telling you all about that. The specifics are in your programs. But let me briefly refresh your memories on who they are.

During the past several years whenever there's been a vacancy to be filled in a top legal position in the federal government, somebody at the White House is bound to say, why don't we get Larry Thompson. (Laughter.) But, like Britney Spears, he decided to choose Pepsi. (Laughter.) He's been vice president for government affairs and general counsel at PepsiCo for two years, leaving behind an exhausting tour as deputy attorney general during the chaotic days when the Justice Department was re-inventing itself to fight the war on terror, and he also had the difficult job of directing the department's corporate fraud task force.

Helaine Barnett knows all about congressional criticism and attempts to limit jurisdiction. The Legal Services Corporation which she now runs, which provides legal aid to low-income Americans, must constantly contend with efforts to trim its authority - moves usually described, and this should sound familiar, as reforms. In military jargon, somebody who rises from the enlisted ranks to become a commissioned officer is known as a mustang. She is a legal mustang. The first legal aid lawyer who worked in the trenches for 37 years, in fact, in New York City, to become the president of the Legal Services Corporation.

Randall Shepard was way ahead of John Roberts in bringing youth to the job of chief justice. He became one of five members of the Indiana Supreme Court at the age of 38, becoming its chief justice less than two years later, in 1987, at age 40. And he told me this morning that he is almost, by just a matter of a few months, the longest-serving chief justice of the states. And he knows his way around Washington, too, having served here in the Department of Transportation. Judge Shepard was appointed to his position, but that was not always the practice in Indiana, which revised its constitution in the 1970s ending the practice of electing judges to the court. He recently described Indiana's role in improving the function of the nation's courts this way: rarely first, occasionally last, and frequently early. (Laughter.)

It's tempting to steal a line from Newsweek and describe Richard Scruggs as quote, possibly the most influential man in America that you never heard of. (Laughter.) But that wouldn't work with this crowd, which knows him very well as one of the nation's leading practitioners in mass tort cases. After his firm's success in handling the asbestos cases, the attorney general of Mississippi hired him to represent them in the massive state lawsuits against the tobacco industry. And he played a leading role in negotiating the landmark settlement with tobacco companies in 1998. And after hurricanes Katrina and Rita savaged his state, Mr. Scruggs announced that he would represent residents of Mississippi and Alabama who claim that insurance companies to honor their policies of people who lost their homes.

That's the panel. Mr. Thompson, it's all yours.

LARRY THOMPSON: Thank you, Pete. First time I've ever been compared to Britney Spears. (Laughter.)

MR. WILLIAMS: And favorably so.

MR. THOMPSON: It's good to be here. This has been a great conference, and we've had some great experiences. A little disclaimer, since I'm no longer a trial lawyer, what I'm going to talk about this morning with respect to low judicial salaries, is not pandering to judges. It's something that I really think is important.

From early in our country's history, the notion that we would have a judiciary of highly qualified individuals was a cornerstone of the concept of an independent judiciary. Judges, according to the records of the federal convention of 1787, should be of the first talent. And it was recognized then that our judges would have to be highly qualified because they would be expected to resolve difficult and important issues of law, and in a conscientious manner and in an intellectually rigorous manner.

Now, as I said yesterday in my discussion group, I strongly believe that scandalously low judicial salaries is the greatest threat to the independent and effective judiciary that we currently have. And so this morning, I'm going to focus a little bit on federal judicial salaries, but the same is true at the state level.

As noted in the excellent ABA federal bar association report on federal judicial pay, the constitutional guarantees of life tenure and an undiminished salary are the hallmarks of our federal judiciary. They provide for independence, they provide for the integrity of judicial decision-making in return for a commitment to public service. And I think it is this important commitment to public service that is undermined when raw financial considerations prevent quality candidates from seeking an appointment to the federal bench, and when it causes sitting judges to leave the judiciary for more lucrative jobs in the private sector.

So let me review a few statistics with you. Although judges have never been highly compensated in our country, federal district and circuit judges' real pay has declined nearly 24 percent since 1969. And this is even worse when you consider that state general trial jurisdiction judges are paid an average of 70 percent of a federal district judge's salary. Now, this erosion in judicial income is dramatically illustrated when you compare the salaries of the dean and senior professors at the Harvard law school with the salaries of U.S. District Courts judges in 1969, and then compare those salaries with senior professors and deans of top law schools in 2005. May we have the first chart?

Okay. So look at this chart. In 1969, the salary of a federal district court judge was considerably higher than the Harvard law school dean and higher than senior professors at Harvard law school. And the next chart, please.

But go to 2005. In 2005, the salary of a district court judge is considerably less than senior professors and considerably less than the dean at the top law school in the United States. Now this is not a plea to lower the salaries of the professors or dean. (Laughter.) Based on my, I think, pretty strong anecdotal evidence, judges are leaving the bench. And they're leaving the bench at an earlier age, and they're not taking senior status in favor of returning to the private sector. And to me, this is a very dangerous trend that goes directly to the heart of judicial independence at the federal level. Think about this, for a judge to be put into a situation where a judicial position is merely a stepping stone to re-entry to the private sector, is a clear weakness in our system. And it's certainly inconsistent with the notion of a lifetime calling of public service.

And it should also be noted that when an experienced judge resigns or retires, the caseloads of the remaining increase and the judiciary loses the valuable skills and insights of the departing judge that are not easily or quickly replaced. And furthermore, it is important in every important occupation, there is what I would call the war for talent. And this is no less so for judges than it is for lawyers in private law firms. And I can tell you that as a former official at the Department of Justice that unrealistically low judicial salaries was probably the most important factor in a good lawyer refusing to accept a judicial appointment.

And I believe that there is a real risk, at the cause of low judicial salaries, that our judiciary will eventually, at the federal and state levels, will not be made up of a diverse group of our country's very best lawyers. As the late Chief Justice Rehnquist noted, we do not want to get to a position where judges come from only the well-to-do lawyers or from the mediocre lawyers. To me, it's very important for us to avoid this situation.

Now, a study of the background of lawyers held immediately prior to their confirmation as district judges from 1953 to 2004 is another very illuminating chart here. Can we have the next chart, please?

You'll see from this chart that from the Eisenhower administration, through the Nixon and Ford administrations, most district judges came from private practice. This trend narrowed during the Carter, Reagan and George H. W. Bush administrations. But during the Clinton and George W. Bush administrations, there is a rather pronounced trend toward most appointees coming from the public sector. To me, this trend does not bode well for the judiciary. Again, as the late Chief Justice Rehnquist noted, lawyers from the private sector bring a perspective to the bench that is important to the judiciary. But beyond that, our judiciary benefits from the collective wealth of experience and expertise of those who have served in a variety of capacities in both the public and private sectors. This diversity of the background of lawyers who come to the federal bench may be just as important as the racial, ethnic and religious diversity that all of us know has positively benefited our judicial system.

MR. WILLIAMS: Thank you. Ms. Barnett?

HELAINÉ BARNETT: Thank you. I am so pleased to be part of this important conference. Very grateful to Georgetown University Law Center, the American Law Institute, Justice Breyer and Justice O'Connor, and all those responsible for organizing this event. It is certainly unusual to have so many leaders in the legal, business, media and educational communities gather in one place to address the critical issues facing the American judicial system. And it means a great deal to me to be part of the discussion, and to bring the perspective drawn from my entire career and my current service as president of the Legal Services Corporation. What I will try to do is address the issue of improving the American judicial system, from the point of view of the legal services community and its aim to insure equal access to the justice system, regardless of ability to pay for an attorney.

The principle of equal justice under law is one that is relevant to each and every American, as it is the foundation of our judicial system and our form of government. As former Supreme Court justice Lewis Powell described it, it is perhaps the most inspiring ideal of our society, that justice should be the same in substance and availability without regard to economic status. Two hundred and twenty-seven years ago this month, our founding fathers devised a system of government that was remarkable in so many ways, as we've heard throughout this conference. Including its strong emphasis on the independence of the judiciary.

The independent judiciary ensures our adherence to the rule of law. Our judicial system protects individual rights and makes fundamental determinations relating to life, liberty and property. But the rights and protections embedded in our laws are not self-enforcing. Rather, individuals must often secure or defend their rights using legal claims or defenses, and interacting with the courts. As we all know, the procedures of our legal system are complicated. The language of our laws is often opaque, frequently impenetrable and subject to multiple meanings and interpretations. Having access to the specialized skills of a lawyer is almost always necessary to navigate the complexities of our legal system.

And yet, most low-income Americans, when faced with circumstances requiring legal redress for essential needs, such as protection from abusive relationships, habitable housing, necessary health care, child support or relief from financial exploitation have no choice but to face legal proceedings without the assistance of a lawyer.

The lack of lawyers to represent the poor in such proceedings that have such a fundamental effect on their lives, led to the creation of the Legal Services Corporation 32 years ago. LSC's mission is to promote equal access to justice in our nation and provide high quality civil legal assistance to low-income persons. Congress created the corporation in 1974 as an independent, non-profit corporation that receives federal funding appropriated each year by Congress, and then funds local organizations throughout the country that provide civil legal assistance to low-income individuals. Currently, there are 138 programs with over 900 offices operating in all 50 states, the District of Columbia and the U.S. Territories. The level of funding for the fiscal year ending tomorrow is \$326.6 million.

Out of a total population of approximately 300 million, about 50 million Americans are eligible for LSC assistance due to their poverty. A recent census report in 2005 also shows that almost 13 million American children now live in poverty. To be eligible for LSC assistance, an individual can earn no more than 125 percent of the income that the federal government sets as the official poverty level. As an example, a family of four has to have an income that's lower than \$25,000. Compared to the need for civil legal assistance to the poor, the level of LSC resources is inadequate. The gap between the resources available and the needs of low-income Americans has been a key issue throughout LSC's history. And the problem of inadequate resources in the face of the growing need for civil legal assistance, has been a primary focus of LSC in the past year.

In October 2005, LSC issued its report entitled, Documenting the Justice Gap in American, the current unmet civil legal needs of low-income Americans. The report was the result of a year-long study, which demonstrated the significant shortage of civil legal assistance available to low-income Americans. The main study was one in which LSC asked all of its grantees, for a two-month period, to document the potential eligible clients who actually came to our offices, but could not be served due to a lack of resources.

The LSC Unable to Serve study, the first comprehensive, national statistical study ever undertaken, established that for every client that we were able to render service to, one applicant was turn away, indicating that 50 percent of the potential clients requesting assistance from LSC grantees were turn away due to lack of resources. Projecting that number over a year, it would suggest there were more than one million cases that potential clients brought to our grantees that they were not able to handle. When you consider that there are many other low income people with legal problems who didn't even ever make it into a legal aid office, it is clear the unmet need is even greater.

Other studies cited in the Justice gap report indicated that at least 80 percent of the civil legal needs of the poor are not being met. The analysis of the reports was concluded in August 2005. As such the report does not reflect the vastly increased need for civil legal assistance resulting from the impacts of hurricanes Katrina and Rita. Not only in the states where the hurricanes struck, but across the nation, where evacuees were relocated.

One year later, these many new clients sill need assistance with disaster-related issues, such as challenges to rent gouging by unscrupulous landlords; dispute on rental housing repairs; issues related to temporary housing in mobile homes and hotels; home repair and contractor disputes; consumer fraud issues; health problems; and increased family law issues, including child abuse and domestic violence and disaster-related stress. I know from my own experience with 9/11 and the work we did at the Legal Aid Society in New York City for those affected by those attacks, we will be dealing with Katrina-related cases for many years to come.

This gap in the amount of representation available for the growing needs for the civil legal needs of the poor impacts the state of the judicial system in numerous ways. First, it challenges the concept of a fair and independent judicial system, when large segments of the population effectively do not have the means to have legal representation to navigate the judicial system. Without access, a significant segment of the population will lack confidence in the system. An erosion of the perception that the system is just and equitable also erodes confidence in the fairness and impartiality of the judicial system. We are a civil society that operates within a system of law requiring judicial resolution of disputes. But when access to the judicial system is so limited, when the doors to the courthouse only open to those with resources, it can lead to disillusionment and result in dispute resolution outside of the accepted avenue.

The lack of civil legal assistance to the poor also has a very practical effect on the day-to-day functioning of the judicial system. While the case load of most courts continue to increase, so do the number of litigants who are faced to proceed pro se due to the lack of representation. This results in increased delays in court systems as well as costs in terms of court resources, a staff is required to deal with questions and needs of so many pro se litigants and judicial proceedings slowing down.

The inability of a person before the court to understand the system, the law, or the language of the legal proceeding renders access to justice meaningless. Or worse, can result in severe injustice. This quandary is made even more complex where language, cultural, physical or other barriers exists for the person before the court. The courts need to consider simplifying their procedures, rules and language, and making them more comprehensible and easier to understand and user friendly. They also need to insure there is adequate translation and interpretation services where required.

The judiciary has long recognized the problem caused by lack of equal access to justice for the poor. Groups such as the conference of chief justices, of which my distinguished colleague Chief Justice Shepard was the immediate past chair, have made a real difference in providing more representation to low income persons.

In my opinion, when a chief justice makes access to justice a priority, things happen in that state that would not otherwise happen. With the leadership of the chief justice of a state, legislators, private lawyers, business leaders and others take actions necessary to provide greater access to the poor. Chief justices have encouraged members of the bar to embrace their professional responsibility, to significantly engage in pro bono activities. Chief justices also lead the efforts to secure additional sources of funding for under-funded legal aid programs. They encourage the initiation of statewide studies that accurately document the unmet legal needs of the poor and lend support at the state level for more adequate resources. They have played an important role in the creation of state access to justice commissions, which try to insure an integrated and coordinated system for the delivery of legal services to the poor in their state.

But because we are not able to provide legal services to all the eligible clients who need it, more and more Americans represent themselves. And though some may

choose to go to court without counsel, most have no choice. We need to work with the courts to find ways to support pro se litigants where appropriate; to provide the information assistance they need to effectively navigate the court system and find access to justice without a lawyer at their side. This can be in the form of self-help centers, kiosks, websites. We need to continue our efforts to harness the huge potential of the Internet and the ability to provide online tools, including providing online live help as an applicant to court prepares court documents.

While these efforts hold much promise, the fact remains that the majority of poor Americans do not have access to lawyers to assist them in resolving problems that may determine whether they have access to basic essentials such as food, housing, medical care and personal security.

That this is the state of affairs in the wealthiest country in the world, and in a country that was founded on the principle that justice be available to all, is not something we should accept. If access to this justice system continues to be limited in practice only to the wealthy and the powerful, we risk jeopardizing our citizens' faith in the judicial system, and in turn, our system of government. This problem requires all of us, representatives gathered here, the legal services community, private practice, the business, the judiciary, the law schools, the fact-based community and our society as a whole to continue to work together to pursue all of our efforts to fulfill the unmet legal needs of the poor. The work of leaders such as those assembled brings us closer to the ideal that equal access to justice cannot remain an aspiration, but must become a reality.

It means a great deal that the perspective of equal access to justice for the poor is being addressed in this event on improving the judicial system. I am honored to be part of it, and look forward to our discussion and our continuing work toward a judicial system so that access to the system of justice is not just for some, but truly for all.

MR. WILLIAMS: Thank you. Mr. Chief Justice?

JUDGE SHEPARD: That was great. I'd like to begin by saying what so many others have said, that yesterday and today have been remarkable. And to thank our organizers and other members of the court who've made that happen. It's a great pleasure to be your allies on topics of this sort.

Since our assignment is to talk about improving the system, I am going to try to be as prescriptive as I possibly can this morning. At the end of the day, I have four proposals which you may take as you like.

The first has to do with the discussion that we had yesterday about the political moment in which the judiciary presently finds itself. It is a moment in which the nature of judicial elections, and the rules of play for judicial elections are in enormous turmoil. And the people who are in charge of writing the rules about how those engagements shall occur. And the people like judicial qualifications commissions who are in charge of enforcing them feel a terrible sense of intimidation and doubt about just what it is that

they are authorized to do, and what ought they to do. Now, at the end of the day on this topic, what's really in play, as I think Stephen Burbank said so well yesterday, is the question, should the country have a judiciary in which the people are chosen through one method or another as policy agents at a relatively micro level. That is to say, people who are appointed or elected or un-elected because of the relative success which their sponsors or supporters believe they will achieve on a list of changes in substantive policy for the state or the country. Not terribly dissimilar from the kind of list that one might imagine a candidate for congress or a state legislator or a governor might lay before the voters.

Now in this respect, I think that both federal judges and state judges are largely in the same boat. You'll recall Kathleen Sullivan's quoting Chief Justice Roberts yesterday during his confirmation hearing, saying, judges are not like politicians. He didn't mean that in any negative sense because he went on to say what he meant by that, which was, they are not in a position to make certain promises in return for votes. And the question that I think is on the table at the moment for both state and federal judges is, why not? The profession has always said that the answer to that question is judges aren't in a position to trade substantive outcomes for votes or appointments or confirmation. And that the moment in which we find ourselves is one in which there are substantial forces in the country arguing the opposite. And this happens both in judicial elections and in confirmations.

Parts of society engage basically in sort of two big places on this. One is the list of hot button social issues that we all know. It's doubtless there are more we haven't discovered as hot button issues, yet. And the other is the great divide between American business and plaintiff's lawyers. There's one thing that Kathleen Sullivan said yesterday that went by very quickly, and I think it's valuable for everyone to know it, to hear the fuller explanation.

She made a reference to judges and judicial elections and issues about judges as creating a moment in which various political parties or candidates can affect voter turnout. And there's no doubt that in the last election or two, there have been campaigns with respected or constitutional referenda in various states, which have as their purpose, not necessarily the apparent object of the referendum, but rather who shows up at the polls on election day as a way of altering the elections for other parties. The best example I can think of, of course a very straightforward one, is the gay marriage referendum which was, to take an example, on the ballot in Ohio, to amend the Ohio constitution to prevent a gay marriage decision from being entered by that court. Now anybody who knows anything, even in passing, about the jurisprudence of the Ohio Supreme Court, or its personnel knows that this was exceptionally unlikely. (Laughter.) Although brother Moyer told me he was giving it some thought. (Laughter.) But the one thing we do know, for sure, was that having measure on the ballot affected who showed up at the polls on election day. And in this respect, judges are not the target at all, we're just roadkill – (laughter) -- for some other venture.

Now I think, in truth, this phenomenon is a passing one. I don't think that it means – and frankly there's not much we can do about it – I assume, eventually, that the political parties and the campaign consultants will find a more efficient tool and this will abide.

I have two suggestions for things that would be helpful on this broad topic in the present moment. First is, it would be very helpful for a federal circuit to say, nothing in the White decision prevents the state from barring sitting judges from soliciting campaign contributions from litigants. I think this would be an easy holding, myself. But I put it to you that if the 8th circuit's on-bank decision on remand stands for any proposition, it stands for the proposition that that can't be prevented. Now, there are a number of state supreme courts that have made this point already. People tend not to believe us. My fellow circuit judges in the room, I invite you to make a decent contribution to any district judge who'd care to stand up and say the same thing, would have made a useful contribution to the better of the core.

The second thing I'd like to suggest relates to the discussion we had yesterday about big money races. People do not get up in the morning in Wyoming, or pretty much anywhere and say, let's have a million-dollar race. Well, maybe in Texas they do. (Laughter.) But they don't get up in the morning and say, let's have a \$13 million election for the supreme court of Michigan. The decisions about whether that's going to happen are made by people who have their offices within two miles of the place we are now sitting. And one can have an argument about whether the American corporate representatives or the plaintiffs' bar fired the first shot. I don't care who fired the first shot. But it might be possible – one of the things about those elections is that they spend a lot of money and fight each other to a stand still. Those multi-million dollar races in Ohio didn't throw out a single incumbent. The \$13 or \$14 million spent in Michigan didn't result in a single change on the Michigan Supreme Court. So far, no one has lost in Washington. The only country example I can think of is the election for the southern seat in the Illinois Supreme Court.

But these parts of our society are spending a huge amount of money, and fighting each other to a standstill, and there are people in this room who, it seems to me conceivably, could broker, if you will, a Peace of Westphalia. Is it possible to create some kind of accommodation that would keep this money from being spent?

Point two, judicial institutions. We are responsible for whether we are effective and what people expect out of us. And this has a lot to do with plain old court administration. And our friends in the academy, in the law schools pay more attention to state courts than state court judges think they do. But, they are not particularly focused on the courts as institutions, and state supreme courts spend a lot of time trying to figure out how to revise and reform and rebuild state court systems, and we could use more help, more serious scholarly help from our friends in the schools. It's the reason why the chief justices and the folks at the Kennedy School and the National Center for State Courts are now engaged in trying to get them interested, and they are.

Point three. The one thing that we didn't hear yesterday that's a part of all the data about public trust and confidence is that whatever the whole country thinks about judges, African Americans do not have an adequate level of trust that we will do the right thing for them, that they will get well treated in our courts. They are much less confident in us than we are in ourselves. And we simply have to redouble our efforts to change that, including, for example, making the profession more accessible to African Americans, to Hispanics, and this is hard work. Our state has now spent \$6 million on a classic, old-fashioned sort of Hubert Humphrey affirmative action, recruiting kids from minority schools and minority neighborhoods, giving them extra mentoring, extra education, a little extra cash to help them get through law school. And the Kentucky Supreme Court has done the same thing, and so has the Georgia Supreme Court. It's hard work, but we have to do more of that sort of thing.

And then finally, just an example, it has to do with court administration, which is how do we treat people when they come to the courthouse, and who sits on juries. Neither state nor federal courts have done a very good job of assuring that jury pools are representative of the population as a whole. Batson lays down an important rule: we will not permit discrimination against people who show up in that jury box through the use of preemptory challenges. The question is how do we get them into the box in the first place? And that, too, is a matter that's tough, hard work, and simply another example of the many ways in which we have to create courts in which the members of the minority populations in this country can walk in the door and think that this is a place where they get a fair chance, and further (affiants sayeth ?) I. (Laughter.)

(Applause.)

MR. WILLIAMS: And finally, Mr. Scruggs.

MR. SCRUGGS: Thank you, Pete. To this point, I think the greatest threat to the independence of the elected state judiciaries are the 527 group monies that are coming in now from anonymous donors with post office boxes during the off-season. And you have no idea where the money's coming from. There's an awful lot of money going in. The candidate generally has no connection with the money, sometimes objects to the money. Even that which seems to be advertising for his election or defeat, even though those two words are magically not used because they are magic words, as those of you on the court here know. But I think that's the greatest threat to the elected judiciary in the state court system. I know it unseated a couple of justices on our state supreme court in Mississippi. One that was advocated by one of these groups almost unilaterally. So, it backfired in that case, but generally I think that's the greatest threat to the independence of the elected judiciary nationwide.

I have, perhaps, a simple view of the independence of the judiciary. And I think it is in the elegance of the founding fathers in creating a separation of powers. After the American Revolution, we obviously did not want a dictatorial regime. We had just thrown off one dictator, and wanted to make sure that no group of men or women could get together and impose their will dictatorially, and therefore the two branches could

gang up on one, or no one branch of the government, the executive, legislative or judicial, could gain excess power against the other two. And I think that's the most elegant and marvelous legacy that we've been left and it's served us very well.

The trade-off, unfortunately for the separation of powers, is some degree of inefficiency in government. And the political branches often find it convenient to shirk their responsibility. Perhaps the most recent example is in some of the congressional redistricting races where the bi-cameral legislatures in these states have just, knowing that a federal court would step in and re-write the boundaries for them, just agreed and winked and nodded at each other and the legislative leaders that we just, okay let's just don't do anything. We don't have to take a hard vote here. We won't have to pay the political consequences and a lifetime appointed federal judge will come in and do it for us.

That's the sort of thing that I think is, that inefficiency in the political branches and the default to the judiciary is happening more and more, perhaps. Or maybe I'm just becoming more and more aware of it. Maybe it's happened for the last two hundred plus years. But it happens often, and many hot potato issues are kicked over into the courts so that political leaders don't have to make hard decisions. The courts, I think, have been somewhat timid in defending their co-equal roles in this government. I think they are a little thin-skinned about activist judges, either by doing nothing or simply trying to make decisions that really the political branches ought to be required to make. Judges mandamus each other, from appellate courts down to trial courts. Perhaps once in a while they should do it to a legislature or to the congress. This is your job, not ours. You do it, or we'll withhold your salary or something like that. (Laughter.) I realize that's a radical approach. But, you shouldn't just sit back and take it. And you shouldn't be defensive about it.

I think that the last three appellate arguments that I've had in the federal system over the last three years have been, I've been tenth or eleventh up with cases that I thought had some public health merit, large numbers of people were affected by the decision of the lower court, and I had to sit there and listen endlessly to immigration cases being argued. One by one by one, almost the same thing, over and over again. Now I'm not an immigration lawyer, and I'm sure there were good points to be made by both sides, but the fact that these cases have been dumped for lack of a better term, into the federal system, and many petty criminal cases are being dumped into the federal system. It's really preventing the courts from doing what it really should be doing, I think. Many of these were political decisions, and they should be kicked back to the political branches of government to resolve them. And the courts shouldn't be defensive about that.

I think I have one slight difference of opinion with my friend Larry Thompson about judicial salaries. I don't think it's so much judicial salaries, and believe me I'm not for not raising judicial salaries, I can promise you that. I'm certainly not going to say that here. (Laughter.) I think one of the things that may be driving judges into the private sector, good judges, is not so much the salary, it's the fact that they get bored with some of the tasks that they have to do. Some of this is not challenging. Some of it's pretty

routine stuff. That, of course, comes with any profession. I think it is a lack of intellectual challenge that drives judges into the private sector more than money. No one becomes a judge, I don't think, for money. Because most judges have usually established themselves already as competent lawyers and they are able to live on their salaries and they want to devote their lives to public service and leave something – make a mark, as they should, and carry forth the role of the co-equal third branch of government.

So, I think that if the courts would be a little less thin-skinned and timid about defending their co-equal role and bouncing some of these political questions back to the political branches of government and somehow require them to actually perform their jobs as opposed to being the dumping grounds and the parking lots for political issues that are too hot for decision. I think that would help ensure the independence of the judiciary. Thank you.

MR. WILLIAMS: Thank you very much.

(Applause.)

MR. WILLIAMS: We have about 20 minutes or so remaining. Let's start with electing judges. Do any of you believe that there's any reason why judges should still be elected? Mr. Scruggs, how about you? Would you like to appear before an elected or non-elected judge, and do you think plaintiffs' lawyers can use the fact that judges are elected to their advantage, and they'd hate to lose that?

MR. SCRUGGS: Actually, plaintiffs' lawyers generally have been hammered lately by elected judges because of these 527 groups that I was just complaining about, electing many judges now usually is funded with corporate money.

I have mixed feelings about an elected judiciary. I think that often an elected judiciary, provided the judge has long enough term, not just has to run every four years or every six years, does display a great deal of independence and most judges really want to do a good job. They don't want to pander to some group that might influence the next election, although, that clearly does play a role with big money coming into these judicial races like it used to. That's sort of a new thing, over the last 10 or 15 years, for the kind of money that's coming in these judicial races now. And essentially, I'm more and more inclined to lean toward an appointed, lifetime judiciary, like we have in the federal system, because of that.

MR. WILLIAMS: Anyone be sorry to see judges no longer elected?

JUDGE SHEPARD: I would stand up for it at one level. I think it makes a great deal of difference at what level and what size of the jurisdiction there is. There are a lot of places in my state and a whole bunch of other places, including New York in some counties, where you can run for judge very inexpensively, you don't have to raise a lot of money. There are places in my state where people can run for judge by knocking on doors. And I think there is something to be said for the notion, that at some moment,

through some mechanism, like a retention election or for that matter, an election, we are accountable to our fellow citizens. Hard to argue in a democracy that that's an evil of some sort.

On the other hand –

MR. WILLIAMS: But I thought the courts were not supposed to be the political branch.

JUDGE SHEPARD: Well, I think every time one of us gets ready to write the words “the Constitution made me do it” – (laughter) – is a moment that ought to be one of special introspection. And, so it doesn't bother me to put myself to my 6 million citizens.

What I would say is that the larger the enterprise, that is to say, if you get up to a place like state-level elections in Texas or in Ohio, in relatively large places, then you get a very different dynamic in which people are prepared to invest lots of money in the hope of driving outcomes. They don't do that for trial-judge elections. Nobody buys one trial judge at a time, it's just a very inefficient sort of way of going about it. (Laughter.)

MR. THOMPSON: I don't know about that.

JUDGE SHEPARD: The only thing that makes sense is to deal wholesale, right? (Laughter.)

And that's what, in large jurisdictions, the dynamic is very different.

MR. THOMPSON: Mr. Justice, in my former role as a prosecutor, there are some people that try to do that – (laughter) – one judge at a time. (Laughter.)

My personal view would be that all I could see were retention elections. I don't see that there's any reason to subject judges, especially the important things that come before judges, I just don't see any reason to subject judges to campaigns, partisan-like campaigns. I think that's a travesty to the independence of a judiciary at the state level. Retention elections, I can see some benefits to those, but these partisan campaigns, I think we should try to get rid of them.

MR WILLIAMS: Ms. Barnett, did you want to weigh in here?

MS. BARNETT: In the state of New York, our chief judge had appointed a commission to improve public confidence in judicial elections. It's clear that the elective system of justice was going to remain, that was not our charge, to weigh in merit appointments versus election. And so I think it's constructive to focus on ways to improve the system of electing judges, and whether that includes some form of public financing, if that includes voter-education guides, if that includes screening committees, I think it's a constructive effort to work in those states where there's clearly going to

remain elective judges, ways to improve the process, so the public has confidence in them.

MR. WILLIAMS: On the question of salaries, Mr. Thompson, just to be clear about this. Are you saying that judges are sometimes – their decisions are affected by keeping an eye on future employers? Is that what undermines independence?

MR. THOMPSON: When you have a situation, Pete, where a number of judges – and I know this from my own anecdotal experience, where a number of judges are finding at points in their careers, where they have children ready to go to college, and they're looking for more – and it's not being bored, Dick, I think. It's simply, they have friends in law firms and they know what the life in the law firm is like, and that's not milk and honey, either. (Laughter.)

They simply do not have enough money, and I'm not saying that judges are directly influenced by the prospect of moving to private practice, but the fact of the matter is, when you have a situation where a judgeship may end up being a stepping stone to some other career, I think that really undermines the independence of the judiciary in terms of a commitment to public service. And I think that's a dangerous trend.

MR. WILLIAMS: But in terms of the decisions a judge actually renders while on the bench, what difference does the salary make?

MR. THOMPSON: Again, it gets to this public perception, and if you have a situation where judges, if they would tend to leave the bench in increasing numbers, I think that would be certainly a bad perception, especially at the federal level.

MR. WILLIAMS: Well, do you think it makes a difference in terms of who is interested in becoming a judge?

MR. THOMPSON: Absolutely it makes a difference in terms of who is to become a judge. And I want you to think about this proposition because it was mentioned in my discussion group yesterday. I know from experience that the low salaries is something that deters a lot of good lawyers from wanting a federal judgeship. But think about the kind of person it attracts, and it's not sometimes necessarily the well-to-do person or even a mediocre lawyer. It may be a person who has an agenda and they want to become a judge from an ideological standpoint, they're driven by the agenda and I don't know if that's a good situation to be in, too.

JUDGE SHEPARD: Can I say that Larry's chart, which is splendid, does paint a picture using two special slices of life – U.S. district judges and the Harvard Law School. (Laughter.) You could – I think it's important for everybody to know, you could do a chart just like that for virtually any state university in the country, as compared to the judges who serve in that same jurisdiction. It is a highly ordinary phenomenon, and what

it does is shrink the pool of those persons whom the public can bring to the cause in ways that are harmful, not simply on independence, but on a whole host of fronts.

MR. WILLIAMS: What about this, Mr. Scruggs? I guess it will always be the case that you will be the highest paid person in the room – (laughter) – but –

MR. SCRUGGS: No applause? (Laughter.)

MR. WILLIAMS: Would it make a difference if there were little less of a gap?

MR. SCRUGGS: You could double what I make and I would not be a federal appeals court judge and have to listen to what I endured and felt the pain of those judges – (laughter) – every time I've sat there and listened to these endless, mindless, repetitive arguments.

No, I don't think – I do think that you've really got to be dedicated to the judiciary and to serving that role, and I think that's what – that's why judges really should be taken from the ranks of people who have a little more experience and have tried what Larry's done in big law firms. They've had real-world experiences and they understand what goes on in everyday law practice and they become better judges that way. They're not out to make a fortune, they've had their shot at that, and they want to serve. And so I really don't think that doubling or tripling a judge's salary will make a whole lot of difference. I do think that honing down the subject matter that they have to consider and have to deal with on a routine difference might make a lot of difference.

MR. WILLIAMS: I'm told we have about five minutes left. So let me ask my remaining two questions. Ms. Barnett, for you, is the lack of resources for groups like yours, do you think, by design or by neglect? And secondly, I'll ask you, Larry, you wrote in your essay for this group that you were concerned about the role of the jury system, if you could explain that?

Ms. Barnett, first for you.

MS. BARNETT: Well, obviously, I believe that we are not adequately funded. However, I am pleased to report that we look like we were on schedule for the first increase in four years, before Congress adjourns, I believe, this afternoon. We do have bipartisan support in large measure. The result of the increase was a sponsored amendment by Senator Domenici and Senator Harkin, and so it's important that we have bipartisan support.

Our board has asked for a 20 percent increase, based on our justice-gap report. If we're turning away 50 percent, we took an analysis and said it would be unrealistic to expect a doubling of our basic field grant in one year, we want to do it over five years, we've asked for a 20 percent increase. But what's important is the federal government cannot do it alone and we have to leverage our federal dollars. And we need funding from the states and we need funding from IOLTA and we need the contribution of the private

bar in increased pro bono efforts. The federal government is the heart of the program, but it alone cannot do it and we need additional resources and leveraging those dollars to really make a dent.

MR. WILLIAMS: Mr. Thompson, just to amplify on my question here. I thought the jury system was one of the strengths of American law, why are you concerned about its role in civil cases?

MR. THOMPSON: Absolutely, when juries decide facts, one of the issues you see, and we've talked about the rule of law in this conference, and one of the great things that will undermine the rule of law is, that when similar cases, which should be decided alike, similar cases should be decided alike are not decided alike. And one of the reasons they are not decided alike is because judges, for lots of reasons, are ducking some of the things that judges should be doing, like deciding issues of legal liability and everything is being pushed to the jury. And I know Dick will have a comment on this – (laughter) – but what happens when similar cases are not decided alike, very similar issues, and the role of the jury is expanded beyond that of fact finding, what happens is an unpredictability.

So, for example, one of the things that I've looked at in my capacity in my present job, is the lack of activity that we all see, of children in our country, and if you look around, there's a diminution in playgrounds throughout the country. And there's an organization called the Common Good and they put on a conference with the AEI and the Brookings Institution, to examine the question is -- why is it that we're having fewer playgrounds in our country? Kids need to have activity, but yet we have fewer playgrounds. And one of the things that they discovered was that this sort of fear of aversion of risk, because there was no predictability as to all the lawsuits and so forth that would happen when school districts and municipalities built playgrounds. And there's such an unpredictability that they decided, what do we do? We're just going to avoid playgrounds. Well, that's not a good result, when you do not – when our legal system does not produce the desired predictability that it should. Then you're going to have some adverse consequences that, I think, are unacceptable.

MR. WILLIAMS: Mr. Scruggs, we'll give you the last word, knowing how you feel about juries.

MR. SCRUGGS: Well, I feel about juries like Churchill felt about democracy. It's the worst system except for all the others. (Laughter.) I think that the jury system is fundamental in – there are times when juries are inconsistent, as Larry said, and that there is a lack of predictability. We're probably about to go through some of that with the Hurricane Katrina litigation, we're representing several thousand families on the Mississippi Gulf Coast. There's one senior-status federal judge that has all of these cases, they're all severed, they're not aggregated in any way and there will be decisions, probably, all over the lot. So, there won't be a whole lot of consistency there.

There are tools that the courts have to – in similar cases, like Rule 42 and Rule 20, to combine those cases and try them one time, if they're similar cases with common

issues. There seems to be an aversion in the federal system now, of any sort of aggregation of cases. Rule 23 has become very difficult to – even though it has very laudable purposes. And Rule 42 has become more difficult, as well, to get common issues resolved in one trial. So there is a degree of unpredictability. I think that unpredictability sometimes, though, fosters safety. Uncertainty, if you're not quite sure what you can get away with, makes you a little more cautious. So there is some benefit in that as well.

MR. WILLIAMS: Well, as they say at the Supreme Court, our time is expired and would you join me in thanking our panelists.

(Applause.)

Thank you very much.

(End of session.)

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