

# Court Review

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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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## EDITOR'S NOTE

This issue is the second in our new layout and content format. We hope that you'll find it has materials of interest to you.

Our interview for this issue is with Eleanor Dean Acheson, the Assistant Attorney General in charge of the Justice Department's Office of Policy Development. In that role, she heads the Justice Department's efforts to suggest nominees for federal judgeships and assists in presenting nominees for confirmation. Given her role in selecting judges, we think you'll find her views on what makes a good judge of interest. In addition, the pace of judicial nominations and confirmations gained considerable attention in the past year. We discussed that with her, and we also have included in this issue a student-written piece examining the constitutional issues presented when the Senate fails to act on judicial nominations.

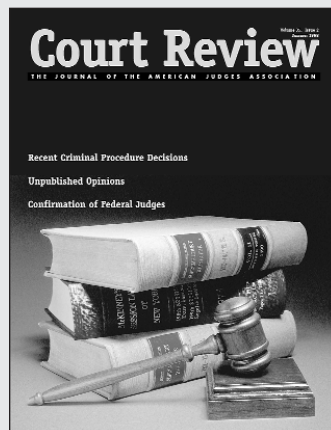
The other articles in this issue are Professor Charles Whitebread's annual review of the past Term's criminal procedure decisions from the United States Supreme Court and an article by Professor Robert Van Der Velde examining the use of unpublished federal appellate court decisions. Although many articles on unpublished opinions have been written, Professor Van Der Velde examines data not previously reviewed to form some practical conclusions – and suggestions – regarding the practice.

In a book review, Professor David Wexler reviews Deborah Tannen's book on the argument culture. A leading scholar in the emerging area of therapeutic jurisprudence, he then discusses its potential value in lessening the ill effects Tannen ascribes to the culture of critique.

We have added some additional members to our Editorial Board: Mark D. Hinderks, a trial lawyer who is chair of the Board of Editors of *The Journal of the Kansas Bar Association*; Judge Gregory E. Mize of the D.C. Superior Court, who was co-chair of the D.C. jury reform group that recently issued its excellent report (see 35 *Court Review* 40 (Spring 1998)); Professor Reginald L. Robinson, who just returned to academia after a five-year absence, during which he spent a year as a White House fellow followed by four years in senior executive positions at the U.S. Justice Department; and Professor Jacqueline St. Joan, a former judge of the Denver County Court who has written on domestic violence and directs clinical programs at the University of Denver College of Law.

We know that we're behind schedule in getting our issues to you. I can tell you, though, that we are on schedule to catch up in the coming year, which will result in your getting all of the issues you are supposed to receive – and, we believe, getting good content in each one. Please feel free to contact us at any time with questions or comments.

– SL



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth at page 27 of this issue. *Court Review* reserves the right to edit, condense or reject material submitted for publication.

Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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# President's Column

Paul Beighle

First, I thank the members of the AJA for giving me this opportunity to serve you as president for a year. It is a great honor, and I will do my utmost to bring credit to the organization and the judicial community.

The annual conference in Orlando was successful and satisfying in at least three ways. First, Judge Rosinek had prepared an outstanding educational program. Second, Judge Strickland-Saffold conducted a productive business meeting in which the AJA renewed its collective resolve to advance the causes of law and justice. Third, the attendees and their families had an opportunity to meet, to socialize, and to enjoy the many attractions in the Orlando area, including Disney World and Epcot Center.

The educational session got off to a stimulating start with the Tom C. Clark lecture by Dr. Wade Davis. Dr. Davis illustrated his lecture with slides of his cultural studies of the peoples of the Andes, Tibet, and Haiti. Other speakers and panelists presented topics ranging from domestic violence and juvenile justice to the relationship between the courts, communities, and the media. Recent decisions of the Supreme Court were discussed by Prof. Charles H. Whitebread.

One of the innovations of note at this particular conference was the emphasis on court technology. That emphasis was directly related to our first-ever vendor show, which featured a demonstration of Courtroom 21, the world's most technologically advanced courtroom. In all, twenty-one vendors provided booths and displays for the participants at the conference and their guests. Many of them conducted drawings and awarded gifts to lucky winners.

Judge Rosinek reported at the general meeting on Thursday that the vendors had been very pleased with the interest shown in their products and expressed a desire to return to future AJA conferences. The technological advances that were demonstrated during the Courtroom 21 presentations were received with interest by the judge participants, many of whom indicated an interest in incorporating the new technology into their own courts.

AJA members whose states have continuing legal or judicial education requirements are reminded that the educational program provided 13 CLE/CJE credits for the participants.

At the General Assembly meeting on September 3, 1998, there were two things of note to report. Before the election of officers of the association, First Vice President Doug Voss withdrew his name from consideration as president-elect. Judge Voss explained that because of his retirement and relocation far from the madding crowd in Michigan, his contacts with the

courts and court activities had waned. He felt that a more active judge should be in the leadership role. The association will miss his skills. Gerald T. Elliott was elected to the position of president-elect; Chris Williams was elected first vice president; Bonnie Suddreth was elected second vice president; and Francis Halligan was elected secretary.

During the meeting, the membership discussed implementation of the long-range plan that had been approved in 1996. It is interesting to compare the long-range plan presented by Judge Philip Fairbanks in 1976 with the plan approved in 1996. Judge Fairbanks suggested that the AJA's long-range goals should be (1) increased membership; (2) improved communications and publications; (3) strengthened and improved relations with other judicial organizations; and (4) continued sponsorship and participation in a strong, judicial education program.

Since 1976 our membership has doubled. Since 1976 AJA publications have quadrupled, and recent improvements in the *Court Review* journal have dramatically increased its quality. Since 1976 AJA members have been invited to participate on many significant national boards and committees. But we cannot rest on those accomplishments. As is clear from the goals of the 1996 long-range plan, the organization is a work-in-progress. Those goals are: (1) to retain and increase membership; (2) to be a leading voice of the judiciary; (3) to address issues of judicial interest; (4) to improve the effective administration of justice; and (5) to provide and promote education.

It is clear that these compatible and continuing goals extend from 1976 to 1996 and to the present. The executive committee has pledged to diligently pursue the implementation of the 1996 long-range plan. We will be calling upon the committees, the delegates, and the membership-at-large to help us carry out this mandate.

I mentioned three innovations at this year's meeting. The first was the vendor show. The second was a silent auction of various items that had been donated by AJA and AJF members. The proceeds of the auction, over \$2,000, will go into the coffers of the AJF to be used for educational programs for the AJA. The third innovation of note was that, thanks to the efforts of Judge Strickland-Saffold, we had our first judge from Mexico to attend a conference. Justice Julio R. Patino, the Chief Justice of the Supreme Court of Vera Cruz, honored us with his presence. We hope that he will return and that other judges from Mexico will participate in future conferences. With members from Canada, the United States, and Mexico, ours will truly be an association of North American judges.



# The Argument Culture and the Courts

David B. Wexler

THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE. By Deborah Tannen. Random House, 1998 (\$25.00). 304 pp.

In *The Argument Culture: Moving from Debate to Dialogue*, linguist Deborah Tannen explores how a culture of argument and critique severely limits creative problem-solving. Tannen demonstrates how an argument culture or culture of critique pervades Western society and manifests itself in politics, journalism, academia, and, of course, law.

Tannen's argument is not with the value of argumentation itself; she has no qualms with argumentation and critique as legitimate and indeed crucial aspects of critical thinking. Her concern is rather with the *culture* of critique — the political, journalistic, academic and legal cultures that *privilege* argumentation and critique and *disparage* other approaches of intellectual inquiry.

This review will summarize Tannen's main points and then suggest how, in the legal sector, certain new approaches are consistent with her recommendations. The new approaches, moreover, are highly relevant to the judiciary.

## A Summary of the Book, with Commentary

Although argumentation and critique have, as methodologies, served us well, a *culture* of critique “corrodes our spirit”

as it “urges us to approach the world — and the people in it — in an adversarial frame of mind.” In our culture of critique, opposition and debate are the preferred methods of resolving conflicts and of solving tough problems. We engage in debate rather than dialogue, use war metaphors to describe disagreement over policy, and generally have come to enjoy a good fight and to regard politics as a spectator sport.

Despite its short-term entertainment value, the costs of a culture of critique are considerable. It leads us to focus on controversial matters (“What is the most controversial thing about your book?”), even when, as is often the case, “the most controversial thing is not the most important.” It prods us to be “provocative” rather than “thought-provoking,” which “can open old wounds or create new ones that are hard to heal.”

By encouraging debate rather than dialogue, the culture of critique leads us to believe that every issue has two sides, no more, no less, and ignores the fact that “often the truth is in the complex middle, not the oversimplified extremes.” When “the middle ground, the sensible center, is dismissed as too squishy, too dull,” and when nuanced views are denigrated and the policy-makers who support nuanced, middle ground positions are regarded as “two-faced,” compromise is often sacrificed in favor of polarized, rigid ideology.

The argument culture revels in debate on inflammatory issues, and encourages

us to take on the big divisive issues rather than to attempt to heal a hurtful divide. A “big divisive issue,” however, is often so categorized “not because it is very important but because it is very divisive.”

Relatedly, intellectual inquiry in a culture of critique focuses on criticism rather than on “integrating ideas from disparate fields ...” Moreover, “opposition does not lead to the whole truth when we ask only ‘What’s wrong with this?’ and never ‘What can we use from this ...’” We tend to play what Peter Elbow calls “the doubting game,”<sup>1</sup> “approaching others’ work by looking for what’s wrong,” and do not systematically approach new ideas with the different spirit of a “believing game,” which would encourage us to look for new insights and to do “integrative thinking.”

The believing game by no means requires uncritical acceptance of new ideas, theories, findings. As Tannen puts it:

The believing game is still a game. It simply asks you to give it a whirl. Read as *if* you believed, and see where it takes you. Then you can go back and ask whether you want to accept or reject elements in the argument or the whole argument or idea... . We need a systematic and respected way to detect and expose strengths, just as we have a systematic and respected way of detecting faults.

### Footnotes

1. DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* at 273 (1998), *citing* PETER ELBOW, *EMBRACING CONTRARIES: EXPLORATIONS IN LEARNING AND TEACHING* (1986).

In addition to systematically playing the believing game, Tannen believes we can better our problem-solving skills by the use of other helpful approaches and techniques — several of them suggested by communitarian scholars. We might look at a specific problem and ask, “What shall we do about this?” In doing so, we might look at the problem from several angles, not simply from two polarized sides. In moving from debate to dialogue, it may also be useful to leave some issues out, to avoid talking exclusively about rights, which seem non-negotiable, and to focus more on “needs, wants, and interests.”

With such an expanded approach to problem-solving, we may also increase the pool of problem-solving talent. In a culture of critique, those who do not thrive on a steady diet of criticism or confrontation may drop out of — or never choose to enter — the domains of academia, politics, journalism, and law.

Law seems to play a central role in the argument culture: First of all, “the American legal system is a prime example of trying to solve problems by pitting two sides against each other and letting them slug it out in public.” Moreover, the legal system both “reflects and reinforces our assumption that truth emerges when two polarized, warring extremes are set against each other.”

The corrosive effect of an attitude that “litigation is war,” and of judging lawyers by such standards as the tough or lackluster nature of their cross-examinations, may explain in part the well-documented phenomenon of lawyer distress and dissatisfaction. The adversarial culture, therefore, needs also to be examined for its impact on “what it does

to those who practice within the system, requiring them to put aside their conscience and natural inclination toward human compassions.”

And when the legal system and its lawyers put aside natural inclinations toward human compassion, we begin to take for granted certain behaviors and practices that we ought to find disturbing. For example, our legal system discourages a driver from apologizing after an automobile accident. Our criminal law system similarly discourages people from admitting wrongdoing and accepting responsibility. And our emphasis on litigation often does not allow people to get on with their lives until a lawsuit is resolved, thus exacting a high psychological cost. “As so often happens with the argument culture,” says Tannen, “the ultimate price is paid by human beings in personal suffering.”

### **Therapeutic Jurisprudence as a Response to the Culture of Critique**

Dissatisfaction with business as usual has led not only to ADR, but also to a number of related, alternative approaches — preventive law, restorative justice, creative problem-solving, holistic law, and the perspective with which I am most familiar — therapeutic jurisprudence.<sup>2</sup>

Therapeutic jurisprudence, for example, has developed very much along the intellectual paths proposed by Tannen. Therapeutic jurisprudence is a perspective that recognizes that, know it or not, like it or not, rules of law, legal procedures, and the behavior of lawyers and

judges often have an impact — positive or negative — on psychological well-being. Therapeutic jurisprudence proposes only that we recognize and consider the potential therapeutic and anti-therapeutic consequences of the law and legal processes; it does not propose that therapeutic concerns should “trump” other deeply held values. It urges us to consider whether insights from psychology can be brought into the law or its administration in a way that will improve therapeutic consequences without offending principles of justice.

As such, therapeutic jurisprudence seeks to use relevant and promising psychological literature to help shape the law. It thus does not simply look for weaknesses in psychological material, but actively urges us to play the “believing game” and to consider how behavioral science knowledge might be creatively integrated into the legal system. For example, therapeutic jurisprudence writers have used psychological principles for increasing patient compliance with medical decisions (such as signing behavioral contracts, involving family members, and making a public commitment to comply) to ponder how judges might increase probationer compliance with conditions of release.<sup>3</sup>

Not only has therapeutic jurisprudence work followed the methodological path proposed by Tannen, but it has also begun to address substantively Tannen’s areas of concern regarding the legal system: how courts might influence a criminal defendant’s acceptance of responsibility,<sup>4</sup> the role of apology in tort<sup>5</sup> and other settings,<sup>6</sup> the anti-therapeutic consequences of delaying the resolution of personal injury cases,<sup>7</sup> the

*Continued on page 19*

2. See DAVID B. WEXLER & BRUCE J. WINICK (Eds.), *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996).

3. See WEXLER & WINICK, *supra*, Chap. 9.

4. See Peggy Fulton Hora & William G. Schma, “Therapeutic Jurisprudence,” 82 *JUDICATURE* 8 (July/Aug. 1998); Thomas J. Scheff, “Community Conferences: Shame and Anger in Therapeutic Jurisprudence,” 67 *REVISTA JURIDICA UPR* 97 (1998); WEXLER & WINICK, *supra* note 2, at 137, 159-64.

5. See Daniel W. Shuman, “The Psychology of Compensation in Tort Law,” in WEXLER & WINICK, *supra* note 2, at 433, 457-60.

6. See Bruce Feldthusen, “The Civil Action for Sexual Battery: Therapeutic Jurisprudence?” in WEXLER & WINICK, *supra* note 2, at 845, 871-72 (criminal context).

7. See Daniel W. Shuman, “When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases,” 4 *PSYCH., PUB. POL. & LAW* \_\_\_\_ (1998) (publication forthcoming).

# An Interview with Eleanor Dean Acheson

*Editor's Note: This interview was done about two weeks before the U.S. Senate completed its work for 1998, with some activity still in progress on judicial nominations. The current state of judicial vacancies — and the final numbers on confirmations by the 105th Congress — are shown in tables accompanying the interview.*

Eleanor Dean (“Eldie”) Acheson is the Assistant Attorney General in charge of the Office of Policy Development at the Justice Department. She is responsible for a broad range of policy initiatives within the Justice Department, as well as the Justice Department’s role in the selection of federal judges. Prior to her nomination and August 1993 Senate confirmation as Assistant Attorney General, she was a litigation partner in the Boston law firm of Ropes & Gray. As her name suggests, she is the granddaughter of Dean Acheson, who, as Secretary of State from 1949 to 1953, was a principal architect of American foreign policy at the start of the Cold War. Additional biographical information about Eleanor Dean Acheson is available on the Justice Department Internet site at <http://www.usdoj.gov/offices/edawebbio.htm>.

**Court Review:** First, would you start by just telling us briefly what it is the Office of Policy Development does? It’s one of those strange titles that could mean anything, and perhaps sometimes it does.

**ACHESON:** The Office of Policy Development ... has two separate or distinct functions, and they’re both very important. One is to accomplish the Department of Justice’s role in the federal judicial appointment process, and

the second is to ... undertake policy work, which can mean everything from developing legislation that the administration may want to proffer, developing or assisting in the development of grant programs or ideas for grant programs.

It can mean reacting to proposals for



programs or legislation from components within the Department of Justice, from other agencies within the federal agency group, [or] from the Hill. It can mean wrestling with implementation questions. For example, when the Crime Act of 1994 was passed, the Office of Policy Development worked ... to figure out exactly how the department was going to implement the many, many different pieces of that plenary crime bill, both its creation of new crimes, new sentences, new programs through funding, who was going to do it, and how we were going to do it.

Major hate crimes initiatives the department has undertaken, we’ve been integrally involved with from the beginning. We’ve worked with the Office of

Justice Programs a lot on developing regulations when they’re called for and other kinds of guidance if regulations are not required to implement grant programs that the Congress has established.

**CR:** How would you say your time is split up between the one role, working on choosing and getting federal judges nominated and confirmed, and the other, working on general policy issues?

**ACHESON:** ... I probably spend roughly a third of my time on the judicial appointment front and probably two-thirds of my time overall on the policy area and the various, indeed many, projects that are in that bailiwick. And the office is similarly split.

[T]here are not separate staffs. There is one individual at any given point in time whose job it is to run on a day-to-day basis the various jobs and tasks that need to be accomplished on the judicial appointment front. All the other lawyers in the group, ... that’s basically about 30 people, work part time on the judges, and the rest of their time on policy issues. And indeed we have other lawyers from other components within the department who help us out on the judges front, so it’s not just the same group from the Office of Policy Development who work on the various judges’ issues.

We have a good mix of experience and perspective and other important factors by having lawyers who are indeed practicing in components around the department to assist with that work, which is very, very good. ....

**CR:** Let me ask you about the current state of appointments and openings. At the beginning of this year there was quite a bit of public attention to the large number of unfilled vacancies in the federal courts. Chief Justice Rehnquist said one of every ten federal judgeships then

was vacant, and the number of judges confirmed declined from 101 in 1994 to 17 in 1996 and 36 in 1997.

In the Ninth Circuit there were then 10 openings on a 28-member court, and Chief Justice Rehnquist concluded that vacancies could not remain at such high levels indefinitely without eroding the quality of justice. How have things gone this year?

**ACHESON:** I think at least in part because of the Chief Justice's ... comments and the force of his comments, particularly in the context of the vacancy situation we were facing, the whole process has worked a lot better. And indeed we've had a very constructive year ... from the perspective of the Administration, which had always been sending nominations, but perhaps not as quickly as some would like, and as the vacancy rate really sort of demanded, for a variety of reasons that didn't have anything to do with a lack of interest.... You can face tremendous political and administrative obstacles in doing this, and we've had a couple of years of very serious problems on that front.

We seemed to break through that, at least those aspects of the problems we had control over. We have sent up a number of nominations. There have been a lot of confirmations this year. I think the number at the moment is ... 44 confirmations this year of Article III judges, and ... that includes ten circuit court confirmations ... so far, which is three more than we had last year, and fully ten more than we had in 1996. So we're doing quite well. ....

There were five vacancies in the Second Circuit at one point, which is not all that big a circuit, and we filled three of them. We have a nominee pending, and we do not yet have a candidate for the fifth position, but we've made significant progress. And that was very, very good productive, constructive work with the New York senators, with the committee, and then with the full Senate.

And we have also sent to the Ninth Circuit, which has had absolutely gaping vacancy rates, as many as 10 out of 28 judges this year alone. Nobody was confirmed last year to the Ninth Circuit, and this year we had one, two, three, four people confirmed. ....

**STATEMENT OF JANET RENO  
U.S. Attorney General  
October 22, 1998**

I'd like to acknowledge the great work of Senators [Orrin] Hatch and [Patrick] Leahy, and the Judiciary Committee, and to Senators [Trent] Lott and [Tom] Daschle on the floor, and this Congress, in securing the confirmation of a number of judges. Yesterday, the Senate confirmed 24 of the federal judicial nominations pending on the floor. Included in that number were 18 federal district court nominees, and all six of the U.S. Court of Federal Claims nominees, thus filling all the vacancies on that Court.

We intend to work very hard to begin the 106<sup>th</sup> Congress with as many candidates for nomination as possible, so that we can continue to work with the Senate to ensure a full bench of outstanding judges to hear important federal cases. I really appreciate the efforts of the Senate, and I think it will have a great impact on the federal bench.

And now before the Senate, ... ready to be voted on any time between now and [adjournment] ... are five additional circuit court nominees, ... one of whom is for the Second Circuit, and two of whom [are] for the Ninth Circuit, which - if those three people got confirmed - [it] would go a long, long way.

And then there are ... 13 district court judges awaiting confirmation by the Senate. So let's be conservative and say that instead of five of the circuit court people getting through, let's say three do and ten of the 13 - that would put us [to] 57 [confirmations this year], which is pretty significant.

And then on top of that, we're having a hearing on Thursday for five additional district court nominees, and I think there's a very strong likelihood that at least four of those five if not five of those five will be confirmed before they go out on [final adjournment], which could put us ... into the high 50s, and there's a possibility of a couple of more judges.

**CR:** Back in February after the Chief Justice's remarks, you had commented

that civil business in the courts had all but been shoved off the active docket in many areas, and the Ninth Circuit was certainly one area in which the chief judge had indicated 600 hearings had been canceled in the last year, and civil trials had been pushed back. Do you have any sense of what the current impact of the vacancies is in the federal courts on handling of cases?

**ACHESON:** ... I can't offer really anything specific on that question. It's very hard to get a handle - short of working with the Administrative Office of the U.S. Courts on virtually a circuit-by-circuit, district-by-district basis to determine what is happening.

At the time I made that statement, we had in fact done that, and I think that we had a vacancy rate of over a hundred vacancies in an 844 - [judge] Article III judiciary, and there were significant impacts in the Second Circuit and the Ninth Circuit as I said, and in the district court in a couple of other places. And that level of vacancy rate had persisted for a long time and had been essentially building with very few downward dips since January of 1996.

In January of 1996, which was the end of our first full year working with Senator Hatch as chairman of the committee, we had reduced the number of vacancies in the Article III federal judiciary to 49, which is just extraordinary given sort of the recent modern history of this. Then we had the experience of '96, which really threw us well down the road of disaster, and '97, and they had a huge impact.

This year, we have persistently - we've worked slowly, you know, and hard, but it has been incrementally down, you know, the vacancy rate has come down. It is currently at 72.

And as I say, it's going to be significantly - you know, there could be as many as 15 to 20 additional confirmations, which would bring us well down to close to what ought to be how the system works. If you turn it around and look at it from - not from these huge vacancy numbers we've had but from if the system worked perfectly, if everybody was doing their job candidates being recommended efficiently and quickly to the district courts, the administration coming up with candidates effi-

**ACTION ON JUDICIAL NOMINATIONS - 1997-1998**  
**105<sup>TH</sup> CONGRESS**

	NOMINATIONS MADE	NOMINATIONS CONFIRMED	NOMINATIONS NOT ACTED UPON
Courts of Appeals	29	20	9
District Courts	90	79	11
Ct. of Intl. Trade	3	2	1
Withdrawn	5		
<b>Total</b>	<b>122</b>	<b>101</b>	<b>21</b>

Source: U.S. Senate Judiciary Committee, data as of October 21, 1998.

Note: Nominations not acted upon in 105<sup>th</sup> Congress must be resubmitted to proceed further.

ciently and quickly [to] the circuit courts — the background work being done quickly and the Senate moving expeditiously, you could argue you should never be more than somewhere between 17 and 23 vacancies behind. You should never really have a vacancy rate over about 23. And that's because of recent history that about every quarter, I think the average has been until recently, [that] roughly 17 Article III judges took senior status.

**CR:** Every quarter?

**ACHESON:** Every quarter. Now, that rate has actually slowed significantly, in part because whole generations of judges have almost sort of come out of the system.... You know, there are not that many Nixon and Carter judges left, although there are some.

But the other thing is many judges are not taking senior status because either their districts are desperate because of other vacancies, people beat them to it, or they are concerned that if they do, ... that their place would not be filled ... relatively soon, [so] they're not willing to do that and put their districts or their circuits in a bad way. So we've seen a significant slowdown.... [Since] the end of 1997, I think there are fewer than eight or nine judges [per quarter] taking senior status.

**CR:** Tell us a little bit about how the process works. How do you go about finding good judges?

**ACHESON:** The process works essentially as follows, ... and let me start with the district court.... Historically, tradition has developed, and this same prerogative or practice is followed in this Administration, that the President

looks to the senior senator from his party party to make ... a recommendation for a district court vacancy.

We don't tell a senator how to do that, and that to some extent differs from the early practice of Bush Administration and the practice of the Carter Administration, which ... had views about how senators should go about their process and how many recommendees should be sent and so forth.

Our message is you choose somebody you want to recommend to the President any way you want to, but be mindful of basically the type of people we're looking for, the standards that we expect any nominee to meet or any candidate to meet with whom we would consider going forward.

And we try and lay those out pretty clearly in conversations with the senator or with staff, and we indicate that if somebody fails to meet those standards, we will decline to send the person forward. Certainly we've have had occasions where we had to say no, but I'm happy to report that those are very few and far between.

In any event, the senator makes a recommendation, we have a fairly elaborate and, we hope, comprehensive and thorough internal — and when I mean internal, I mean internal to the Administration — evaluation of the candidate. We review forms, we essentially develop a pretty three-dimensional profile of somebody's professional life, whether it's in practice or whether it's on the bench or whether it's as a law professor or whether it's something else.

We read all the cases. We read as much as we can about the cases that they've been involved with, the opinions that they've written and all that, and we

call a cross section of practitioners, judges, and others in the professional community that the person works in. And then beyond the professional community, we try to reach out to pro bono organizations, civic organizations with which a candidate has been active, all in an effort to determine the individual's abilities, intellectual and professional, and the regard in which the person is held in the community, the individual's — to the extent that you can judge it in this way — integrity and reputation for reliability and integrity in ... whatever it is that they've been doing professionally.

And finally, ... the whole business of judicial temperament or judicial demeanor — trying to sort of determine from what you can learn about a person in this way how this individual is going to conduct himself or herself on the bench — kind of beyond the sort of [usual questions such as] can they do the work, can they do the job, can they understand the issues, and are they going to be reliable and honest and hardworking — to sort of try and assess the very important, to some extent tangible and [to a] large extent intangible, nature of what kind of presence are they going to be, both ... in the courtroom and then beyond the courtroom. Are they going to provide the kind of leadership and reputation for evenhandedness and fairness and patience, and listening and understanding the position of the parties, and all that sort of thing? That's very important.

If we feel that a candidate ... has a lot of good qualities that go in these directions and certainly seems like they would be a very good candidate, we then go into the external evaluation process, which involves sending the candidate to the American Bar Association for its professional evaluation. And that's a process independent of either the Administration or the Senate.

**CR:** Have you found those reviews useful?

**ACHESON:** Yes, we have found those reviews useful. First of all, we think it's very important to have a group independent of any of the constitutional and sort of public players in the thing making a professional evaluation. It ought to give, and we think it does give,

a strong sense of public confidence about the process....

I should say there seems to be no controversy about whether there should be an independent group performing this function. There has been some controversy about who should do it.

There have been some bars, mostly voluntary bars, that have expressed concerns that the American Bar Association has demonstrated over time too conservative a view about what kinds of experience and qualifications ... make a good federal judge. I think [they] believe that [the ABA] standards are not sufficiently flexible to respond to some of the different types of careers that some of our candidates have had, including some of our women and minority candidates, and thus they may not get a shake at the American Bar Association that fully appreciates the kind of experience that they've had, some of the obstacles they've faced, perhaps some of the experiences they've not been able to have that others have just had no problem with. And also taking into account the fact that plenty of people always, but maybe more in this day and age, don't choose traditional law careers, ... but do some slightly different things or a greater variety of things, and would bring a lot of perspective to the bench....

There's been a lot of discussion about this. I have to say I think by and large the American Bar Association, which currently performs this function and has since I believe either the late '40s or the early '50s, has done overall a very good job, and our experience with the ABA is that it is very responsive both to us and to others who have tried to engage it on this issue of appreciating, and I mean that in the sense of their own standards, the experience that the variety of candidates have brought, which are not so much the traditional pattern, and they've been very responsive.

One kind of noncontroversial, but ... very important area has been the fact that many, many lawyers these days [are] people who might in another time have called themselves litigators or trial lawyers and done a lot of that, [but who] have developed specialties and a lot of expertise as mediators or conciliators or arbitrators or whatever the title may be in the whole vast area of alternative dis-

pute resolution and play various roles there, some of which are sort of judge-like to some extent.

Certainly there are lots of differences. Perhaps the core one is that in that whole discipline, the point is not to come to a yes or no, you know, A- or B-type decision, somebody wins, somebody loses. It's to work something out on sort of a brokered basis or a compromise basis.

But in any event, increasingly you see candidates with a significant element of their professional experience being this kind of work, and this is very, very new, and it's not something that the ABA has sort of dealt with institutionally in the context of their own criteria. And a couple of years ago, when we started to see this and we felt that candidates ... had a very significant set of skills and good, interesting and useful perspectives that were developed from this [type of] practice were — [it] seemed to us — not being ... really given the weight we felt it should be in the context of the ABA process.

The ABA has been tremendously responsive to concerns that we expressed and has developed, I think, a very good approach, a sensitivity to that kind of practice. I think that [there are] plenty of people on the various ABA committees who understand this because they either see this practice developing in their firms or they do it themselves. I think the ABA overall has done quite a good job.

The other thing that happens at the same time the professional evaluation of the ABA is going on is that the files of the candidate are sent to the F.B.I. for the full-field background, which is investigation that focuses largely on somebody's — not their professional life, but their nonprofessional comings and goings and acquaintances and neighbors and so forth in their life to judge the candidate's character, integrity and reputation.

Those two processes each take about a month, six weeks, and at the end of that whole deal, which probably together takes six weeks to two months, you put those various pieces from the point in time we get a recommendation, we make a decision as to whether or not to nominate the person. And when I say

“we,” I mean the Administration, not just the Department of Justice.

Once a nomination is made, the Senate Judiciary Committee has its own process.... They have a rule that a nomination, in most cases, unless they choose to waive the rule, should be at the committee for three weeks before the individual is eligible for a hearing. And quite often there are a lot of nominees, [and] people are up there a lot longer, but the committee also has an opportunity to perform a bit of an investigation.

They clearly read all the paperwork, which involves a detailed questionnaire and the information or at least the recommendation or rating from the ABA, the F.B.I. background report, and, if there are issues that come up based on those papers, the committee has staff who are free to, and they sometimes do, pursue issues with candidates.

And then at some point when all those matters are nailed down, the committee will notice a hearing. Usually, there are somewhere between four to six to seven candidates on a hearing.... Somebody from the majority chairs the hearing, usually there are members from the minority who show up as well, and they ask questions of the candidates.

There now are pretty regularly follow-up written questions once the actual hearing is over that, usually, ... the nominees have anywhere between three or four days to a week to answer depending upon schedule that the committee is working on.

Once outstanding questions are answered, the committee will vote in a business meeting on the nomination. Assuming that the nomination is voted out of committee, it's sent ... to the floor of the Senate. There, the majority leader — as you know, his job is to manage all the business of the Senate, with help from a variety of people, but nominations essentially are one type of business that he is responsible to manage and to work with other senators to get nominations on the calendar in an appropriate way.

If there are no issues with a nomination, it is put on the unanimous consent calendar, and ... if you look away for an instant from watching the television screen, it will pass.... If there are issues

THE FEDERAL JUDICIARY Current Vacancies	
<b>ALL ARTICLE III JUDGESHIPS</b>	
Vacancies	54
Total No. of Positions	843
Percent vacant	6.4%
<b>U.S. COURTS OF APPEAL</b>	
Vacancies	16
Total No. of Positions	179
Percent vacant	8.9%
<b>U.S. DISTRICT COURTS</b>	
Vacancies	37
Total No. of Positions	646
Percent vacant	5.7%
Source: Administrative Office of the U.S. Courts; Data as of December 1, 1998.	

with a candidate and there are senators who would like floor time to raise questions or make speeches against the candidate's confirmation, the majority and the minority leaders work that out, and there is an assigned time for a debate on the nomination of so-and-so for such-and-such.

And you see that played out, and usually at the end of that, ... it has been agreed there will be a vote, and there is a vote, and you know what happens at the end. It's right there. .... We've had a number of candidates who've — some people have voted against, but they've — as a group they have been confirmed. They're not confirmed as a group, but we have not lost anybody on a roll call vote on the floor.

**CR:** At any time during the Administration?

**ACHESON:** Close, but we haven't.

**CR:** Ignoring the Supreme Court, because that could be an entire book unto itself, how would you briefly describe the circuit court process and how that differs?

**ACHESON:** The circuit court process basically differs in that the history and tradition that has evolved and prerogatives as far as choosing ... the person to go forward lies with the President, whereas, as we had discussed, with a district court, it lies, in the first instance at least, with a senior senator of the President's party.

With respect to the circuit courts, the President has basically the choice or the pick, if you will, and our practice has been, and I believe this is quite similar to prior administrations, or at least recent ones, to look to senators, as well as other sources, other people who are interested in the circuit, in the court, in the community that the court serves. You know, it cuts through a whole lot of organizations or bar associations, bar groups, individual lawyers, members of congress, senators — we consult with them about candidates that we're considering, we're happy to get recommendations from them.

Before we actually get to the kind of work I described with our own very thorough internal review and then going on to the ABA and the F.B.I., in the case of the circuit court vacancies, we do try and develop for the President a short list. [It] could ... be as few as two or three people, it could be as many as four or five people. In rare circumstances, it might be even more. With respect to [these people], we develop profiles basically from public record, from all the information available about an individual as a matter of public record through the various databases that exist, without going into the phone calls and all that, and once the President makes a decision about the individual who he wants to go forward with, we dive into the very specific focused work on an individual.

**CR:** Have you covered already every-

thing you think makes a good judge, or are there any important criteria that you would suggest that you haven't listed already?

**ACHESON:** We have treated under the three main categories of professional excellence, integrity, and temperament how we've thought of just the whole group of qualities, [we have] categorized them under those three headings.

Certainly, [what makes a good judge] is a question we ask every single person who comes in as a candidate, you know, what they think. And I don't think I have ever disagreed with an answer or thought that somebody — something somebody had said sounded odd or off or something.

People assign different priorities to different specific qualities, skills under those three general topics — patience, huge work ethic, a willingness ... to be a person who does the work up front — and in my own experience and view, this all seems right.

You know, particularly for a trial judge, a good sense and kind of way with people, the parties, for the lawyers, for the jury, for the court personnel [are important]. I think ... that we like ... somebody who has true humility, not in the sense of somebody who's obsequious or self-denigrating, [or] self-deprecating in some way, but try to look out for arrogance or kind of impatience or sort of a sense of well, gee, "I know all about that," "I don't need to think about that," or, "I don't need to learn about that."

Obviously an important thing [is] just compassion, interest, understanding, that ... the case is for the people there, and, you know, it's their case, it's the most important case in the world, whether it's a tiny case or a huge case.

**CR:** Do you have one or two judges that you would say would be the ideal of what you think is a good judge?

**ACHESON:** Well, I'm reluctant to answer a question like that because we've sent, you know, 300-plus [nominees].

**CR:** I was thinking more of ones you've been in front of as opposed to ones you'd sent up.

**ACHESON:** Well, the person that I would say I think [was] just a spectacu-

lar judge is the judge for whom I clerked, who's unfortunately now deceased ... but Edward Gignoux, who was a United States District Court Judge in the District of Maine, appointed by President Eisenhower and, sadly, didn't take senior status until shortly, relatively shortly, before his death, but who was the district court in Maine for many years.

He was the chief judge, he was the only judge and was an extraordinary person. Just tremendous intellect and integrity and the sense of fairness and tremendous sort of patience and interest in all types of cases and situations, of all types of people, and a hard and relatively quick worker. I don't mean that he whipped things off in any light way, but he had an ability to move through matters to decision.

And that's another point that many people often talk about, and it's most interesting to hear people who have been judges talk about it, the ability to make a decision. You can have lots of people with lots of fine qualities, but people who are slow to reach decision or really can't [make a decision] on issues, and try and get — you know, even when it's clear the parties can't, and that's why they're in court — to go back at them to settle or resolve or compromise is not a good thing.

It's important to be able to make a decision, to recognize when parties or lawyers are not going to, and that it's your job to. Anyway, he was great at those sorts of things.

**CR:** In terms of the relationship between the Justice Department and the judiciary broadly speaking, I know that your office does all the sort of management for and response for meetings that the Attorney General would have with representatives of various judicial organizations, ... [including] the national Conference of Chief Justices. Could you talk a little bit about those interactions from the perspective of what they do for the Justice Department? The justices [who have participated in these sessions have] talked about how unusual they were historically and the regularity with which the Attorney General had these meetings. It seems to me the judges would be interested in the Justice Department perspective of the value of

maintaining a strong relationship in that way.

**ACHESON:** Well, as I think you know, the Attorney General started meeting with the executive committee of the federal judiciary. We were into that relationship, although it was fairly early on, it clearly became so useful to have a forum in which to talk informally about matters ... judges wanted to raise with the Department, whether they related to practice of United States attorneys in various ways or large policy questions about what position the Department was going to take on legislation pending in Congress, the Attorney General ... thought it would be extremely useful to set up the same kind of a series of regular meetings and hopefully develop a good set of relationships with the Conference of Chief Justices and the National Center for State Courts.

And so we did that and have with the CCJ two or three meetings a year. And ever since we set this up, the CCJ has, in addition to our regular Washington meetings, invited the Attorney General to come to their annual meeting and make a presentation, give a speech.

Once she did a listening session. Instead of going and giving a big speech on a topic, the main part of her time spent with them was actually to sit with the entire group of 50-plus chief justices of the states and some other jurisdictions, and talk about, in a very informal setting, a variety of issues that they were interested in, and that she was interested in, raise questions, and have basically a give and take.

It has turned out to be, and we expected this, but it has just been a tremendously valuable relationship from the perspective of the Department of Justice on many levels. One is certainly being able to sit down and work with the judges on so many of the issues that are not necessarily federal issues, or we might feel they should not become federal issues, but we are trying to give support and give suggestions to the state courts on — giving priority to certain issues, or hearing from them about what we can do to support them in certain issues.

I mean, some good examples of this are, for example, in the Violence Against

VACANCIES WITHOUT PRESIDENTIAL NOMINEES	
Courts of Appeals	5
District Courts	24
<b>Total</b>	<b>29</b>
Source: U.S. Senate Judiciary Committee, data as of October 21, 1998.	

Women Act, which is part of the Crime Act of 1994, there is basically a mandatory full faith and credit provision. Now, this is something that really doesn't involve federal government or the federal courts, but it is a piece of federal legislation that basically says full faith and credit shall be given to protective orders [and] related kinds of court orders that might fall within what's covered by this provision.

And yet the mechanisms for actually achieving the vision that that provision is trying to achieve; namely, that when a woman... has fled from Jurisdiction 1 to Jurisdiction 2 (or, indeed, it could be a man), but whose abuser or stalker or whomever follows her or him, can go into the courts of Jurisdiction No. 2 and easily, quickly, and efficiently have the court or have the police of Jurisdiction No. 2 understand that there is an outstanding order and take the appropriate action against an individual who may be violating the order.

And there are a number of ways in which we have worked with the CCJ on this, bringing to their attention this provision, talking to them about the ... scope of the problem of domestic violence or family violence or intimate violence, whatever you want to call it, on the one hand, and the ... obstinance and difficulty of the problems of full faith and credit from the perspective of victims, which we hear about daily — helping to identify best practices in this regard, helping to fund ... pilot programs the various states could try for putting protective orders on line or into their criminal history record databases; compacts between states whose law enforcement officials have actually experienced, across a state line, problems where people flee from X County, Ohio, into Y County, Kentucky, and back and forth.

There are places, borders like this

within the United States, where there are a lot of these kinds of issues, and local courts are essentially trying to do what they can to develop ways to resolve these problems and facilitate them.

So you have that kind of work with the Attorney General bringing these issues to CCJ, but basically saying — and the National Center for State Courts — we will do everything we can to help you and support you. And here are the kinds of things we have in mind, here are the things we want to do for you, tell us what you think works. Would it be useful to have a best practices conference? Would it be useful to have [a] state judges and tribal judges conference, where you have states with Indian country in them, and these kinds of issues going back and forth, funding programs, having all sorts of work going on in this regard?

Coming the other way, one of the things that has been very, very good in this relationship is [that] it's given state judges an avenue to bring to our attention deep concerns they have, sort of structural concerns indeed that they have about what seems to be, [from] their perspective, ... sort of an epidemic of federalizing matters. We've heard some of that in the context of violence against women, we've heard some of that in the context of the Administration's, initiatives on hate crimes in ... our proposals and our support of Senator Kennedy's bill to amend the current federal hate crimes statute, and they have a lot of concerns about that.

So there are a number of examples about areas that we can bring to each other's attention, and [that] we can do a lot of work in to often find common ground. It's just been very valuable.

**CR:** Are there other issues that you're working on that you think would be of special interest to judges, particularly state or municipal? In other words, are there other topics you would particularly like to be able to address to judges?

**ACHESON:** One of the things that right now we are working on in the Department, and we have been for about a year-plus, and it is an issue that the Attorney General has been raising regularly with state judges ... is the problem that [has] existed for some time — this is not anything new, but it doesn't seem to get any better — on the indigent defense front and the need that there clearly is to do what we can.

And this so often falls on state and county officials, including state and county judges as well as the people who fund the courts and fund these programs, to do what we can to see that some consistently good standard is maintained in representation for indigent persons. And that is simply not the experience in all too many jurisdictions around the country. And the Attorney General is very concerned about it.

We understand that this is significantly, but perhaps not exclusively, a resources problem. The Attorney General has talked to Congress about this issue, ... and she ... has expressed the Administration's concern and, indeed, opposition about a number of proposals that are in the Congress that, in fact, would have the opposite effect....

And yet particularly with respect to capital trials, but also across-the-board, we see some situations that, you know, one wonders what kind of representation somebody really is getting. Oftentimes, ... there are serious [stakes] ... — always, certainly, with respect to the individual involved, there are huge stakes.

Her view as a former prosecutor, and actually a current prosecutor, although obviously she's not sort of on the line day-to-day as she was in Miami, but ... I think she sees from the perspective of the prosecutor that this is a really serious and important issue really as a structural matter to a fair, reasonable investigation, prosecution and trial and justice process.

It's not a stand-alone issue that ...

people think is a good thing or a bad thing. It has to be seen as an element in ... a multifaceted process which we basically call our justice process. And it's not a good process, and most prosecutors would agree, if you have lots of resources for investigation and prosecution but a disproportionately lesser amount for a critical element of this process, which is defense.

**CR:** Is the Department likely to publish or issue some clear standards as to how much is enough with respect to defense of certain crimes?

**ACHESON:** I'm not sure that's the route to go, and I don't think we ... , as a Department, are going to directly publish something like that.

One of the things we are doing is that we have funded some pretty comprehensive research, because it hasn't been done ... at least since the early '80s, into what kinds of systems there are in the states and counties across the country, what kinds of resources are going into these systems, and really kind of try and [not only] collect all the data that there is, but actually develop some where it appears there's not current data on what is going on out there, and measure it in different kinds of ways.

And we've got a grant out, and we expect a full-blown report on that front in 1999. We already have a little bit of a snapshot document which we have just gotten fairly recently, actually, from this contractee, which gives us some sense of what the situation is.<sup>1</sup> But we've asked for a full-blown report.

And we, among many other things we are doing on this front, we are having in February a National Symposium on Indigent Defense, which we expect will be significantly informed by this research, but that is not just to focus on or look at the research, it is to try and tee up what other kinds of issues there are beyond resources and how defenders are responding, whether the defense function is organized on a state basis or a county basis.

#### Footnotes

1. The preliminary report is entitled, "Improving State and Local Criminal Justice Systems: A Report on How Public Defenders,

Prosecutors and Other Criminal Justice Practitioners Are Collaborating Across the Country."

People have developed ways to respond, to try and figure out where we are and what works, what kinds of contributions the department can make directly or indirectly to training, to some of the same access, if you will, and training about technological developments in areas that are critical to investigating and presenting compelling evidence, understanding what that evidence means, and developing scientific areas like DNA analysis and similar kinds of things.

So I think we are probably not going to be in the business of developing our own standards. I think what we would like to be in the business of, is to bring investigators, defenders, prosecutors, [and] judges, all of whom have experience and ideas about how to try and solve some of these problems, together to develop on a very practical basis for use by people in areas where they have severe resource problems, sort of ... what is the ... the consensus sense of best practices in different kinds of circumstances. That's certainly what our goals are here.

**CR:** Let me introduce one kind of final topic. You're the granddaughter of Dean Acheson, and accordingly you've come into contact with lots of people who could give you advice over the years. In an article you wrote, you said that Clark Clifford advised you while you were in law school to go into the public sector to pursue your career out of law school since there were better opportunities for women there in the early '70s. You didn't take that advice and instead went into the private sector. What would you say was the best career advice you've ever gotten?

**ACHESON:** I don't know. I don't know that I've gotten the best career advice that can be given. You know, I expect the best career advice that I've gotten, and this is not to say that Mr. Clifford's advice wasn't good, because I think it was very good. It was true, [though,] that I didn't take it for a number of reasons.

But probably the best advice that I got was my father's not only advice but sort of persistent advice in, I think, the beginning of my third year of law school

to try hard to get a clerkship. And he felt very strongly that it really almost didn't matter what court, state or federal, it didn't matter, unless one had a definite leaning toward trial work over other kinds of work, whether it was a trial court or an appellate court.

He had a very, very strong sense of the value of working very closely for a year with a judge who was just an amazingly good judge in all the ways that we've sort of talked about, somebody who was extraordinarily intelligent, experienced, compassionate, [a] person of great integrity.... I think he was focused certainly at least as much on the sense of somebody who'd had a long career, long and really outstanding career, in the law, [who] happened to be a judge at the moment, who could be a tremendous mentor in a lot of ways.

And that was certainly the best advice I got, and leading to one of the absolute best professional experiences that, you know, I ever had, and that was ... my year of clerking with Judge Gignoux.

**CR:** Thank you.

**VACANCIES IN EXISTENCE FOR 18 MONTHS OR LONGER  
(DESIGNATED "JUDICIAL EMERGENCIES" BY U.S. COURTS)**

JUDICIAL CIRCUIT	COURT	VACANCY CREATED BY	REASON	VACANCY DATE	DAYS PENDING
First	D.P.R.	Raymond L. Acosta	Senior status	6/1/1994	1643
Second	N.D.N.Y.	Con. G. Cholakis	Disabled	6/30/1996	883
Third	3rd Cir.	H. Lee Sarokin	Retired	7/31/1996	852
Third	E.D. Pa.	Edmund V. Ludwig	Senior status	5/20/1997	559
Third	E.D. Pa.	Thomas N. O'Neill, Jr.	Senior status	7/6/1996	877
Third	W.D. Pa.	Alan N. Bloch	Senior status	4/12/1997	597
Third	W.D. Pa.	Maurice B. Cohill, Jr.	Senior status	11/28/1994	1463
Fourth	4th Cir.	J. Dickson Phillips, Jr.	Senior status	7/31/1994	1583
Fourth	4th Cir.	New Position	—	12/1/1990	2921
Fifth	5th Cir.	William L. Garwood	Senior status	1/23/1997	676
Fifth	N.D. Tex.	Barefoot Sanders	Senior status	1/1/1996	1064
Sixth	6th Cir.	Damon Keith	Senior status	5/1/1995	1309
Seventh	N.D. Ill.	Brian Barnett Duff	Senior status	10/30/1996	761
Eighth	E.D. Mo.	George F. Gunn, Jr.	Senior status	12/1/1996	729
Ninth	9th Cir.	Robert R. Beezer	Senior status	7/31/1996	852
Ninth	9th Cir.	John T. Noonan	Senior status	1/1/1997	698
Ninth	9th Cir.	Cecil F. Poole	Senior status	1/15/1996	1050
Ninth	9th Cir.	Charles E. Wiggins	Senior status	12/31/1996	699
Tenth	D. Kan.	Sam A. Crow	Senior status	11/15/1996	745
Tenth	N.D. Okla.	Thomas R. Brett	Senior status	10/3/1996	788
Eleventh	S.D. Ala.	Alex T. Howard, Jr.	Senior status	10/21/1996	770
D.C.	D.C. Cir.	James L. Buckley	Senior status	8/31/1996	821
D.C.	D.D.C.	Stanley S. Harris	Senior status	2/1/1996	1033

Source: Administrative Office of the U.S. Courts; Data as of December 1, 1998.

# Recent Criminal Procedure Decisions of the United States Supreme Court: The 1997-1998 Term

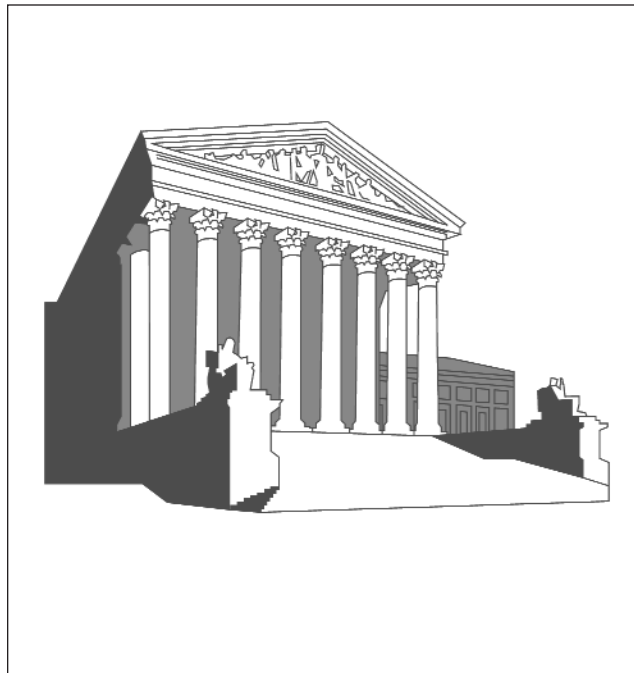
by Charles H. Whitebread

**D**uring the 1997-1998 Term, the Supreme Court ruled on a variety of significant issues affecting constitutional criminal procedure. For the most part, the Court continued its current tendency to restrict defendants' rights under the Constitution, as illustrated by its recent holdings on the Fourth Amendment, the exclusionary rule, the Sixth Amendment right to present a defense, the Eighth Amendment right against the imposition of excessive punitive fines, the Fifth Amendment privilege against self-incrimination, double jeopardy, and sentencing. However, there were a few outlying decisions, such as the ruling expanding the protections afforded criminal defendants

under the Confrontation Clause of the Sixth Amendment and the holding granting white defendants standing to challenge racial discrimination against African-Americans in the selection of a grand jury foreperson. Furthermore, two of the four rulings on issues affecting habeas corpus broke from the Court's ongoing inclination to decrease state criminal defendants' access to federal courts.<sup>1</sup>

## THE FOURTH AMENDMENT

The Fourth Amendment right against unreasonable searches and seizures was further constrained by the Rehnquist Court in *United States v. Ramirez*.<sup>2</sup> In *Ramirez*, the Court unanimously held that the Fourth Amendment does not require a stricter standard for "no-knock" entries that result in the destruction of property. In *Richards v. Wisconsin*,<sup>3</sup> the Court had held that "no-knock" searches were permissible where police had a reasonable suspicion that announcing their presence "would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." In *Ramirez*, Chief Justice Rehnquist reaffirmed that the standard announced in *Richards* was all that was necessary to justify a "no-knock" entry, regard-



less of whether property was destroyed during the entry or search. Moreover, the Court concluded that the officers' conduct in this case was reasonable in light of the fact that they had broken only one window in a garage, where they had been informed weapons were being stored.

The Court also limited the availability of the exclusionary rule as a remedy for Fourth Amendment violations. In *Pennsylvania Board of Probation and Parole v. Scott*,<sup>4</sup> the Court held 5 to 4 that the exclusionary rule did not apply in parole revocation hearings. This decision was consistent with historical reluctance to apply the exclusionary rule in contexts other than criminal trials. Writing for a bare majority, Justice

Thomas explained that the exclusionary rule "is prudential rather than constitutionally mandated" and, therefore, was "applicable only where its deterrence benefits outweigh its 'substantial social costs.'" The Court reasoned that since the use of the exclusionary rule in criminal trials already provided significant deterrence of unconstitutional searches, any deterrence effect from use of the exclusionary rule in parole revocation proceedings would be minimal. Moreover, applying the exclusionary rule in this context would "hinder the functioning of state parole systems." This decision illustrated the Court's concern with the exclusionary rule's "costly toll" upon truth-seeking and other objectives of law enforcement. In dissent, Justice Souter argued out that parole revocation proceedings, which "serve[] the same function as a criminal trial," may be the only context in which a state will seek to use evidence of a parole violation, and, therefore, the exclusionary rule should apply.

## FIFTH AMENDMENT

Continuing on its trend of confining defendants' rights within the criminal process, the Court delivered a narrow interpretation of the Fifth Amendment Self-Incrimination

Clause. In *United States v. Balsys*,<sup>5</sup> the Court held 7 to 2 that the privilege against self-incrimination was not available where a party seeks to assert the privilege out of fear of criminal prosecution by a foreign country. Justice Souter concluded that a criminal prosecution by a foreign nation not subject to our constitutional guarantees was not a “criminal case” for purposes of the Fifth Amendment privilege. Souter further explained that the Self-Incrimination Clause granted “a witness the right against compelled self-incrimination when reasonable fearing prosecution by the government whose power the Clause limits, but not otherwise.” Moreover, under domestic laws, respondent Balsys’ testimony would only have subjected him to deportation, which constitutes a civil proceeding, within which the privilege against self-incrimination may not be asserted.

### SIXTH AMENDMENT

The Court both restricted and expanded defendants’ rights under the Sixth Amendment. In one case, the Court limited a defendant’s right to present a defense with scientific evidence of questionable reliability. However, in another Sixth Amendment case, the Court reversed its course with respect to constricting criminal defendants’ rights by expanding the protections afforded under the Confrontation Clause.

In *United States v. Scheffer*,<sup>6</sup> the Court held that a per se rule against the admissibility of polygraph evidence, such as Military Rule of Evidence 707, at issue here, was not a violation of a defendant’s Sixth Amendment right to present a defense. During a court martial proceeding, respondent Scheffer was prevented by Military Rule of Evidence 707 from using exculpatory polygraph evidence in support of his argument that he did not knowingly use drugs. Scheffer challenged his subsequent conviction on the basis that Military Rule of Evidence 707 violated his Sixth Amendment right to present a defense.

The Court explained that a defendant’s right to present relevant evidence was subject to reasonable restrictions that accommodate legitimate government interests in the criminal trial process. Here, Rule 707 served to ensure that only reliable evidence was admitted at trial. States may justifiably conclude that polygraph evidence is unreliable since there is a lack of consensus in the scientific community regarding the reliability of polygraph testing. Moreover, Rule 707 ensures the preservation of the jury’s role in determining credibility (“the jury is the lie detector”). Finally, the per se ban on the use of polygraph evidence serves the legitimate government purpose of avoiding litigation that is collateral to the primary purpose of the trial.

In contrast, *Gray v. Maryland*,<sup>7</sup> expanded criminal defendants’ protections under the Sixth Amendment. In 1968, the Court had held in *Bruton v. United States*,<sup>8</sup> that despite limiting instructions, the admission of a codefendant’s out-of-court confession at a defendant’s trial, naming and incriminating the defendant, violated the defendant’s Sixth Amendment right to cross-examine witnesses. Subsequently, in *Richardson v.*

*Marsh*,<sup>9</sup> the Court had held that a confession by a codefendant redacted so as to omit all references to the defendant fell outside of the protection afforded under *Bruton*. In *Gray*, however, the Court concluded 5 to 4 that codefendant confessions redacted only to the extent that the defendant’s name was replaced with a blank space, the word “delete,” or other symbols, fell within the protection of the *Bruton* rule, and were, thereby, inadmissible. The Court reasoned that juries would realize that a codefendant’s confession redacted in this manner refers specifically to the defendant. Moreover, substituting blank spaces or the word “delete” was likely to cause juries to pay heightened attention to the accusations within the confession and overemphasize their significance. In dissent, Justice Scalia argued for the admissibility of confessions redacted in this manner because they were not “facially incriminating.” Scalia vehemently protested that expanding the *Bruton* rule in these circumstances would “seriously compromise society’s compelling interest in finding, convicting, and punishing those who violate the law.”

**The Court explained that a defendant’s right to present relevant evidence was subject to reasonable restrictions ....**

### EIGHTH AMENDMENT

The Supreme Court’s recent decisions affecting defendants’ rights under the Eighth Amendment were generally consistent with its past and continuing propensity to limit defendant’s rights in the criminal trial process.

In *Buchanan v. Angelone*,<sup>10</sup> the Court held 6 to 3 that the Eighth Amendment did not require jury instructions on mitigating evidence in a capital case. At the sentencing hearing of a defendant convicted of multiple murder as part of the same act under Virginia law, the jury was instructed that the Commonwealth must establish beyond a reasonable doubt that the defendant’s conduct was “vile” before they could impose

#### Footnotes

1. For a more in-depth analysis of the Supreme Court’s recent decisions in criminal procedure please refer to CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 1997-1998 (American Academy of Judicial Education 1998).
2. 118 S. Ct. 992 (1998).
3. 520 U.S. 385 (1997).
4. 118 S. Ct. 2014 (1998).

5. 118 S. Ct. 2218 (1998).
6. 118 S. Ct. 1261 (1998).
7. 118 S. Ct. 1151 (1998).
8. 391 U.S. 123 (1968).
9. 481 U.S. 200 (1987).
10. 118 S. Ct. 757 (1998).

**The Court stressed that pardon and commutation decisions were rarely, if ever, appropriate subjects for judicial review.**

the death penalty. If the jury found that this condition was met, they were instructed to impose the death penalty only if they found that it was justified. Buchanan requested but was denied jury instructions on factors considered mitigating evidence under Virginia law. Chief Justice Rehnquist stated that the jury instructions given at Buchanan's trial were in conformity with constitutional protections because there was not a reasonable likelihood that they were applied in a manner that prevented consideration of constitutionally relevant evidence. It has

never been held that "the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." Moreover, the Court reasoned, it was highly unlikely that the jury would disregard the extensive evidence of mitigating factors presented by the defense throughout the sentencing hearing, especially when the instructions given required the jury to consider "all of the evidence."

To some degree, the decision in favor of the defendant in *United States v. Bajakajian*,<sup>11</sup> appears to be a victory for defendants' rights under the Eighth Amendment's Excessive Fines Clause. On the other hand, the standard announced for violating the Excessive Fines Clause is clearly consistent with the Court's desire to side with law enforcement. In *Bajakajian*, the Court ruled 5 to 4 that forfeiture of the full \$357,144 that respondent Hosep Bajakajian failed to report that he was transporting out of the United States pursuant to federal statute violated the Excessive Fines Clause of the Eighth Amendment. Although the defendant won, Justice Thomas announced that a violation of the Excessive Fines Clause would only occur where there was "gross disproportionality" between the severity of the crime and the value of the property seized, thereby erecting an extremely high hurdle for defendants seeking to enforce their Eighth Amendment rights. The majority felt that because Bajakajian had caused minimal harm and because he could not be characterized as the "money launderer," "drug trafficker," or "tax evader" for whom the statute was designed, full forfeiture of the \$357,144 he was attempting to transport out of the United States was grossly disproportionate to his crime. Although the dissent agreed with the "gross disproportionality standard," it criticized the majority for disdainfully downplaying the seriousness of Bajakajian's offense.

## DUE PROCESS

The Court's continuing inclination to favor law enforcement and to restrict the rights of criminal defendants is further illus-

trated by this Term's series of cases addressing due process issues, both substantive and procedural.

In *County of Sacramento v. Lewis*,<sup>12</sup> the Court unanimously held that a police officer who kills a suspect during a high speed chase must have had a purpose to cause harm unrelated to the legitimate purpose of arrest in order for his conduct to constitute an unconstitutional deprivation of the substantive due process right. Justice Souter emphasized that the threshold question is "whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." In further qualifying this standard, the Court stated that conduct intended to cause harm in a manner unjustifiable by any government interest would be the type of conduct most likely to be found to shock the conscience. The police officer in this case, on the other hand, had done nothing to cause the fleeing suspect to drive recklessly or evade law enforcement authority, rather, he was merely reacting instinctively.

Turning to issues of procedural due process, in *Ohio Adult Parole Authority v. Woodard*,<sup>13</sup> the Court held 8 to 1 that Ohio's clemency procedures did not violate due process under the Fourteenth Amendment. Respondent Eugene Woodard had challenged Ohio's clemency procedures on the basis that he was not provided timely notice of, nor allowed to have counsel present at, his clemency interview, thereby unconstitutionally depriving him of his "continuing life interest." In spite of the attempt to characterize his deprived interest as a "continuing life interest," the Court rejected Woodard's claim under *Connecticut Bd. of Pardons v. Dumschat*,<sup>14</sup> which held that refusal to commute a prisoner's life sentence did not deprive him of a protected liberty interest since his liberty interest had already been extinguished by his conviction and life sentence. The Court stressed that pardon and commutation decisions were rarely, if ever, appropriate subjects for judicial review. Moreover, an appeal for clemency is merely a "unilateral hope," not a "constitutional entitlement" or "right explicitly conferred by the State," therefore, Woodard had no reasonable expectation of clemency.

Finally, in *Hopkins v. Reeves*,<sup>15</sup> the Court held 8 to 1 that state trial courts were not required to provide jury instructions on lesser included offenses of felony murder that were not recognized under state law. Respondent challenged his felony murder conviction and death sentence on the grounds that his request for jury instructions on second degree murder and manslaughter as lesser included offenses of felony murder was improperly denied. Justice Thomas' opinion focused on distinguishing *Beck v. Alabama*,<sup>16</sup> in which the Court held that denying state juries the option of convicting a capital defendant with a lesser included, noncapital offense was unconstitutional. First, the Alabama statute at issue in *Beck* prohibited jury instructions on lesser included offenses clearly recognized under Alabama law and it did so only in capital cases. Here, on the other hand, the Nebraska trial court merely refused to

11. 118 S. Ct. 2028 (1998).

12. 118 S. Ct. 1708 (1998).

13. 118 S. Ct. 1244 (1998).

14. 452 U.S. 458 (1981).

15. 118 S. Ct. 1895 (1998).

16. 447 U.S. 625 (1980).

provide instructions on crimes the Nebraska Supreme Court had not recognized as lesser included offenses of felony murder. Second, in *Beck*, the jury's decision to convict was automatically tied to the death penalty, whereas in *Hopkins*, the jury was not required to impose a sentence.

## HABEAS CORPUS

The Supreme Court's recent decisions affecting criminal defendants' rights to habeas relief were not entirely consistent with the Court's zealous effort to restrict state criminal defendants' access to federal court. At least one decision affecting habeas, *Stewart v. Martinez-Villareal*,<sup>17</sup> stands in stark contrast to the Court's current trend in habeas jurisprudence.

The ruling in *Stewart* marks a relatively significant victory for state prisoners seeking adjudication of federally protected rights in federal courts. In *Stewart*, the Court held 7 to 2 that a habeas petitioner's claim of incompetence to be executed, after initially being dismissed as premature, was not subject to the prohibition against "second or successive" applications for habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA). Chief Justice Rehnquist rejected a literal reading of the AEDPA's prohibition against successive habeas applications. Instead, Rehnquist argued that respondent's claim of incompetence to be executed, previously dismissed as premature, "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies," since in both circumstances the habeas petitioner has not received adjudication of his claims. Justice Scalia wrote a strong dissent attacking the majority for revising "the very lathe of judge-made habeas jurisprudence [the AEDPA] was designed to repair."

In a smaller victory for criminal defendants seeking federal habeas relief, the Court unanimously held in *Trest v. Cain*,<sup>18</sup> that in reviewing a district court's habeas decision, a court of appeals was not required to raise sua sponte a habeas petitioner's potential procedural default. The Court left for another day, however, the issue of whether a court of appeals was "permitted" to raise a habeas petitioner's potential procedural default when the state itself did not do so.

The Supreme Court also decided two cases in accord with its inclination to limit the availability of federal habeas relief to state prisoners. In *Spencer v. Kemna*,<sup>19</sup> the Court held 8 to 1 that, although a habeas petitioner's release from prison did not cause his petition to become moot, the collateral consequences allegedly resulting from petitioner's parole revocation were insufficient to satisfy the injury-in-fact requirement of Article III. Justice Scalia explained that a habeas petitioner was only required to be incarcerated at the time he filed the petition. Once the petitioner was no longer in custody, there was a presumption that "some concrete and continuing injury" or "collateral consequence of the conviction" still existed for purposes of Article III. However, Scalia concluded that the presumption of continuing collateral consequences for wrongful

convictions did not extend to wrongful termination of parole status. Without the benefit of the presumption, petitioner was forced to allege specific "concrete injuries-in-fact" resulting from his parole revocation, such as, that it could be used against him in future parole or sentencing proceedings, and it could be used to impeach him as a witness in a future criminal or civil proceeding. However, all of petitioners' alleged injuries-in-fact were rejected as insufficient.

Furthermore, in *Calderon v. Ashmus*,<sup>20</sup> the Court unanimously held that an action brought by state death-row prisoners seeking injunctive and declaratory relief to determine whether California qualified under Chapter 154 of the Antiterrorism and Effective Death Penalty Act, which imposes heightened restrictions on filing for habeas relief for prisoners in qualifying states, was not a justiciable case within the meaning of Article III. Chief Justice Rehnquist reasoned that the true "controversy" between respondent and petitioner was whether respondent was entitled to habeas relief setting aside his sentence or conviction obtained under California law. Here, however, respondent was not seeking resolution of a "case or controversy," but rather attempting to determine whether California qualified under Chapter 154 in order to anticipate the best course of action in filing his habeas petition, thereby gaining a litigation advantage by obtaining an advance ruling on an affirmative defense.

## DOUBLE JEOPARDY

The Rehnquist Court also issued rulings restricting the protections afforded defendants under the Double Jeopardy Clause by narrowly defining its scope of applicability. In *Hudson v. United States*,<sup>21</sup> the Court determined that the administrative proceedings in which the Office of the Comptroller of Currency (OCC) imposed monetary penalties and debarment sanctions on petitioners for unlawful banking practices were civil proceedings for purposes of the Double Jeopardy Clause. Therefore, subsequent criminal prosecution was not unconstitutional. In concluding that the sanctions imposed by the OCC were civil in nature, the Court pointed to the language of the statute pursuant to which the sanctions were imposed as well as the fact that sanctions did not involve any "affirmative disability or restraint." Moreover, the purpose of the sanctions was to deter conduct, and deterrence serves civil as well as criminal goals. Consequently, petitioners could be criminally prosecuted for the same conduct for which the OCC penalties were imposed.

**The ruling in Stewart marks a relatively significant victory for state prisoners seeking adjudication ... in federal courts.**

17. 118 S. Ct. 1618 (1998).

18. 522 U.S. 87 (1997).

19. 118 S. Ct. 978 (1998).

20. 118 S. Ct. 1694 (1998).

21. 522 U.S. 93 (1997).

**For the most part, ... the 1997-1998 Term followed the pattern established by the Court under Chief Justice Burger ....**

In *Monge v. California*,<sup>22</sup> the Court further limited defendants' rights against successive prosecutions for the same offense after acquittal or conviction as well as protections against the imposition of multiple criminal punishments for the same criminal act by refusing to apply the Double Jeopardy Clause in noncapital sentencing proceedings. Justice O'Connor, writing for the 5 to 4 majority, held that the prosecution may seek

review of sentencing determinations and a defendant's sentence could be enhanced upon retrial without violating double jeopardy. The Court reasoned that sentence enhancements had never been construed as additional punishment for a past offense and sentencing determinations made in the defendant's favor could never be analogized to an acquittal, since they did not have the same qualities of constitutional finality. Although the Court had held in *Bullington v. Missouri*,<sup>23</sup> that double jeopardy principles applied in capital sentencing proceedings, the Court refused to extend this narrow exception to noncapital sentencing proceedings.

#### SENTENCING

The Court's lone and short ruling on sentencing upheld judges' authority under the Sentencing Guidelines to draw evidentiary conclusions beyond those drawn by the jury. In *Edwards v. United States*,<sup>24</sup> the Court unanimously held that a jury's beliefs about whether a conspiracy involved crack or cocaine were irrelevant in light of the judge's authority under the Sentencing Guidelines to consider whether defendants' offense-related activities involved either crack or cocaine.

#### STANDING

One of the most significant, as well as controversial, breaks from the Court's general trend of cutting off state defendants' access to federal courts was the holding of *Campbell v. Louisiana*,<sup>25</sup> in which the Court determined that a white defendant had standing to bring Equal Protection and Due Process claims for discrimination against African-Americans under Louisiana's system of selecting grand jury forepersons. In applying the three preconditions for third-party standing under *Powers v. Ohio*,<sup>26</sup> Justice Kennedy reasoned that, first, the defendant's injury in fact was the doubt cast on the integrity of the judicial system resulting from the discrimination; second, the white defendant's connection to the excluded

African-American veniremen was the common interest in eliminating racial discrimination in the selection of grand jury members; and third, the excluded veniremen had minimal incentive to assert their rights due to economic burdens. In dissent, Justices Scalia and Thomas argued that the alleged racial discrimination constituted "injury in perception" as opposed to injury in fact; and moreover, there was little, if any, connection between white defendants seeking reversal of their convictions and excluded African-American veniremen.

#### CONCLUSION

For the most part, the Supreme Court's decisions for the 1997-1998 Term followed the pattern established by the Court under Chief Justice Burger, in which the constitutional protections afforded defendants were narrowly defined throughout the criminal process. The Court reasserted its inclination to side with law enforcement in contexts such as the Fourth Amendment protection against unreasonable search and seizure, and the availability of the exclusionary remedy. However, there were a few small but significant victories for defendants seeking access to the federal courts and procedural protections throughout the trial process from cases addressing the Confrontation Clause, habeas corpus and standing.



*Charles H. Whitebread (A.B., Princeton University, 1965; LL.B. Yale Law School, 1968) is the George T. and Harriet E. Pflieger Professor of Law at the University of Southern California Law School, where he has taught for almost two decades. His oral presentation at the annual meetings of the American Judges Association exploring recent Supreme Court decisions on criminal procedure have been well received for many years. Professor Whitebread gratefully acknowledges the research assistance of Stephanie Zavala.*

#### SUGGESTIONS FOR THE RESOURCE PAGE

Each issue of *Court Review* features The Resource Page (see pages 35-36), which seeks to help judges find solutions to problems they may be facing, alert them to new publications, and generally try to provide some practical information judges can use. Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: [sleben@ix.netcom.com](mailto:sleben@ix.netcom.com).

22. 118 S. Ct. 2246 (1998).

23. 451 U.S. 430 (1981).

24. 118 S. Ct. 1475 (1998).

25. 118 S. Ct. 1419 (1998).

26. 499 U.S. 400 (1991).

Continued from page 5

therapeutic implications of mediation,<sup>8</sup> the therapeutic inappropriateness of the adversary system in certain substantive settings (e.g., adjudication of the “best interest” of children),<sup>9</sup> and the contribution of the legal system to lawyer distress.<sup>10</sup>

Moreover, in a true integration of theory and practice, therapeutic jurisprudence is beginning to influence day-to-day judging and lawyering.<sup>11</sup> In the judiciary, perhaps the most evident applications are in the creation of special treatment courts, such as drug courts, domestic violence courts, mental health courts, and the like. But creative problem solving approaches, and an emphasis on the healing (or traumatic) power of hearings, is increasingly of interest as well to general jurisdiction courts.

Efforts are now underway to introduce therapeutic jurisprudence – and other models that are alternatives to the argument culture – into judicial, legal practice and law school settings. The hope, of course, is that bringing an explicit ethic of care into judicial and legal practice will better serve consumers, will humanize the process, will contribute to judicial and lawyer satisfaction and decrease distress, and will attract to the profession some who now opt out of professional life altogether in a culture of critique.



David B. Wexler is the Lyons Professor of Law and Professor of Psychology at the University of Arizona and Professor of Law and Director, International Network on Therapeutic Jurisprudence, at the University of Puerto Rico. He serves as a member of the Research Advisory Committee of the National Center for State Courts. His latest book is *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press 1996) (with Bruce J. Winick).

#### LETTERS TO THE EDITOR

Letters to the Editor, intended for publication, are welcome. *Court Review* is received by more than 3,500 judges throughout the United States and beyond. Thus, it is a good forum for discussion of issues affecting the judicial system. Please send letters intended for publication to *Court Review's* editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: sleben@ix.netcom.com.

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8. See Ellen Waldman, “The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence,” 82 MARQUETTE L. REV. 155 (1998). Note that, on occasion, litigation itself may serve a therapeutic function. See Bruce Feldhusen, *supra* note 6, at 845.

9. See Janet Weinstein, “And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,” 52 U. MIAMI L. REV. 79 (1997) (adversary system inappropriate mechanism for adjudication of “best interest of child” issues).

10. See Amiram Elwork & G. Andrew H. Benjamin, “Lawyers in Distress,” in WEXLER & WINICK, *supra* note 2, at 569. For a synthesis and interesting discussion of much of the empirical literature on lawyer attributes, see Susan Daicoff, “Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,” 46 AM. U. L. REV. 1337 (1997).

11. See Peggy Fulton Hora & William G. Schma, “Therapeutic Jurisprudence,” 82 JUDICATURE 8 (July/Aug. 1998).

# Quiet Justice:

## Unreported Opinions of the United States Courts of Appeals – A Modest Proposal for Change

by Robert J. Van Der Velde

As the number of appeals continues to grow, the United States courts of appeals are increasingly choosing not to publish large numbers of their decisions, including decisions in civil appeals. The growing volume of litigation – and the small number of cases heard by the Supreme Court – have resulted in the courts of appeals becoming virtually the nation's courts of last resort. Accordingly, the ways in which these courts control publication of their decisions is important to litigants and the public.<sup>1</sup> This article explores how unreported appellate decisions differ from reported ones, and whether court policies and practices regarding non-publication of decisions should be revised.

Part I provides the historical background and reviews some of the literature regarding unreported circuit court decisions, most of which disapproves of non-publication, though frequently with little empirical data to support the criticisms. Part II presents an empirical analysis of reported and unreported decisions. Focusing on 1992 through 1995, the most recent years for which information is available, data are compiled for every appellate case across a series of variables. The data include information on the types of decisions that are published and not published, and answer the previously unexplored issue of whether cases with unpublished decisions are resolved significantly faster than those in which the court chooses to publish its decisions. Part III describes each circuit's local rules regarding publication, and examines whether the data suggest that the circuits follow these rules. Finally, Part IV sets forth proposed revisions to court policies regarding publication, and assesses the possible benefits and burdens of the suggested changes.

### PART I: BACKGROUND

The genesis of limited publication rules was the 1973 report of the Advisory Council for Appellate Justice<sup>2</sup> urging courts to reduce the number of published opinions. The report recommended the adoption of limited publication plans by the appellate courts, proposing that an opinion be published only if it 1) establishes a new rule of law, or alters or modifies an existing rule, 2) involves a legal issue of continuing public interest, 3) criticizes existing law or 4) resolves a conflict of authority. By 1977, most of the circuits had adopted limited publication plans, although with considerable variation in the criteria used to determine whether a decision should be published, how many votes are required to publish an opinion, and whether unpublished opinions may be cited.<sup>3</sup> As discussed in Part III below, such variations persist more than twenty years after the adoption of limited publication plans.

Limited publication rules have drawn considerable criticism. One commentator suggests that critiques of limited publication plans may be grouped into five broad categories: judicial accountability, review by higher court, predicting precedential value, equality of access, and judicial and litigant economy,<sup>4</sup> each discussed in turn herein.

Reynolds and Richman, two “judicial accountability” critics of limited publication rules, have attacked limited citation rules as allowing courts to decide behind closed doors “troublesome cases presenting issues the court does not want to address in public.” Although commentators have demonstrated that there are, indeed, instances of cases that should have been published but were not, perhaps due to an intentional failure to comply with the rules, none of the critics have

#### Footnotes

1. Concerns about delay at the district court level led to passage of the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (1990) (codified as amended at 28 U.S.C. §§ 471-82), but as yet no such reform effort has reached the appellate level.
2. Committee on the Use of Appellate Energies, Advisory Council for Appellate Justice, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973). For a more detailed explanation of the Advisory Committee report, see Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J. L. REF. 119 (1995) (hereinafter “Martineau”).
3. William L. Reynolds & William M. Richman, *The Non-precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) (hereinafter “Reynolds & Richman I”). See also, William L. Reynolds & William M. Richman, *An Evaluation of Limited*

*Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) (hereinafter “Reynolds & Richman II”); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L. J. 807, 809; Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L. J. 155 (1992); Milton J. Silverman, *The Unwritten Law: The Unpublished Opinion in California*, 51 CAL. ST. B. J. 33 (1976); Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977); Donald R. Songer, Danna Smith and Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 964 (1989).

4. Martineau, *supra* note 2, at 128-145.

undertaken a detailed study of all of the circuits. Thus, they are vulnerable to counter-criticism that there has been no systematic showing of increased "judicial irresponsibility"<sup>5</sup> as a consequence of the adoption of limited publication rules.

Intriguingly, one defense to the "judicial accountability" critics is that judges on an appellate panel who disagree with the court's decision will provide a concurring or dissenting opinion, and the majority and minority opinions would then qualify for publication.<sup>6</sup> However, as demonstrated in Part II below, significant numbers of cases with concurring or dissenting opinions go unpublished. Thus, even in cases in which appellate judges disagree about the law or its application to the facts the court nevertheless decides not to make this dispute public. Moreover, it is possible that an unprincipled but unanimous court might decide not to publish its opinion, even when it otherwise clearly met publication criteria.

Critics of limited publication plans have also argued that limited publication hampers judicial review by higher courts, as unpublished opinions could be used to hide embarrassing information about litigants or their counsel,<sup>7</sup> or to send messages to government agencies on future cases without disapproving of past cases.<sup>8</sup> Moreover, the prospects for the further review of unreported appellate panel decisions are diminishing. For example, as set forth below, in 1995 the United States courts of appeals issued opinions in 30,240 cases, 22,054 of which were unpublished. By contrast, in its 1995 Term, the Supreme Court issued opinions in only sixty-four cases arising from the circuits, two of which were appeals from unpublished dispositions.<sup>9</sup> The growing caseload of the circuits has resulted in "making the 13 intermediate appellate courts more and more the nation's courts of last resort."<sup>10</sup>

Critics also argue that judges are poor predictors of whether their decisions will be useful as precedent, and even advocates of limited publication usually concede this point. Part III of this article concludes that the variation in publication rates among the circuits cannot be explained by the local rules, suggesting that the circuits may not be following their own rules. This practice adds to the mounting evidence that there is a small but significant problem with courts and litigants relying on unpublished decisions despite rules to the contrary.<sup>11</sup>

Equality of access is also a substantial factor identified by critics of limited publication rules.<sup>12</sup> The use of computer technology by even solo practitioners may level the playing field, although several circuits refuse to provide unpublished opinions to computer-assisted legal research firms.<sup>13</sup> However, just as new published opinions now are generally made available to the public on the Internet, unpublished dispositions also could be made available on the Internet.

The judicial and litigant economy criticisms of limited publication suggest that there is little evidence that non-publication rules result in added productivity of the judiciary. However, analysis of data collected from each case should be useful in answering whether non-publication does save time.

Part II examines this question and demonstrates that cases with unpublished opinions are resolved substantially faster than those in which the opinion is published. Moreover, decisions without publication are resolved more quickly than published decisions in every category analyzed: the action taken by the court, the subject matter of the appeal, the type of appeal, whether the government is a party, the circuit in which the appeal is heard, and whether the case is heard on oral argument or decided on briefs alone.

Whether the benefit of this time savings outweighs the

5. *Id.* at 130. By their very nature, unreported decisions are not usually easily accessible to the public, so access to data about unreported decisions has been difficult for researchers not affiliated with the courts.

6. *Id.* at 129.

7. Judge Nichols of the Federal Circuit reports that in his experience as a visiting judge the Fifth and Eleventh Circuits will issue an opinion which reads in its entirety "AFFIRMED. See Loc. R. 47.6" in cases in which "the case presents no genuine appealable issue and the parties who initiated the appeal should have known this and probably did," which he terms "a rebuke for misuse of the appellate process, but one administered with true Southern courtesy." Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 55 AM. U. L. REV. 909 (1986).

8. *Id.* at 133. Table 6 sets forth data regarding unreported cases in which the government was a party.

9. The two cases are *Behrens v. Pelletier*, 516 U.S. 299 (1996) (reversing an unpublished Eleventh Circuit opinion), and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) (affirming an unpublished Sixth Circuit opinion). In addition, the Court noted in *Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235 (1996) that it granted *certiorari* to resolve a conflict between the Fourth Circuit's reported decision, a reported decision of the Tenth Circuit, and unreported decisions from the Second, Sixth and Ninth Circuits. *Id.* at 239. During the 1996 Term, the Court

reviewed two unpublished opinions of the circuits, *Lynce v. Mathis*, 519 U.S.433 (1997) (reversing an unpublished Eleventh Circuit opinion), and *Old Chief v. United States*, 519 U.S. 172 (1997) (reversing an unpublished Ninth Circuit opinion).

10. Federal Judicial Center, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (1990). The Report notes that while the Supreme Court granted *certiorari* in 157 of the 1,992 appellate cases decided in 1945 (7.9 percent of all decisions of the circuits), the 142 grants of *certiorari* in the 19,178 cases decided by the circuits in 1989 amounted to review of less than one percent of the appellate court's decisions.

11. See, e.g., Foa, *supra* note 3; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); Songer, Smith & Sheehan, *supra* note 3; Peter J. Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE U. L. REV. 277 (1988).

12. See, e.g., Foa, *supra* note 3; Robel, *supra* note 11; Reynolds & Richman II, *supra* note 3; Peter J. Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE U. L. REV. 277 (1988).

13. At last report, the Second, Third, Fifth and Eleventh Circuits did not make unreported opinions available to electronic publishers. Martineau, *supra* note 2, at 144.

costs is a more difficult policy question.<sup>14</sup> The literature leads to several questions that may be answered by the empirical data. First, is the number of unreported decisions growing? Second, are cases that should be published improperly relegated to unpublished status? Third, are unpublished opinions used only in cases involving routine subject matters or only in certain types of appeals? Fourth, is there a variation in publication among the circuits, and if so, may that variation be explained by the variations in publication rules? Finally, are cases with unpublished decisions resolved more quickly than those in which the court writes a published decision, and if so, is there a variation in the amount of time saved?

## PART II: THE DATA

This study examines all decisions of the United States courts of appeals in which opinions were issued from 1992 through 1995.<sup>15</sup> For each case terminated, the clerk completes a form setting forth basic data about the case. These forms are compiled by the Federal Judicial Center, and the data are then made available to researchers by the Interuniversity Consortium for Political and Social Research,<sup>16</sup> based at the University of Michigan.<sup>17</sup>

The number of unreported opinions has increased just as dramatically as the growth of appellate litigation. In 1981, the courts decided 18,885 appeals and just under half of decisions were unpublished,<sup>18</sup> but in 1995, more than seventy percent of the 30,240 opinions of the circuits were unpublished dispositions. Table 1 sets forth the total numbers of published and unpublished decisions from 1992 to 1995, demonstrating the overall trend toward increased use of unreported decisions. It is apparent that one mechanism the circuits have used to cope with an increasing caseload is the increased use of limited publication rules.

**Table 1: Publication Rates by Year**

YEAR	PUBLISHED	UNPUBLISHED	TOTAL	PERCENT UNPUBLISHED
1992	11811	22331	34142	65.4%
1993	8927	21526	30453	70.7%
1994	8538	20165	28703	70.3%
1995	8186	22054	30240	72.9%

Table 2 sets forth data on the number of cases published by the action taken on the merits. As one might expect, more than ninety percent of all cases dismissed as frivolous resulted in an unpublished decision. But the courts have frequently resorted to unpublished opinions in cases in which the lower court was reversed or remanded, in whole or in part. In 8,583 cases, the appellate court reversed or remanded, at least in part, yet the opinion of the appellate court was not published. These cases represent decisions where a reviewing court disagreed with the lower court, and therefore are decisions that, under most circuit rules, probably should have been published. As Table 2 also indicates, these reversals were accomplished more rapidly than in cases with published opinions, and the dismissals of frivolous appeals occurred considerably sooner when the opinion was not published. While the mean number of days pending<sup>19</sup> for appeals with published affirmances was 450, unpublished affirmances occurred in just 326 days. The disparity was somewhat less for outright reversals, with published opinions issued 456 days after the record was complete, compared to 406 days for unpublished opinions. By contrast, unpublished dismissals of frivolous appeals occurred after a mean of 221 days, or less than half the time of published reversals.

14. Although there is a substantial body of opinion that there is a "crisis of volume" facing the courts, a significant minority opinion that suggests that the "crisis" may be overstated. *Compare* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE at 109-110, with the minority report, *id.* at 123-24. The Report notes that the courts have coped with increasing caseloads "by adopting truncated procedures that probably have reached the limits of their utility without compromising the quality of the process." *Id.* at 111. Judge Posner reviews the limited publication rules and trends towards curtailing the number of oral arguments and concludes that the benefits of what he terms a "streamlined" appellate process outweigh the costs. Richard A. Posner, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 163-189 (1996).
15. Many appellate cases are resolved without judicial involvement, either by procedural default (such as the failure to comply with rules requiring the filing of the record) by settlement, or by voluntary dismissal by the appellant. This study examines only those cases where an opinion is issued on the merits. In addition, the data for 1992 reflect the conversion to a different reporting year and thus include 15 months of cases.
16. In slightly less than five percent of the cases data such as the dates of commencement or termination of the case, type of appeal, or

- category of appeal were missing. Consequently, calculations of mean days pending were made only for those cases in which data were present to permit the calculation. Because of missing data in some variables, the total number of cases is not the same for each table.
17. The data for this study are from ICPSR project 8429, and may be downloaded in SAS or SPSS format via the Internet at <<http://www.icpsr.umich.edu>>.
18. Donna Steinstra, *UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS* at 3 (1985) (finding that 49 percent of decisions in 1981 were not published). Data on the numbers of unpublished opinions have been reported in the Annual Reports of the Administrative Office only since 1989. One study indicated that non-publication rates in the 1960s were low as 16 percent. J. Woodford Howard, Jr., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS* (1981).
19. The mean days pending was calculated from the date the record was complete until the date of final judgment, rather than from the date the appeal was filed, so that delays in assembling the lower court's record would not be included.

**Table 2: Publication and Mean Days Pending by Type of Action Taken on the Merits**

Action on the Merits	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
Affirmed or Enforced	19521	65328	77.0%	450	326	362
Reversed or Vacated	7563	4543	37.5%	456	406	437
Affirmed in Part and Reversed in Part	5404	2690	33.2%	531	447	503
Dismissed - Frivolous	460	5384	92.1%	382	221	234
Remanded	886	1350	60.4%	487	363	412
Other	514	952	64.9%	489	412	439
ALL CASES	34348	80247	70.0%	465	337	375

Table 3 indicates that there were 1,063 cases in which a separate concurring or dissenting opinion was filed. This relatively low figure suggests that publication of all cases in which a member of the panel disagrees with the majority would not be an undue burden on publishers or the legal community.<sup>20</sup> Indeed, inclusion of these 1,063 cases would increase the total number of published opinions by less than three percent. Moreover, as also demonstrated by Table 3, the time cost of publication for these decisions does not appear to be significant. Although unpublished opinions in which there was a concurrence were resolved ninety days sooner than published cases, unpublished cases in which a dissent was filed were resolved only seven days sooner than published cases with a dissenting opinion. Thus, publication of all cases in which there is a dissenting or concurring opinion would come at little cost, either in time or volume.

20. The underlying assumption behind presumptive publication of such cases would be that they are likely to illuminate disagreements about developing legal issues. However, as Judge Nichols has noted, in some cases concurrences or dissents may not be based upon issues of law. Nichols, *supra* note 7 at 925. Moreover, Judge Nichols notes that publication of a decision in which he dissents would make the majority decision a binding precedent, a result many dissenters wish to avoid. *Id.* On the other hand, Robel indicates that mere information about the opinion of an individual judge may be valuable to litigants. Robel, *supra* note 11 at 947.

**Table 3: Publication and Mean Days Pending by Existence, Types of Separate Opinions**

Opinions	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
No separate opinion	33021	88689	72.9%	403	306	335
Dissenting opinion	2917	641	18.0%	457	450	456
Concurring opinion	1364	400	22.7%	467	377	448
Both concurring and dissenting opinion	168	20	10.6%	429	391	425
Both concurring and dissenting opinion - <i>en banc</i>	117	2	1.7%	412	N/A	412
ALL CASES	37587	87752	70.0%	409	308	340

The data in Table 4 on publication by case category<sup>21</sup> are equally illuminating. Publication rates vary considerably with case category, but in most categories at least half of the decisions are not published. Table 4 shows that eighty-five percent of Social Security appeals and almost ninety percent of decisions involving prisoner petitions were not published, as one might expect given the growing volume of litigation in these categories.<sup>22</sup> But even in categories such as contract, real property and bankruptcy actions, more than half of the decisions went unpublished. Prisoner petitions accounted for nearly half of all the unpublished decisions. As also shown by Table 4, in every case category, unpublished decisions were resolved more quickly than published decisions, and in some categories unpublished cases were completed as many as 100 days sooner.

21. The category of cases is derived from information contained on the civil cover sheet filed at the commencement of every case at the lower court. Case category, date of completion of the record, and/or date of termination is missing in some cases, so the total number of cases in these tables does not add to the total number of terminations on the merits.

22. See, Carol Krafka, Joe S. Cecil and Patricia Lombard, *STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS 4(1985)* (concluding that “growth in appellate caseloads has been partly attributable to increasing rates of appeal in prisoner actions and, to a lesser extent, civil rights cases”).

**Table 4: Publication and Mean Days Pending by Category of Case**

Category	PUBLISHED		UNPUBLISHED		ALL CASES	MEAN DAYS PENDING		
	Number	Percent of all Pub.	Number	Percent of all Unpub.	Percent Unpub.	Pub.	Unpub.	Cases
Contract	2375	11.6%	3252	6.3%	57.8%	388	309	342
Real Property	390	1.9%	608	1.2%	60.9%	438	344	382
Torts	2675	13.1%	4048	7.8%	60.2%	397	304	340
Civil Rights	4559	22.3%	9865	19.1%	68.4%	402	295	331
Prisoner Petition	3037	14.9%	25122	48.7%	89.2%	435	286	305
Forfeiture/ Penalty	208	1.0%	369	0.7%	64.0%	392	322	348
Labor	1724	8.4%	1618	3.1%	48.4%	407	328	368
Bankruptcy	11	0.1%	18	0.0%	62.1%	345	283	305
Property Rights	408	2.0%	360	0.7%	46.9%	393	322	360
Social Security	410	2.0%	2290	4.4%	84.8%	425	302	317
Federal Tax	387	1.9%	588	1.1%	60.3%	419	333	369
Other Statutes	4245	20.8%	3452	6.7%	44.8%	410	327	375
ALL CASES	20429	100%	51590	100%	71.6%	407	299	334

Table 5 presents data on publication rates and mean days pending by type of appeal. Considerable variation exists in publication rates among the different types of appeals. Notably, nearly seventy percent of all civil private cases were resolved without a published opinion;<sup>23</sup> three-quarters of civil

23. "Civil, private cases" includes many cases that fall into the "prisoner petition" category brought not as criminal appeals but as civil actions against state officials. Most of the remaining categories are self-explanatory. The "Criminal" category was replaced in January 1988 with the implementation of sentencing guidelines with five new categories: Guideline case - general; Pre-guideline case or other; Guideline case - sentence only; Guideline case - conviction only; Guideline case - sentence and conviction. "Original proceeding" includes petitions for writs of prohibition or mandamus, but not writs of habeas corpus. CODEBOOK FOR APPELLATE AND CIVIL DATA, (1997), available via the Internet from Inter-university Consortium for Political and Social Research at <<http://www.icpsr.umich.edu>>.

24. As discussed in n. 15, *supra*, the data for 1992 in this study include 15 months of cases due to the conversion to a different reporting year.

cases involving the United States were not published; and two-thirds to four-fifths of cases under the federal sentencing guidelines were unpublished dispositions.

Table 5 also demonstrates that in nearly every type of appeal, unpublished cases were completed more quickly than those cases with published opinions. Unpublished civil cases were resolved in as much as 100 days less than were cases with published opinions. Unpublished criminal decisions also were generally resolved in less time than were cases with published opinions. A small subset of unpublished criminal decisions — cases arising prior to the adoption of sentencing guidelines — were pending for an astounding mean of 1,821 days, but this would appear to be attributed to a statistical anomaly, since only fifteen unpublished cases fell into this category.

**Table 5: Publication and Mean Days Pending by Type of Appeal**

Type of Appeal	PUBLICATION			MEAN DAYS PENDING		All Cases
	Published	Unpublished	Percent Unpublished	Published	Unpublished	
Admin. Review	2742	4304	61.1%	400	314	351
Admin. Enforcemt.	334	894	72.8%	394	235	296
Civil, U.S.	4959	14922	75.1%	403	294	326
Civil, Private	16511	38245	69.8%	408	303	338
Criminal	35	15	30.0%	878	1821	1119
Original Proceeding	163	2307	93.4%	384	317	364
Bankruptcy, from BAP	94	187	66.5%	568	502	524
Bankruptcy, from Dist. Ct.	1276	1630	56.1%	394	296	339
Pre-guidelines	1467	2447	62.5%	443	304	352
Guidelines - general	232	986	81.0%	424	270	299
Guidelines - sentence only	1999	5876	74.6%	368	299	315
Guidelines - conviction only	1808	3593	66.5%	428	329	360
Guidelines - sentence & conviction	5697	11946	67.7%	418	331	357
ALL CASES	37587	87752	70.0%	409	308	340

Publication rates dropped considerably when the United States was not the appellant. Table 6 shows that while just over half of cases in which the United States was the appellant had unpublished opinions, over seventy percent of cases in which the government was not the appellant had unreported opinions. The disparity was slightly less when the government prevailed at the lower court. Table 6 also shows that when the government was involved, unpublished cases were concluded more quickly than the published counterparts, just as was true in cases generally.

**Table 6: Publication and Mean Days Pending by United States Status as a Party**

Party	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
Non-U.S. Appellant	34789	84590	70.9%	411	309	341
U.S. as Appellant	2798	3162	53.1%	384	270	328
Non-U.S. Appellee	21299	45241	68.0%	406	300	337
U.S. as Appellee	16288	42511	72.3%	415	316	344
ALL CASES	37587	87752	70.0%	409	308	340

Table 7 shows that wide variation in publication rates continued to exist among the circuits, ranging from 41 percent of cases unpublished in the First Circuit to 84 percent of cases unpublished in the Fourth Circuit. Table 7 also reveals that there were similar variations in the mean days pending for appeals, with a high of 408 days in the Seventh Circuit to a low of 215 days in the Second Circuit. In every circuit, unpublished cases were resolved more quickly than cases with published opinions, and in some circuits, such as the Ninth and Eleventh, cases with published opinions often took substantially longer to resolve. Further research may demonstrate whether this variation can be explained by variation in the circuits as to judicial workload, presence or absence of senior or visiting judges, or the number of vacant judgeships.

**Table 7: Publication and Mean Days Pending by Circuit**

	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
D.C. Circuit	1985	2391	54.6%	355	269	325
1 <sup>st</sup> Circuit	2063	1458	41.4%	316.71	220.52	277.90
2 <sup>nd</sup> Circuit	3125	5263	62.7%	265	185	215
3 <sup>rd</sup> Circuit	1885	7089	79.0%	325	204	231
4 <sup>th</sup> Circuit	1946	10363	84.2%	354	292	309
5 <sup>th</sup> Circuit	4728	12457	72.5%	360	234	272
6 <sup>th</sup> Circuit	2268	8211	78.4%	425	273	307
7 <sup>th</sup> Circuit	4770	3806	44.4%	437	372	408
8 <sup>th</sup> Circuit	4620	5354	53.7%	365	262	331
9 <sup>th</sup> Circuit	4750	16265	77.4%	576	435	467
10 <sup>th</sup> Circuit	2765	4917	64.0%	386	250	308
11 <sup>th</sup> Circuit	2682	10178	79.1%	521	338	377
ALL CASES	37587	87752	70.0%	409	308	340

The data clearly demonstrate that cases selected for oral argument are more frequently those in which a published opinion will issue. Whether a case is heard on oral argument does not determine whether an opinion will be published. Indeed, it is somewhat surprising that decisions in forty-four percent of cases judged significant enough to merit oral argument were not deemed worthy of publication. It is clear that oral argument increases the amount of time a case remains pending. Given the need for notice to the parties and time for the court and litigants to prepare for oral argument, it is not surprising that cases which were argued took an average of more than 100 days longer to resolve than those that were submitted solely on briefs. In contrast, lack of publication saved only fifty-five days for cases that were heard on oral argument. Courts would apparently save considerably more time by selecting fewer cases for oral argument than by reducing publication rates.

**Table 8: Publication & Mean Days Pending by Existence of Oral Argument**

	PUBLICATION			MEAN DAYS PENDING		
	Published	Unpublished	Percent Unpublished	Published	Unpublished	All Cases
Argued	26801	21375	44.4%	415	360	391
Not Argued	2661	41465	94.0%	349	281	285
ALL CASES	29462	62840	68.1%	409	308	340

With only one anomalous exception, already discussed, in every one of the variables examined by this study, cases with unpublished decisions were completed in considerably less time than cases with published decisions. It is impossible to determine without a detailed examination of each opinion whether this is because less care was taken with opinion writing in unpublished cases or simply because these cases were easier to resolve. But the data clearly demonstrate that there is a significant time savings associated with the increased reliance on limited publication rules.

### PART III: THE RULES AND WHETHER THEY ARE FOLLOWED

As noted in Part I, when the circuits originally adopted limited publication plans, there was considerable variation in the criteria used to determine whether a decision should be published, how many votes were required to publish an opinion, and whether unpublished opinions could be cited. These variations persist today and have resulted in significant disparities in publication rates. Table 9 sets forth the local rules of each circuit regarding publication of opinions. Four circuits have a presumption in favor of publication of opinions, and six have a presumption against publication. Criteria for publication range from specific to vague, or none at all. In some circuits one member of a panel can decide that the opinion should be published, and in others a majority is required. Most courts disfavor the citation of unreported opinions, and some prohibit citation.

Some evidence from other researchers suggests that these rules are not always followed, usually through review of the content of the unreported opinions to determine whether they made new law. Careful comparison of publication rates by circuit (in Table 7) with each court's local rules regarding presumptions about publication (in Table 9) provides additional evidence that the criteria in the courts' local rules may not always be followed. Two circuits with rules favoring publication nevertheless maintain high rates of unpublished decisions. Some seventy-eight percent of decisions went unpublished in the Sixth Circuit, while seventy-two percent of decisions were not published in the Fifth Circuit, two courts with rules favoring publication of opinions. The Seventh Circuit has a rule disfavoring publication, yet at forty-four percent had the second lowest rate of non-publication. Thus, although the local rules state each circuit's policy regarding publication, the data suggest that these policies are not uniformly implemented.

### PART IV: RECOMMENDATIONS AND CONCLUSION

The data presented in this article demonstrate that significant time savings occur through the use of limited publication plans by the appellate courts. With each variable examined, unpublished cases were concluded more quickly than published cases, and in some cases several months sooner.

The courts certainly use limited publication to resolve routine cases more quickly. The data show that many decisions on prisoner petitions and administrative appeals are not published, but at the same time large numbers of cases in non-rout-

**Table 9: 1998 Circuit Rules Regarding Publications**

Circuit	Presumption Regarding Publication	Criteria for Publication	Limited Citation	Votes Required for Publication
D.C.	In favor: Rule 36(a)	Specific: Rule 36(a)(2)	Prohibited: Rule 28(c)	
1 <sup>st</sup>	In favor: Rule 36.2	Specific: Rule 36.2(b)	Prohibited: Rule 36.2(b)(5)	One Judge: Rules 36.2(b)(2) & 36.2(b)(3)
2 <sup>nd</sup>			Oral decisions from bench not to be cited: Rule §0.23	
3 <sup>rd</sup>	Against: IOP 5.3	Vague: IOP 5.3	Court "by tradition" does not cite: IOP 5.8	Majority: IOP 5.1
4 <sup>th</sup>	Against: Rule 36(a)	Specific: Rule 36(a)	Disfavored: Rule 36(b)	Author or majority: Rule 36(a)
5 <sup>th</sup>	In favor: Rule 47.5.2	Specific: Rule 47.5.1	Allowed: Rule 47.5.4, but see Rule 47.5.3 for opinions before 1996	One Judge: Rule 47.5.2
6 <sup>th</sup>	In favor: Rule 24(b)	Specific: Rule 24(a)	Disfavored: Rule 24(c)	Majority may decide not to publish: Rule 24(b)
7 <sup>th</sup>	Against: Rule 53	Specific: Rule 53(c)	Prohibited: Rule 53(b)(2)(iv)	Majority: Rule 53(d)
8 <sup>th</sup>	None	Specific: Plan for Publication of Opinions	"Generally should not cite": Rule 28A(k)	One judge: Plan for Publication of Opinions
9 <sup>th</sup>	Against: Rule 36-2	Specific: Rule 36-2	Prohibited: Rule 36-3	Majority: Rule 36-5
10 <sup>th</sup>	Against: Rule 36.1	Specific for appeals of published decisions: Rule 36.2	Not favored: Rule 36.3	"The court": Rule 36.2
11 <sup>th</sup>	Against: Rule 36.1	Specific: Rule 36-1	May be cited: Rule 36-2	Majority: Rule 36-2

tine categories also go unpublished.

The data also indicate that a rule requiring the publication of cases with dissents or concurrences would not be a substantial burden, increasing the total number of published cases over four years<sup>24</sup> by only 1,063, an increase of just over one percent. A significantly higher number of cases would be added to publication if all reversals<sup>25</sup> were published, adding 8,583 cases to the 37,462 decisions published during the four years, an increase of ten percent.

The benefits of publication of all cases with separate opinions (dissents or concurrences) and of all reversals appears to outweigh the burden of publication. Such a rule would make public judicial expositions about the law or its application to the facts in cases in which reasonable minds may differ. These modifications of the rules could quell criticism of limited publication rules on the basis of judicial accountability at minimal cost to judicial efficiency. Finally, revision of publication rules in these ways would help the public and legal community understand what appellate judges are thinking about the evolution of the law.

Additional research may be needed to understand fully the appellate courts' use of limited publication. Continued examination of the content of unreported opinions would help determine the extent to which the courts do not follow their stated criteria for publication. Review of unpublished opinions also would reveal whether unreported cases themselves rely on other, unpublished decisions. Finally, the effect of workload, judicial vacancies, and the use of visiting and senior judges should also be studied. There is considerable variation in publication among the circuits, and these factors might help explain that variance.

If "justice delayed is justice denied," limited publication rules do reduce delay and resulting injustice. However, the modest revisions suggested here to current limited publication rules would help ensure that justice would be rendered publicly without substantial delay.



Robert J. Van Der Velde is an assistant professor at Auburn University Montgomery, where he is director of the Judicial Administration and Legal Assistant education programs. He earned a B.A. in political science from Ohio State University; a M.S. in urban studies from Cleveland State University; and a J.D. from Cleveland-Marshall College of Law. Before joining the faculty at AUM, he practiced law for nine years. Van Der Velde was named the 1997 School of Sciences Teacher of the Year at AUM.

25. This calculation includes cases which were reversed, vacated, remanded, or reversed in part.

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# Due Process Denied?

## Exploring the Constitutionality of the Senate's Failure to Timely Consider and Vote on Federal Judicial Nominees

by Jeffrey A. Goldberg

In 1787, our Founding Fathers agreed to compromise when they determined which branch of government would have the power to fill judicial vacancies in the federal courts. As the process has evolved, the President's power to nominate and the Senate's power to confirm have been the subject of intense scrutiny and heated debate. But in recent years, a Republican-controlled Senate has caused discussion on the issue to escalate by employing non-substantive methods to avoid acting upon President Clinton's selections.

This article discusses the Senate's role in the judicial appointment process and examines its procedural misconduct. Part I recounts the early development of the selection process and summarizes the prevailing views on the issue at the Constitutional Convention. Part II reports on the current state of the federal judiciary and cites specific examples of unreasonable delay. Part III analyzes the problem through a due process inquiry and challenges the status quo on public policy grounds. Ultimately, this article criticizes the Senate's abuse of its advise-and-consent authority and questions the legal and ethical grounds for its stall tactics.

### I. HISTORICAL BACKGROUND

The Constitution provides that the President "shall nominate, and by and with the [a]dvice and [c]onsent of the Senate, shall appoint ... [j]udges of the [S]upreme Court, and all other [o]fficers of the United States, whose [a]ppointments are not herein otherwise provided for ... ." <sup>1</sup> The Framers settled on this language after significant debate over whether the power to appoint federal judges should be given to the President or to Congress. The cooperative structure adopted above was first proposed on June 18, 1787, by Alexander Hamilton, who suggested that—instead of granting the entire appointment power to one body—the executive could select candidates "subject to the approbation or rejection of the Senate."<sup>2</sup>

Supporters of total executive control had argued, among other things, that (1) there would be greater accountability if the President alone were responsible, (2) groups of individuals are more vulnerable to "intrigue," (3) the President would be more capable of selecting qualified persons, and (4) since senators—unlike the executive—would not represent the entire

nation, a powerful senator could convince his colleagues to appoint a candidate from his own state.<sup>3</sup>

Those who lobbied in favor of absolute senatorial authority asserted that (1) placing the appointment power solely in the hands of the President would resemble a monarchy, (2) the President would not really be accountable since he would be immune from punishment for poor selections, (3) the President—not the Senate—would be more susceptible to intrigue, and (4) the Senate would be far more familiar with the pool of possible nominees.<sup>4</sup>

While some scholars have concluded that the records of the debates and the resulting text indicate that the Founding Fathers' intent was for the Senate to play a major role in the appointment process,<sup>5</sup> Hamilton's writings imply otherwise. He wrote that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment."<sup>6</sup> Moreover, he commented, a "single, well directed man ... cannot be distracted and warped by that diversity of views, feelings and interests, which frequently distract and warp the resolutions of a collective body."<sup>7</sup> The Federalist Papers also espouse Hamilton's view that the Senate should give great deference to the President's choices.<sup>8</sup>

But history and practice have not confirmed his position; the Senate—as early as its first term—has taken an active role in assessing the President's appointments.<sup>9</sup> As a result, legal minds have not seriously questioned the constitutionality of a hawkish Senate. But neither the text of the Constitution nor the debates in 1787 provide much guidance as to what factors may be considered by the President when nominating and by the Senate when consenting. Much debate, therefore, has centered on the criteria by which candidates should be evaluated, and the appropriate grounds on which to base a rejection of a president's nominee.<sup>10</sup>

But also conspicuously absent from the text, the Convention records, and the Federalist Papers is any mention or guidance as to the *procedure* by which the President and Senate are to carry out their appointment responsibilities. Once an opening occurs, for example, the Constitution does not specify how quickly the President must forward to the Senate the name of a

Editor's Note: This article, one of the winning essays in the AJAs annual writing competition for law students, was completed in May 1998. It has not been revised after that date by the author to reflect later activities involving judicial appointments. However, this issue of

*Court Review* also contains an interview with Eleanor Dean Acheson, the Assistant Attorney General who works on judicial appointments within the Justice Department. More recent data on judicial appointments can be found in that interview.

replacement. Nor does it state how the Senate is to effectuate its advise-and-consent duty. Are hearings necessary? If so, who may testify? Must the candidate attend? If not, should absence create negative implications?

Just as the *substantive* factors that the Senate should consider when determining whether a particular candidate is fit to be a federal judge have evolved over time, so have the *procedural* nuances of the Senate's fact-finding mission. For example, the Senate Judiciary Committee now routinely questions nominees and recommends whether the entire Senate should approve the candidate.

## II. RECENT DEVELOPMENTS

Despite an historical record of relative cooperation on appointments, the federal judiciary has become severely strained in recent years due to numerous vacancies and an ever-increasing docket. The congestion in the courts has been caused primarily by the failures of the President and the Senate, collectively, to timely appoint judges to fill a growing pool of open positions. On December 31, 1997, Chief Justice William H. Rehnquist, in his annual report on the federal courts, summarized the problem:

If Federal jurisdiction remains at its current level—or, worse, increases—judicial vacancies will aggravate the problem of too few judges and too much work. Currently, 82 of the 846 Article III judicial offices in the Federal judiciary—almost 1 out of every 10—are vacant. Twenty-six of the vacancies have been in existence for 18 months or longer and on that basis constitute what are called “judicial emergencies.” In the Court of Appeals for the Ninth Circuit, the percentage of vacancies is particularly troubling, with over one-third of its seats empty.

Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high lev-

els indefinitely without eroding the quality of justice that traditionally has been associated with the Federal judiciary. Fortunately for the judiciary, a dependable corps of senior judges has contributed significantly to easing the impact of unfilled judgeships.

**[T]he federal judiciary has become severely strained in recent years ....**

... The Senate is, of course, very much a part of the appointment process for any Article III judge. One nominated by the President is not “appointed” until confirmed by the Senate. The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote for him up or vote him down. In the latter case, the President can then send up another nominee....<sup>11</sup>

While most have acknowledged that the Clinton Administration has been slow to nominate candidates,<sup>12</sup> it has become clear that the Senate has been the primary culprit. As the Chief Justice also wrote:

Whatever the size of the Federal judiciary, the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994.<sup>13</sup>

Much of the debate over the failure of the Senate to confirm many of the President's nominations has focused on the ideal-

### Footnotes

1. U.S. CONST. art. II, § 2, cl. 2.
2. JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 138 (A. Koch ed., 1966).
3. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 636-38 (1987).
4. *Id.* at 636-38.
5. See, e.g., Charles Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); see also Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1101-04 (1993).
6. THE FEDERALIST NO. 76, at 492 (Alexander Hamilton) (Modern Library ed. 1937).
7. *Id.*
8. Ross, *supra* note 3, at 640-41.
9. *Id.* at 642-44.
10. See, e.g., Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273 (1989).
11. William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary*.
12. See, e.g., *Emergency in the Courts*, N.Y. TIMES, Apr. 6, 1998, at A22 (“President Clinton has been inexcusably slow in making nominations.”).
13. Rehnquist, *supra* note 11. Much has been made of those nominees who have waited years to get a hearing. A January 1998 editorial highlighted these egregious situations:  
It is almost unbelievable that one of President Clinton's nominees to the federal bench is still waiting for Senate action on his nomination after almost three years. That is not a typographical error. Nor is William A. Fletcher—a well-reputed law professor who was nominated to serve on the U.S. Court of Appeals for the 9th Circuit—the only one of Mr. Clinton's nominees to live in confirmation limbo for such periods of time. There are actually seven would-be judges who have been waiting for a Senate vote since 1995.

The 1995 Seven, WASH. POST, Jan. 9, 1998, at A20.

... the more vexing problem has been the Senate's procedural misconduct ....

ogy of the candidate—the Senate, for example, has refused to confirm any nominee deemed too liberal or “activist.”<sup>14</sup> Although the Clinton Administration has criticized this practice, most agree that the Senate has wide discretion in determining the basis on which to reject a nominee.<sup>15</sup>

But relatively little has been written about the Senate's procedural maneuvers (e.g., neglecting to consider a nominee *altogether*). Again, as Justice Rehnquist commented in his 1997 report:

[T]he Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote....

The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote for him up or vote him down.<sup>16</sup>

It is within this procedural arena that the Senate's abuse of its advice and consent authority is most glaring.

### III. CRITICAL ANALYSIS

As stated previously, most commentators do not question the Senate's right to evaluate and, if it so desires, block the confirmation of a particular nominee of the President.<sup>17</sup> What's more, although most rejections are based on substantive disagreements, from the earliest days we have known that the Senate is not required to give any reason at all for rebuffing a candidate.<sup>18</sup> But the more vexing problem has been the Senate's procedural misconduct—the refusal in many cases even to grant a hearing

or call a vote on the nominee. Such stall tactics do not comport with traditional notions of due process and are impermissible as a matter of public policy.

#### A. Due Process

Although Congress may legislate in whatever manner is “necessary and proper” to carry out its powers,<sup>19</sup> it may not act if to do so would violate other constitutional provisions.<sup>20</sup> Similarly, Congress may determine its own internal rules and procedures,<sup>21</sup> but the Supreme Court has—on at least one occasion—announced that congressional proceedings may not infringe other parts of the Constitution. In the century-old case of *United States v. Ballin*,<sup>22</sup> the Court, in considering the validity of a House of Representatives rule, wrote that

[t]he [C]onstitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.<sup>23</sup>

Both the Fifth and Fourteenth Amendments guard against the deprivation of “life, liberty, or property without due process of law.”<sup>24</sup> Could the Senate's refusal to hold hearings or call votes on announced nominees be considered a violation of procedural due process? Perhaps. A closer examination of such an assertion reveals that the biggest impediments to a claim of this kind would be demonstrating justiciability and establishing the presence of a protectable interest.

#### 1. DEMONSTRATING JUSTICIABILITY

Any claim that an interest was unconstitutionally deprived would fail if a judge considered it non-justiciable. This may occur if a reviewing court rules that the Senate's refusal to hold hearings or conduct votes is a “political question” and, therefore, one that the judiciary should not pass upon.<sup>25</sup> Although

14. See, e.g., Marianne Means, *GOP Puts Choke-Hold on Courts*, ROCKY MTN. NEWS, Jan. 26, 1998, at 38A.

15. See generally Ross, *supra* note 3.

16. Rehnquist, *supra* note 11.

17. See *supra* note 9.

18. George Washington once wrote: “[A]s the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs.” JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 39 (1953).

19. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have [p]ower [t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers, and all other [p]owers vested by this Constitution in the [g]overnment of the United States, or in any [d]epartment or [o]fficer thereof.”).

20. See *Sheldon v. Sill*, 49 U.S. 441 (1850).

21. U.S. CONST. art. I, § 5, cl. 2 (“Each [h]ouse may determine the [r]ules of its [p]roceedings . . .”).

22. 144 U.S. 1 (1892).

23. *Id.* at 5 (emphasis added).

24. U.S. CONST. amend. V (“No person shall be . . . deprived of life,

liberty, or property, without due process of law . . . .”); *id.* at amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”).

25. The modern explanation of the political question doctrine may be found in *Baker v. Carr*, 369 U.S. 186 (1962). The Supreme Court outlined six factors which may define political question cases:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

there have been many cases dealing with the political question doctrine, one recent decision, involving the impeachment of a federal judge, is particularly relevant to the issues addressed in this paper.

In *Nixon v. United States*,<sup>26</sup> a unanimous Supreme Court affirmed the lower courts' dismissals of an action brought by former federal district court judge Walter L. Nixon, Jr., against the Senate challenging the circumstances of his impeachment. Nixon had asserted that the Senate's procedures, whereby a committee would conduct an evidentiary hearing and then report findings to the entire Senate for consideration prior to a full vote, were unconstitutional.<sup>27</sup> Specifically, he argued that a Senate rule prohibiting the entire Senate from taking part in the hearings was inconsistent with the Constitution's mandate that the Senate is to try all impeachments.<sup>28</sup> In ruling that the case presented a non-justiciable political question, the Court relied primarily on the fact that there was a textually demonstrable constitutional commitment of the issue to the legislative branch. It reasoned that the most plausible interpretation of the relevant text led to a conclusion "that the Framers did not intend to impose additional limits on the form of the Senate proceedings . . . ."<sup>29</sup>

But *Nixon* would not necessarily control in the appointments context. Although the Court overwhelmingly voted to affirm, the justices were divided, 7-2, on the issue of justiciability<sup>30</sup> and, more importantly, most of the features of the impeachment clause which the majority cited when reaching its holding cannot be found in the appointments language. For example, the Court made much of the fact that the Senate had been given the "sole" responsibility to try impeachments; such limiting language is not present in the advice and consent area.<sup>31</sup> Justice White emphasized that judicial review exists in many areas that are "textually demonstrable" to other branches.<sup>32</sup>

Moreover, the *Nixon* majority essentially reaffirmed the proposition stated in *Ballin*<sup>33</sup> when it distinguished *Powell v. McCormack*.<sup>34</sup> In that case the House of Representatives sought to exclude a newly elected member, Adam Clayton Powell, Jr., based on reports that he had deceived House authorities during a prior investigation.<sup>35</sup> Powell claimed that the House could only prevent him from taking office if it found that he failed to meet the qualifications specifically set forth in the

Constitution.<sup>36</sup> Noting that the House's assertions would fly in the face of an explicit textual limitation elsewhere in the Constitution, the Court agreed.<sup>37</sup>

The *Nixon* Court explained that, since there was no separate constitutional provision limiting the Senate's impeachment power, *Powell* could not be applied to the *Nixon* dispute.<sup>38</sup> But the Court observed—as it had in *Ballin* seventy-seven years earlier—that expressed powers could not be exercised in violation of and in contradiction to other parts of the Constitution:

In the case before us, *there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in the Impeachment Trial Clause. We agree with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits. As we have made clear, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."*<sup>39</sup>

This was essentially the position taken by Judge Harry T. Edwards when he dissented at the appellate level. He noted that

[i]t is clear from the Supreme Court's rulings . . . that while the courts may well be barred from second-guessing Congress' fact-finding and policy judgments within the zones of discretion assigned it by the Constitution, the courts may review claims that Congress has exceeded an explicit textual limitation on its powers. . . .

But this assignment of power, like the assignment of

**... Nixon would not necessarily control in the appointments context.**

26. 506 U.S. 224 (1993).

27. *Id.* at 228.

28. The Impeachment Trial Clause provides that the "Senate shall have the sole [p]ower to try all [i]mpeachments." U.S. CONST. art. I, § 3, cl. 6.

29. *Nixon*, 506 U.S. at 230.

30. Justices White and Blackmun concluded that the case was justiciable, but voted to affirm "because the Senate fulfilled its constitutional obligation to 'try' [the] petitioner." *Id.* at 239 (White, J., concurring).

31. Although by its terms the advice and consent task is one solely for the Senate, the context of the language and the circumstances of its adoption suggest a more collaborative situation.

32. *Nixon*, 506 U.S. at 240 (White, J., concurring) ("There are numerous instances of this sort of textual commitment, e.g., Art. I, § 8 . . .").

33. See *supra* note 23 and accompanying text.

34. 395 U.S. 486 (1969).

35. *Id.* at 490.

36. U.S. CONST. art. I, § 2. The entire provision reads: "The House of Representatives shall be composed of [m]embers chosen every second [y]ear by the [p]eople of the several [s]tates, and the [e]lectors in each [s]tate shall have the [q]ualifications requisite for [e]lectors of the most numerous [b]ranch of the [s]tate [l]egislature."

37. *Powell*, 395 U.S. at 550.

38. *Nixon*, 506 U.S. at 236-237.

39. *Id.* at 237-238 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)) (alternations in original) (emphasis added).

**[T]he candidate would still have to demonstrate that a protectable interest was present.**

power to Congress to regulate interstate commerce or to provide for the general welfare, may be exercised only within the constraints of other constitutional provisions.<sup>40</sup>

Accordingly, although *Nixon* may be viewed as weighing against a finding of justiciability, the case is distinguish-

able in key factual areas. Moreover, the Court reaffirmed—albeit in dicta—the fundamental principle noted in *Ballin*: congressional procedural rules may not run afoul of other constitutional provisions.

## 2. ESTABLISHING THE PRESENCE OF A PROTECTABLE INTEREST

But even if a judicial nominee could persuade a tribunal to maintain an action over claims that it is non-reviewable, the candidate would still have to demonstrate that a protectable interest was present.

In order to establish a procedural due process violation, a claimant must first assert that a “liberty” or “property” interest existed.<sup>41</sup> Could a nominee have a legitimate and foreseeable interest in a federal judgeship? As the Supreme Court has noted:

“Liberty” and “property” are broad and majestic terms. They are among the “[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.”<sup>42</sup>

While the term “property” has traditionally been used to categorize *tangible* effects, the Court has made clear that “property interests protected by procedural due process *extend well beyond actual ownership* of real estate, chattels, or money.”<sup>43</sup>

Accordingly, the Supreme Court has ruled, for example, that

those reaping welfare benefits under certain qualification standards may have a protectable property interest in their *continuous* receipt.<sup>44</sup> And, in a related case, the Court held that a lawyer who had been denied the right to practice before a state tax board—without a prior hearing or statement explaining the reasons for the rejection—had a property interest and claim to practice because the state board had published eligibility rules.<sup>45</sup> In areas of public employment, the existence of a protectable property right has frequently been found when professors have been dismissed in the face of explicit tenure standards or contract provisions.<sup>46</sup>

But the *absence* of formal rules—either in eligibility regulations, tenure rules, or contract provisions—has not been deemed dispositive on the issue of whether there exists a claim of a protectable property interest.<sup>47</sup> Instead, the Court has looked to see whether the interests could have accrued based on the facts and circumstances surrounding the dispute: “[Property interests] . . . are created and their dimensions are defined by . . . rules or *understandings* that secure certain benefits and that support claims of entitlement to those benefits.”<sup>48</sup>

So in the public employment context, for example, the Supreme Court, in *Perry v. Sindermann*,<sup>49</sup> held that an allegation that a college had a *de facto* tenure policy—which allegedly arose from existing rules and understandings at the institution—entitled a professor to prove the legitimacy of his claim that he deserved tenure.<sup>50</sup> Even though the Court made clear that a mere subjective expectancy of employment is not protected by procedural due process,<sup>51</sup> it established a framework that is helpful for analyzing whether Presidential nominees have a legitimate interest in taking office.

The Court in *Perry* wrote that the professor’s “interest, though not secured by a formal contractual tenure provision, was secured by a no less binding *understanding fostered by the college administration*.”<sup>52</sup> The professor had alleged that he relied on, among other things, an obscure provision in the college’s faculty guide and guidelines promulgated by the state board, both of which could be interpreted as establishing a *de facto* tenure program.<sup>53</sup> Declining to require that formal, written tenure pronouncements be a prerequisite to a protectable interest finding, the Court explained that

“property” denotes a broad range of interests that are secured by “existing rules or understandings.”

40. *Nixon v. United States*, 938 F.2d 239, 255-56 (D.C. Cir. 1991) (Edwards, J., dissenting).

41. *Cleveland Bd. of Educ. v. Loudermill*, 408 U.S. 564, 576-78 (1972).

42. *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972) (citations omitted).

43. *Id.* (citations omitted) (emphasis added).

44. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

45. *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926). In *Goldsmith* the rules indicated that the state board had the discretion to turn down any applicant, but the Supreme Court ruled that the discretionary power could only have been “exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.” *Id.* at 123.

46. See, e.g., *Slochower v. Board of Educ.*, 350 U.S. 551 (1956) (tenure provisions); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (contracts).

47. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (“The respondent’s lack of formal contractual or tenure security in continued employment . . . is highly relevant to his procedural due process claim. *But it may not be entirely dispositive.*” (emphasis added)).

48. *Roth*, 408 U.S. at 577 (emphasis added).

49. 408 U.S. 593 (1972).

50. *Id.* at 599-602.

51. *Id.* at 603.

52. *Id.* at 599 (emphasis added).

53. *Id.* at 600.

A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.<sup>54</sup>

Just as in *Perry*, where a candidate for tenure cited the college's typical practices in support a claim of entitlement to a hearing on his qualifications, a Presidential nominee should be able to point to the Senate's traditional function in the appointment process as evidence that the nominee is entitled to some congressional action. Although recent scenarios may cause some to question the premise,<sup>55</sup> the Senate's role has consistently and regularly included holding hearings and calling votes. Accordingly, when the President selects an individual for a federal office, "rules and mutually explicit understandings" make it reasonable to assume that the Senate will, in the vast majority of cases,<sup>56</sup> eventually act upon the nomination.

In light of this reasoning, and based on the holdings of the cases discussed previously, an argument could be made that, when the President carries out his or her constitutional duties and nominates an individual to fill a vacant seat in the federal courts, a legitimate and foreseeable property interest of public employment inures to that nominee.<sup>57</sup> In turn, that interest becomes protected by procedural due process and any attempt to deprive an individual of that interest without a fair hearing or a formal decision, within a reasonable period of time, could be viewed as unconstitutional.<sup>58</sup>

## B. Public Policy

Demonstrating that the Senate or some of its members have violated the procedural due process rights of a Presidential nominee by refusing to hold hearings or call a vote would be, admittedly, a difficult task to accomplish. The legal hurdles cited and explored above would be hard to overcome. These realities notwithstanding, there are

strong policy reasons why the Senate should halt its stall tactics. Most notably, the Senate's disregard for the advice and consent process has adversely affected the administration of justice and will likely be cited by future Senates as an "appropriate" way of expressing dissatisfaction with the President's nominees.

### 1. ADVERSELY AFFECTING THE ADMINISTRATION OF JUSTICE

As noted previously, Chief Justice Rehnquist has warned that "[v]acancies cannot remain at such high levels ... without eroding the quality of justice ... ." <sup>59</sup> This sentiment has proven true in many jurisdictions and has been echoed at length by the media and other interested groups.

In March 1998, Second Circuit Chief Judge Ralph Winter declared a "judicial emergency" and, among other things, cancelled some arguments scheduled for April 1998.<sup>60</sup> Noting that only eight of the circuit's thirteen seats were filled, he authorized the practice of using as many as two visiting judges for the three-person panels.<sup>61</sup> The Fifth Circuit had also previously declared such a crisis.<sup>62</sup>

The mainstream media has been quick to highlight the problem. The Gannett News Service recently reported the following:

With one out of every 10 federal judgeships now vacant, a backlog of cases is forcing widespread cancellation of hearings, delays in civil trials that can go on for years and is prompting some courts to rely more heavily on retired volunteer judges.

Retired judges, who often travel between courts at

**"[R]ules and mutually explicit understandings" make it reasonable to assume that the Senate will ... eventually act upon the nomination.**

54. *Id.* at 601 (citations omitted) (emphasis added).

55. Several notable cases of Senate stalling have prevented the confirmation of some non-judicial nominees in recent years. See, e.g., Wendy Koch, *Senator Torpedos Hormel Nomination*, S.F. EXAMINER, Feb. 12, 1998, at A-1 (James Hormel for U.S. Ambassador to Luxembourg); David LaGesse, *Weld Ends Fight to Be Ambassador*, DALLAS MORNING NEWS, Sept. 16, 1997, at 1A (William Weld for U.S. Ambassador to Mexico).

56. To be sure, the Senate has throughout the past two centuries failed to act on certain nominations. See Ross, *supra* note 3, at n.61. But they can easily be viewed as isolated incidents.

57. The issue of whether a judicial candidate has a protectable interest in a vacant position was addressed in *Bason v. Judicial Council of the District of Columbia Circuit*, 86 B.R. 744 (1988). In that case, an incumbent bankruptcy judge, George Francis Bason, Jr., who was not chosen for reappointment, sought injunctive relief to prevent the appointing body from installing someone else; he asserted that his right to procedural due process was violated. *Id.* at 747. Bason contended that subsection 120(b) of the Bankruptcy Amendments and Federal Judgeship Act of 1984,

which directs the courts of appeals to select individuals to serve as United States bankruptcy judges, entitled him to a legitimate claim of reappointment after his term had expired. *Id.* at 748. That subsection mandated that incumbent judges receive "consideration equal to that given all other potential nominees for such [vacant] position." *Id.* In denying Bason's motion, the court noted that nothing in the statute's words granted an incumbent a right to the seat; the appointing body could, after giving due and "equal" consideration, select another candidate. *Id.*

But Bason's reasoning cannot be applied to the federal judgeship appointment process. Unlike in *Bason*, until the Senate formally votes a nomination down, the President's candidate is the only individual who may be considered for the vacancy.

58. At least one court has viewed a "possible reappointment" as worthy of some protection, if not the "full panoply" of due process. See Halleck v. Berliner, 427 F. Supp. 1225, 1236 (1977).

59. Rehnquist, *supra* note 11 and accompanying text.

60. *Today's News Update*, N.Y.L.J., Mar. 25, 1998, at 1.

61. *Id.*

62. *Id.*

taxpayer expense to hear cases, now are hearing one in five district court trial cases, up from 14.6 percent of such cases in 1990. At the same time, the number of trials conducted has dropped.

... Meanwhile, local judges say average citizens are being caught in the crossfire.

— Chief Judge Proctor Hug of the 9th Circuit Court ... is facing the most vacancies, with nine of 28 slots on his bench empty. Hug says 600 hearings were canceled last year and civil trials have been pushed back, often for years, to give criminal cases priority. “Examples are persons with claims for Social Security, insurance, environmental suits, and contract disputes in corporate cases ... and people who have disability claims,” Hug said. “They all have to wait.”

— Florida’s Middle District Chief Judge Elizabeth Kovachevich said although a vacancy open since 1995 was recently filled, the system is still heavily clogged. “Everybody is at max, and when you have a vacancy, the people who are going to get hurt are the litigants,” she said. “The chief justice stated it eloquently: The system will be on verge of collapse and there is no quick fix for this.”

— Henry Politz, chief judge of the 5th Circuit Court, said his judges no longer have time for civil cases. “Our judges in divisions on the border, from Brownsville (Texas) west, have such a heavy criminal docket that getting to a civil case is very difficult,” he said. “I don’t see any relief in that.”

— Chief Judge Juan Torruella of the 1st Circuit Court ... said he has been relying heavily on visiting judges during the past year, because one of six positions has been left open. The vacancies “affect the quality of justice and the speed at which justice can be applied to the citizenship,” he said.<sup>63</sup>

Given these testimonials, it is troubling to witness the delays in the Senate. Combining congressional postponements with an ever-increasing docket creates a recipe for disaster. Individual senators must come to realize that their actions—or, rather, inactions—have a direct impact on the everyday litigant. And,

as such, they have a higher duty: to ensure that unnecessary political posturing does not disable our system of justice.

## 2. SETTING AN INAPPROPRIATE STANDARD FOR FUTURE SENATES

Although, as stated previously, the decision to withhold action on particular nominations is not a new phenomenon,<sup>64</sup> there is little doubt that the degree to which the Senate is seeking to delay the appointment process is greater than that seen in any recent term.<sup>65</sup> Whatever the Senate’s motivation,<sup>66</sup> some predict that—should the political tides shift in future years—the stall tactics exhibited now will likely be cited as “precedent” to justify later abuses of the advise-and-consent authority.<sup>67</sup>

In light of the probability that such a “backlash” will occur, the Senate has a duty to rectify the situation as soon as possible. Should it fail to reverse the current course the impasse will escalate with every change in executive and legislative control. As a result, the cooperative procedure the Framers delicately set forth to fill vacancies will likely be reduced to a mechanism for political manipulation at the expense of the judiciary.

## IV. CONCLUSION

There is little doubt that the Founding Fathers did not intend for the President to have a free hand at elevating individuals to the federal bench. But—at the same time—it is unlikely that they would have envisioned that their carefully crafted compromise would cause a judicial gridlock and hinder the administration of justice. It is high time that the Senate recognize that its authority under the advice and consent clause is not absolute, and must be exercised with due regard to constitutional safeguards applicable to all citizens.

As one journalist has concluded: “It is troubling that the Senate has largely abdicated its responsibility to give judicial nominees a timely hearing and an up-or-down vote. By such tactics in pursuit of a partisan campaign, it has broken faith with the Constitution and the American people.”<sup>68</sup>



Jeffrey A. Goldberg is from Bellmore, New York. He graduated from the New York University School of Law in 1998 and earned his undergraduate degree from Lehigh University in 1992. He won second place in the AJA’s 1998 law student writing competition with this article.

63. Sarah Pekkanen & Nicole L. Gill, *Judicial Bench Vacancies Take Center Stage: Some Calling Foul*, GANNETT NEWS SERVICE, Feb. 7, 1998.

64. See *supra* note 56.

65. In 1988, a Democratic Senate approved 41 of President Reagan’s 64 nominees, and in 1992, it confirmed 66 of President Bush’s 75 nominees. By comparison, in 1996, a Republican Senate confirmed only 20 of President Clinton’s 48 nominees.

66. See, e.g., The Chief Justice and Mr. Hatch, N.Y. TIMES, Jan. 5, 1998, at A18 (“It is not simply that conservatives are eager for

revenge over what they still feel was unwarranted Democratic hostility to the Supreme Court nominations of Robert Bork and Clarence Thomas. More important, Republican strategists have decided that fulminating about liberal judges fires up the faithful and raises money.”).

67. See The 1995 Seven, *supra* note 13 (“This is not merely hardball politics but a tactic that borders on an illegitimate exercise of power that Republicans will come to loathe when it is next flexed against them.”).

68. Michael Loftin, *The Senate’s Breach of Faith*, THE CHATTANOOGA TIMES, Jan. 6, 1998, at A4.

# The Resource Page: Focus on Pro Se Litigants

## A PRIME RESOURCE

A single, new publication provides a thorough, readable manual for helping *pro se* litigants, with an appendix of additional resources, including contact names and a bibliography. It reports the findings and recommendations of an American Judicature Society/Justice Management Institute study financially supported by the State Justice Institute. The publication, authored by Jona Goldschmidt, Barry Mahoney, Harvey Solomon and Joan Green, is *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (1998) (113 pp. plus 30-page appendix). The monograph is available for \$15 plus \$3.50 postage and handling from the American Judicature Society, Suite 600, 180 N. Michigan Ave., Chicago, IL 60601 - (312) 558-6900. Many of the resources and much of the information contained on this page is based upon information presented in that monograph.

For a review of efforts in Minnesota since 1994 to improve resources for *pro se* litigants, see John M. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 Wm. Mitchell L. Rev. 297 (1998).



## INTERNET SITES FOR FOR USE BY PRO SE LITIGANTS

### Maricopa County Superior Court Self-Service Center

<http://www.maricopa.gov/supcrt/ssc/ssscheme.html>

Designed and developed with the help of more than \$800,000 in grant funds, Maricopa County has opened self-service centers in two physical locations plus this Internet site. More than 400

"Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word."

*Teegarden v. Director, Arkansas Employment Security Division*, 267 Ark. 893, 899, 591 S.W. 2d 675, 678 (1979) (Newbern, J., dissenting).

forms in areas such as divorce, paternity, juvenile, and probate cases, plus detailed instructions for handling such proceedings, are included.

### Utah Courts Internet Site and QuickCourt

<http://courmlink.utcourts.gov/index.htm>

The Utah state courts have an excellent Internet site, providing "how to" advice for things like fighting an eviction notice, obtain a protection order or file for divorce. The site also has a glossary of legal terms and forms for domestic violence and small claims cases. Information is also available about the Utah QuickCourt kiosk system, through which kiosks at four locations provide forms for divorce and landlord-tenant matters for a \$10 fee.

### Supreme Court of Florida Internet Site

<http://www.firn.edu/supct/sctintro.html>

The Florida Supreme Court has a Self-Help Center, which includes divorce forms, plus links to general legal information prepared by the Florida Bar Association.



## COURT STAFF GUIDELINES: HELPING PRO SE LITIGANTS

### Staff should:

- Provide information contained in docket reports, case file, indexes and other reports.
- Answer questions concerning court rules, procedures and ordinary practices (such questions generally beginning, "Can I...?" or "How do I...?").
- Provide examples of forms or pleadings for the guidance of litigants.
- Answer questions about the completion of forms (when forms are court-provided).
- Explain the meaning of terms and documents used.
- Answer questions about deadlines or due dates.

### Staff should not:

- Give information when they are unsure of the correct answer; transfer such questions to supervisors.
- Advise litigants whether to take a particular course of action. Don't answer questions that begin, "Should I...?" Suggest that a lawyer may be able to answer those questions.
- Take sides in a case or proceeding pending in court.
- Provide information to one party that you would be unwilling or unable to provide to all other parties.
- Disclose the outcome of a matter submitted to a judge for decision until it is part of the public record or as otherwise directed by the judge.

SOURCE: *Meeting the Challenge of Pro Se Litigation*, citing Graecen, "No Legal Advice from Court Personnel' - What Does That Mean?," JUDGES' J. 10 (Winter 1995).

NOTE: Restrictions on the unauthorized practice of law vary from state to state.



# The Resource Page



## NEW PUBLICATIONS OF INTEREST

Timothy R. Murphy, et al., *Managing Notorious Trials* (1998) (225 pp.).

All you really need to know about this book is that Judge Hiller Zobel, who presided over the Louise Woodward (nanny) case, told attendees at AJA's annual meeting in Orlando that the first thing a trial judge should do if he or she gets assigned to a well-publicized case is to get this book because it is "literally packed with suggestions you can use." Topics covered include pretrial matters, dealing with the media, handling the jury, and planning for appropriate security. A detailed appendix provides background legal materials, form orders and a sample courthouse security plan. To order, send \$30 (which includes postage & handling) to National Center for State Courts, Fulfillment Dept., P. O. Box 580, Williston, VT 05495-0580 - or call 1-888-228-NCSC - or e-mail: [ncsc.orders@aid-cvt.com](mailto:ncsc.orders@aid-cvt.com).

National Center for State Courts, *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998) (90 pp.).

This monograph presents a simple proposition - that jurors, even in routine cases, may face stress they do not face in their normal pursuits - and provides a thorough discussion of ways judges and others in the court system can reduce juror stress. Includes results of surveys of more than 800 persons summoned for jury duty and more than 800 trial judges. To order, send \$5 to cover postage & handling to National Center for State Courts, Att.: Lynn R. Grimes, P. O. Box 8798, Williamsburg, VA 23187-8798 - or call 1-757-259-1841 - or e-mail: [lgrimes@ncsc.dni.us](mailto:lgrimes@ncsc.dni.us).

David Rottman, et al., *A Guide to Court and Community Collaboration* (1998) (107 pp.).

The NCSC research staff has prepared this guide to help courts (whether individual judges, entire trial courts or even courts of an entire state) develop programs and systems that let courts and communities cooperate in identifying problems and developing strategies to address them. Exemplar programs discussed include the First Impressions Project, a Los Angeles program introducing elementary school children from underprivileged neighborhoods to the municipal courts; the Detroit Handgun Intervention Program, begun by a trial judge; and a Citizen Advisory Council to the Norfolk, Virginia, Juvenile and Domestic Relations Court. Includes a detailed bibliography and a directory of resource organizations and contacts. To order, send \$5 to cover postage & handling to National Center for State Courts, Att.: Lynn R. Grimes, P. O. Box 8798, Williamsburg, VA 23187-8798 - or call 1-757-259-1841 - or e-mail: [lgrimes@ncsc.dni.us](mailto:lgrimes@ncsc.dni.us).



## INTERNET SITES OF INTEREST

The United States Department of Justice has quite a number of Internet sites that offer useful resource materials. Here is a list of some of them:

**Main DOJ Site**  
<http://www.usdoj.gov>

From the home page, you can choose "Publications & Documents" to get to a listing of a great number of DOJ publications available on line. On line reports include background materials on domestic violence, drug courts and juvenile justice.

**DOJ Office of Justice Programs (OJP)**  
<http://www.ojp.usdoj.gov>

OJP publications available on line include the OJP Resource Guide. OJP administers many DOJ programs, including ones involving drug courts, violence against women and justice statistics.

**Drug Courts Program Office**  
<http://www.ojp.usdoj.gov/dcpo>

The Drug Courts Program Office, part of OJP, has a site providing grant application information, drug court resources and other related publications.

**Office of Juvenile Justice and Delinquency Prevention (OJJDP)**  
<http://www.ncjrs.org/ojjdp>

OJJDP, another part of OJP, has a site providing grant application information, plus many juvenile justice publications and news releases available on line.

**Violence Against Women Office (VAWO)**

<http://www.usdoj.gov/vawo>

VAWO, also part of OJP, has a site providing a great deal of background research information about domestic violence, along with links to domestic violence coalitions in each state.

**Justice Information Center (JIC)**  
<http://www.ncjrs.org>

The JIC provides general access to information tracked by DOJ about the justice system, including a search engine that searches more than 140,000 published and unpublished resources cataloged by DOJ from the early 1970's to the present.



## PRO SE LITIGANT RESOURCES

Resources for use in handling pro se litigants are found on page 35.