

Court Review

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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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EDITOR'S NOTE

The lead article in this issue is by D.C. Superior Court Judge Greg Mize, a member of our editorial board. Judge Mize co-chaired the D.C. Jury Project, which made recommendations for jury trial improvements in state and federal courts in the nation's capital. Following the release of the group's report last March, Judge Mize changed his method of conducting jury selection to add individualized, private sessions with each potential juror. The results were surprising, leading to his recommendation that individual questioning of each potential juror become standard practice. All judges who handle jury trials will find this article of interest.

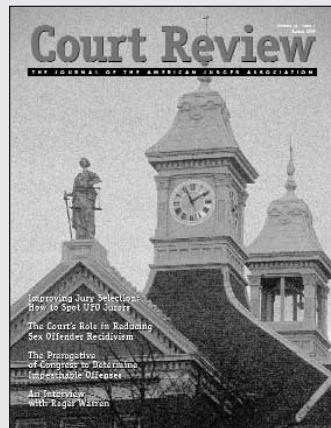
Our second article is by Assistant United States Attorney General Laurie Robinson, who heads the Justice Department's Office of Justice Programs. She reviews the current state of our knowledge about recidivism among sex offenders; describes what makes supervision programs successful in preventing recidivism among these offenders; and discusses the role of the judge in lessening the incidence of recidivism.

Our third article was one of the winning essays in last year's American Judges Association law student writing competition. The author, Mathew Paulose, examines threats to impeach judges based upon the content of their judicial decisions. He concludes that Congress has the power to define impeachment as it chooses. To the extent that politics may be involved, he concludes that Congress is the sole judge of it. While many judges may disagree with his conclusions, we think you will find his discussion of the issue of interest.

Our interview is with Roger Warren, president of the National Center for State Courts. After two decades as a California trial judge, Warren became president of the National Center three years ago. The interview provides a good overview of the Center and its current work.

We hope you will also make a habit of looking at the Resource Page, which begins on the last page of each issue. In this issue, we cover new books of interest; Internet sites relating to judicial independence; and resources on jury reform.

We invite your participation in *Court Review*. This journal provides a means of sharing ideas with judges at all levels of the judicial system throughout the United States and North America. Letters to the Editor are welcome, as are article, essay and book review submissions. Author submission guidelines are found on page 30. – 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 on page 30. *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

In my last column, I wrote about requests for AJA members to participate on various national boards, study groups, panels and committees. I also mentioned the need for a registry of AJA members who are interested in taking an active role in these projects. By way of illustration, I will devote this column to describing some of those activities, the role that AJA members play in those activities, and the related benefits to our organization and the legal community.

Judge Shirley Strickland-Saffold was a member of the planning committee for the National Conference on Public Trust and Confidence in the justice system. This conference was jointly sponsored by the National Center for State Courts (NCSC) and the American Bar Association. Co-chairs of the planning committee were John J. Curtin, Jr. of the ABA and Chief Justice Thomas A. Zlaket of the Arizona Supreme Court. The conference was held in Washington, D.C. in May 1999, with the objective of institutionalizing the best ideas for nurturing public trust in the justice system in the years to come. At the conference, ideas were gathered from delegates from all of the participating states. In addition to Judge Strickland-Saffold's role on the planning committee, I am a member of the National Action Plan subcommittee, which will work toward implementation of the ideas that were developed at the conference.

Judge Gerald T. Elliott, president-elect of AJA, sits on the NCSC Research Advisory Council, which is responsible for consulting with and advising the Research Division of the National Center. The ten members of the council include representatives from the Conference of Chief Justices (CCJ), the Conference of State Court Administrators (COSCA) and the National Association for Court Management (NACM). This group meets twice a year for the purpose of determining what questions will be considered for research, the relevance of each research project to other projects, issues of funding and methods for disseminating the results.

Judge Elliott also has involved the AJA in the Physician Consortium on Substance Abuse Education program. This group consists of medical institutions that have gathered together to promote the education and training of members of the medical and judicial professions on the urgent issues of substance abuse. Through Judge Elliott's efforts, the AJA co-sponsored a prototype educational program at its mid-year meeting in Fort Worth in April; a follow-up program will take place at AJA's annual educational conference in Cleveland in October.

Judge Gayle Nachtigal represents the AJA on the Trial Court Judicial Leadership Program, along with participants from CCJ, COSCA, NACM, the ABA Judicial Division, the National

Conference of Metropolitan Courts, and the National Association of State Judicial Educators. The purpose of the committee is to develop a training model for presiding judges and trial court administrators or elected clerks to build effective leadership teams at the local trial court level. The committee will be assessing the needs of the program and advising on the curriculum for the project.

Judges Eileen Olds, Toni Higginbotham and John Mutter assisted the NCSC in preparing a response to a request for comments on legislation before the United States Congress. The bills on which AJA members were asked to comment and advise were the Adoption and Safe Families Act, and the Strengthening Abuse and Neglect Courts Act of 1998.

Judges Jay Dilworth, Eileen Olds, Bonnie Sudderth, Mike McAdam and Terry Elliott took part in a national conference on the Trial Court Performance Standards sponsored by the NCSC and the Bureau of Justice Assistance. After that conference, those judges and other AJA members developed a recommendation that led to the AJA's endorsement of the Trial Court Performance Standards at the September 1998 national meeting.

A commission of judges and court support personnel developed the Trial Court Performance Standards, which consist of twenty-two standards for trial court performance and substantive commentary on the rationale for each standard; they articulate the guiding principles by which trial courts fulfill their purposes and carry out their responsibilities. The ultimate aim of the standards — and AJA's endorsement of them — is to provide a systematic assessment of the trial court as an organization that serves a public need and to use the data to make courts as responsive and effective as possible.

In addition, Judge Leslie Johnson is representing the AJA on a committee sponsored by NCSC and the National Judicial College on the future of judicial education. Judges Jeffrey Rosinek and Terry Elliott are on the planning committee for Symposium 2000, being sponsored by NACM. Judge Thomas Clark will be attending the Physician Leadership on National Drug Policy Conference this June.

As you can see from this list, which is only representative, AJA members are deeply involved in national projects of great significance to the organization, the judiciary and the public. It is in order to expand that involvement and to have a broad base of representation from AJA that I have requested each of you to send me your name, the name of your court, the jurisdiction of your court, your areas of specialization and your areas of personal interest. The information will be used by me and by future AJA presidents to make appointments and assignments to such groups as I have listed here.



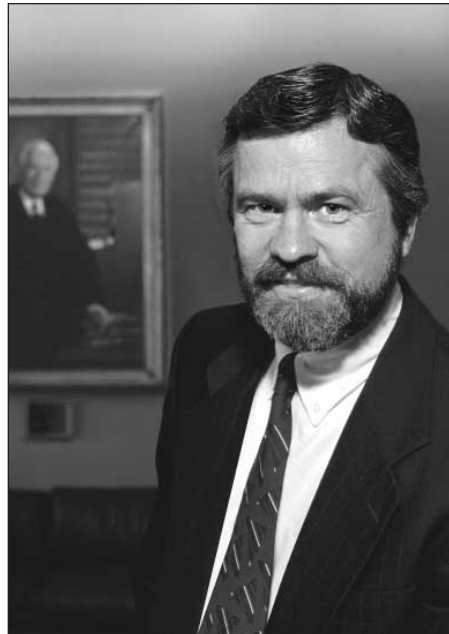
An Interview with Roger Warren

Roger Warren became the president of the National Center for State Courts three years ago, leaving behind a successful career as a trial judge in California. His judicial career began as a municipal judge in Sacramento, California, where he served for six years, including one as the presiding judge. He then became a judge on the Sacramento Superior Court, where he served from 1982 to 1996, including several years of service as a presiding judge of the court or its divisions. A graduate of the University of Chicago Law School, Warren was named the California Jurist of the Year in 1995 by the California Judicial Council.

COURT REVIEW: *Let me start with what may be the most important — but the most difficult — question for you to answer. How is the National Center for State Courts relevant to the average judge, whether they be in California where you came from, New York, or New Hampshire, or elsewhere?*

WARREN: The average judge is most concerned about his or her workload and the resources available to assist the judge in processing that workload. Most judges tend to focus on what I describe as their on-the-bench activities. That is their core responsibility of deciding the issues and cases that come before them. But the effectiveness with which a judge handles his or her calendar or workload depends significantly on the effectiveness of the court as a whole. It's the way in which the court organizes the court's overall workload and the efficiency with which those various case-load streams are managed, the resources that the court has available, and the way it deploys those resources that really affect the ability of the judge to effectively handle whatever his or her assignment is. And that's, I think, where the National Center comes in. Our mission is to help the courts do their job as best as they can and to help them better serve the litigants that come before them.

That is literally the mission of the National Center, as set forth explicitly in its articles of incorporation over twenty-five years ago. So I think that the National Center has a lot of very immediate and direct relevance to any judge because we can help the court, of which the judge is a part, perform to the best of the court's ability, and that's going to significantly help all of the judges that are part of that court.



CR: *You came to the National Center after spending more than twenty years as a judge in California. Actually, am I wrong on twenty?*

WARREN: Twenty years and one day.

CR: *Okay. You served first as a municipal court judge and then with the Superior Court. After you got to the National Center, were there resources the National Center had caused you to say to yourself, "Gee, I wish I would have known about that while I was doing my work as a judge, because that really could have helped me."*

WARREN: Let me answer the question this way. After being here at the National Center for a year or so, we did a survey of three thousand folks out in the state courts, asking them some questions about the National Center, and the

principal finding from that survey was that those judges who knew about the National Center thought that it was an invaluable resource, but that very few judges knew about the National Center — as contrasted, for example, with court managers and court administrators, who were much more familiar with the work of the Center. And I think that fairly reflects the picture out there — that is, that judges that know the Center are very supportive of what it does and find great value in its work, but that most judges don't know about it.

That was what I felt when I arrived at the Center and looked back at my work in Sacramento — and realized the great variety of ways in which the National Center could have been helpful to me, could have been more helpful — because we did use the National Center at the Sacramento Superior Court.

The National Center provides a broad array of services in virtually every imaginable subject matter area and in a wide variety of ways. Take a topic like court security or court construction or case management or budgeting or court organization or training. In each of those topical areas, the National Center does research, provides technical assistance and consulting, provides education and training programs, works with other national court associations to set policy and models and standards. So there are a wide variety of ways in which the Center provides services and a broad variety of subject matter areas. I think the challenge for the National Center is to communicate more effectively to the judges working out in the courts the ways in which the Center can of assistance to them.

CR: *I know that you have an Internet site now. Are there other ways that you are trying to communicate that message to more judges?*

WARREN: We have had a web site for five years, but we just completed an Education and Technology Center here, a major remodeling project of our head-

quarters' facility in Williamsburg. As part of the Education and Technology Center, we have now established a capability of communicating through Internet technologies and video conference technologies around the world. [We] want to use this facility [as a] platform for distance learning – a worldwide capability, including all the courts in the United States. That will allow us to promote and sponsor video conference programs that will link up the resources at the National Center to judges located anywhere in the United States – ultimately, through desktop video conferencing, but currently through existing uplink and downlink satellite transmission facilities.

CR: *Is there a timetable for this?*

WARREN: We've already started. We had a grand opening ceremony for the facility [in April], and we're already in the process of discussing its use with the various states and state judicial educators – for example, participation by the Center in state judicial education programs around the country. We recently participated in a video conference ceremony with the California Judicial Council ... when they commissioned a new facility.... We hooked up with them and exchanged some messages back and forth from here in Williamsburg. So we've already started to make use of the facility. Now we are gradually converting a lot of our courseware. [Our Institute for Court Management] courses, in the current format, are basically designed to work with judges from around the country who might come to some central location for a two- or three-day educational program. [We are now] taking that curriculum and converting it to a distance-learning format, where judges can stay home and avoid the down time and costs involved in national travel and participate in the same substantive training program either at their desktop or at their courthouse.

CR: *That's what I meant to ask about timetable, but I didn't do a very good job. Do you have any idea when the judge sitting at his or her desktop might be able to participate in educational programming?*

WARREN: Oh, I think that's going to happen within a year. We are right now preparing those courses in conjunc-

tion with state judicial educator offices and others, trying to identify what the most promising subject matters might initially be. The two early courses that we're going to prepare are on caseload management and trial court performance standards – two of the subject matters that trial judges most frequently ask the National Center for information about.

CR: *Let me change the topic for a moment. The National Center, in conjunction with the American Bar Association and other groups, recently convened a national conference in Washington devoted to working on a national action plan to improve public trust and confidence in the courts. Could you tell us a little bit about the conference — what it was designed to achieve, and what type of people attended it?*

WARREN: It was attended by about five hundred participants, and they broke pretty evenly into four different groups. About a fourth of them were judges, a fourth attorneys, a fourth court administrators, and a fourth business or civic or public sector leaders. The background behind the conference is that, over the last decade or so, there have been increasing signs of public dissatisfaction with various aspects of court operations. At the same time, there's been increasing activity in the courts, especially in the trial courts, as they attempt to reach out and include the public more in the life of the local trial courts and [enhance] the public's understanding of the justice system. And this combination of public dissatisfaction and increasing outreach efforts on the part of the courts has resulted over the last decade in a number of court improvement-type projects and bench and bar outreach efforts. I felt that the time had come to try to lend a strategic focus to all of this activity and to involve the leadership of the judicial branch, that is, the chief justices and the administrative leaders of the state judiciaries, in these efforts. And so the purpose of the conference was to bring together teams from each of the states led by the leaders of the state judiciary, the chief justices and state court administrators, to a national conference that would identify the various issues affecting public trust and confidence in the justice system around the country, identify the

strategies that might be most effective to address those issues, and develop a national action plan of actions that could be taken at the national level to support the implementation of those strategies.

CR: *There were two separate national public opinion surveys leading up to the conference, and you have suggested previously that the ultimate report card on the courts is the level of public trust and confidence in the them. What did you take away from those two surveys about the mood of the public toward the court system today?*

WARREN: The public's report card on the state courts, as reflected in the two surveys, gave the courts an average grade. But the courts have high standards. An average grade isn't good enough for most of the state court leaders. The two surveys reflected a public that feels, on the one hand, that the American justice system is the best justice system in the world, that the public has more confidence in the judicial branch of government at every level than in either of the other two branches at any level, that judges are fair and honest, and that the courts do a good job at upholding the constitution and people's constitutional rights. But, on the other hand, the public also feels that the manner in which cases are handled, whether it's in civil cases or criminal cases or family and juvenile cases, is far from perfect and that there is a lot of room for improvement in the way that courts handle cases. The surveys reflected a feeling on the part of African-Americans in particular, but a majority of Americans overall, that African-Americans are not treated in the courts as well as others, that the wealthy are treated better in the courts than the poor, that most Americans cannot afford to go to court, and that one of the large obstacles to fuller participation is the cost of legal services. A large plurality of Americans feels that most courts are out of touch with the communities that they serve and that judicial decisions are influenced by political considerations and campaign contributions in judicial elections. So, overall, I would say that the mood of the American public seems quite mixed. On the one hand, the public seems to recognize what is good and valuable and important about the judi-

cial branch, but, on the other hand, [it] has serious concerns about the ways that courts operate and is demanding of some reform and improvement in the ways courts operate.

CR: *Do you have a sense as to the extent to which the public's impression, both positive and negative, is accurate? In other words, is the problem one simply of showing the public that things are already being done correctly, and their mood would improve further, or is it that the public accurately perceives a number of significant problems that need real work before public opinion would improve?*

WARREN: I think the public's perceptions are extremely accurate and right on the money. The public has always been more aware than those of us who work within the justice system of the shortcomings of the justice system. There has always been a huge gap in this country between the relative optimism of those who work within the system about its effectiveness, and [the] pessimism of those who are from outside the system. Those who are to be served by the justice system — the public — have always focused on issues of access and fairness and cost, and those inside the system have tended to focus on the lack of resources and the inefficiencies. So, I am not surprised by the survey findings, and I think the perceptions are extremely accurate. One of the interesting things about the most recent survey conducted by the National Center for State Courts is that now a majority of all Americans feel that African-Americans don't get a fair shake in the court system. Earlier surveys had indicated a great divide between the perceptions of the African-American community and those of European background... But this most recent survey shows that a majority of all Americans feel that African-Americans get the short end of the stick in court proceedings. So I think the findings are troubling and require those within the courts to look within and find the areas where significant improvements can be made.

CR: *You mentioned a difference between the view of insiders to the system, judges and attorneys, and the public at large. Do you think those inside the system, judges and attorneys, now agree with the public as to the unequal treatment of people in the system with respect to race?*

WARREN: There is an important role here for dialogue and for greater understanding on everyone's part. I thought it was noteworthy that the issue which was identified by the participants at this public trust and confidence conference as the most critical issue to be addressed by the state courts was unequal treatment in the justice system. Fully two-thirds of the participants in the conference thought that it was absolutely critical and essential that the courts address this issue, and the overwhelming majority of participants at the conference were not African-Americans and were not poor. What that [shows] is that when you bring together judges and attorneys and court administrators with members of the public, and you sit down for a day or two [and have] some thoughtful dialogue about what the real challenges are that confront the justice system, virtually everyone goes away feeling that this issue of equal treatment is just a critical one that we in the courts need to address. And when, later in the conference, we asked people who they felt were responsible to implement the various strategies that were identified at the conference and to address these issues, something like ninety percent of the participants said that it was the judiciary itself and the bar that were primarily responsible for addressing these issues. I don't know that it's necessarily true that two-thirds of all of the folks who work in the state courts around the country have yet come to believe that the issue of fairness and equal justice is overwhelmingly the most critical issue that the courts must address, but I am certain that if all of those folks could have participated in this conference and had the chance to dialogue thoughtfully about the issue, that they would have come to that same conclusion.

CR: *Let me follow up again with a question related to the difference in the view between judges and those in the public. It was interesting that at the conference, one of the discussion groups of participants added a possible problem area — the isolation of judges from the public and a resulting lack of perspective of public concerns by judges — to the survey list that the attendees would rate as to whether it was a significant problem — and a fair segment of the attendees, even among judges, thought that was a significant*

problem. Before you became National Center president, as we mentioned, you spent two decades as a judge. Did you find this to be a problem either for yourself or for other judges you observed, to stay really in touch with what public concerns were?

WARREN: Yes and no. The relative isolation of judges from the public is a truism for almost any judge, but I don't think that it's necessarily true that that results in a lack of perspective by all judges of the public's concerns. The Code of Judicial Conduct under which judges conduct themselves, apprehension on the part of judges [about] being confronted publicly in inappropriate ways, either by disgruntled litigants or with regard to pending litigation, what is in effect a language barrier where judges and lawyers tend to speak a language all their own that makes communication with folks who don't speak that language difficult — all of those are barriers which tend to isolate judges from the public. And yet, many judges do, nonetheless, have a fairly accurate perspective of what the public's concerns are. The challenge of bringing a full and broad perspective to the bench is not solely one of opportunity for interaction with the public. It also involves the judge's mindset and attitudes and willingness to communicate effectively with people who may have a broader perspective. There are things that judges can do to make themselves aware of the public's concerns, even if they choose, as a matter of lifestyle or for whatever reason, to isolate themselves somewhat from the public in a manner which they may not have done before they joined the bench.

CR: *What would be your suggestions?*

WARREN: Judges tend to isolate themselves not only from the public, but, to a significant extent, from almost everyone. There is a tendency on the part of judges to end up associating almost wholly with other judges or lawyers. Depending on the kind of background that the judge had as a lawyer, there is a sort of progression where, as you become a lawyer, you tend to get isolated more and more from those who are not lawyers, and then if you end up being a trial lawyer, even more so, and then if you end up becoming a trial or appellate judge, even more so — to the point where most of your

associates and those with whom you spend time, other than your immediate family, are in this closed circle within the legal profession. Yet judges are typically only a small part of the total human resources that work in a court system. Being actively involved in the work of their court alone exposes judges to the public's concerns pretty dramatically. The public walks in and out of these courthouses doing business there every day, and a wide variety of perspectives and people come in and out of the courts. It's more typically the men and women who work at the front counter and have a daily contact with people coming in and out of courthouses, rather than judges, who are interacting with the public on a regular and frequent basis. If judges are involved in the work of their court, and involved in interactions with other court staff with regard to the problems that confront the court as a whole, I think that will go a long way towards exposing judges to what the public's concerns are – beyond merely participating in jury selection and in handling the cases that may come before the judge on the bench. And then part of it is just attitudinal. It's just being conscious and aware of the fact that the nature of your profession does tend to isolate you and being actively engaged in reaching out and seeking information from other perspectives and being open to hearing things that you might not want to hear or that you wouldn't have the opportunity to be exposed to solely in your role as a judicial officer.

CR: *From the national conference on public trust and confidence, what is going to be the outcome of that? Is there a plan in progress? Is there some further step that will be taken?*

WARREN: The principal outcome of the conference, at this point, will be preparation of a national action plan, which will describe the priorities that were set at the conference and some of the main findings and decisions that were made at the conference. Then we'll seek to create a national network of conference participants, and especially of representatives of the various national bench, bar and public interest organizations, to support efforts throughout the various states to implement the recom-

mendations that came out of the conference. The conference sponsors very clearly indicated all the way along that this conference was not intended to be a one-time event, but to be a catalyst for future efforts around the country to improve the public's trust and confidence in the court system. As a result, virtually all of the national bench and bar organizations have already committed themselves to follow-up activities to implement the various recommendations coming out of this conference and to continue the energy that was evident at the conference itself.

CR: *In looking for effective solutions to improve public trust and confidence, the attendees at the conference chose as the number one action to take the development and dissemination of model programs or best practices, the sharing of information about effective programs developed throughout the country. What's the National Center's role in carrying out that objective, and are there other plans to improve dissemination of best practices or model programs?*

WARREN: That's exactly how the National Center got started, over twenty-five years ago. Then-Chief Justice Burger, at a national conference in Williamsburg in 1971, called for the creation of a national center for state courts to serve as an information clearinghouse of best practices to improve the administration of justice in the state courts. So the initial mission of the National Center was to serve as a national clearinghouse of model programs and best practices. This is definitely part of our core mission.

CR: *Does it surprise you then that the conference attendees, a group of pretty knowledgeable folks, would list that as the number one action step when it's something you're already working on?*

WARREN: No, it doesn't surprise me, because as I've said, although this is the mission of the National Center, there are many out in the courts, especially trial judges, who are unfamiliar with our resources and the work that we do. And so it's quite consistent with our own feeling that the kind of work we do is very valuable and highly valued by folks out in the courts, but that many there are unfamiliar with our work and the services that are available.

CR: *What other steps do you think are ones that should be put at the top of the list to take right away in improving public trust and confidence?*

WARREN: What struck me personally from the conference, in addition to the importance of addressing the issue of race in the justice system, was the perception that so many Americans find the courts unaffordable and feel excluded from access to the courts because of the high cost of access, especially the cost of legal services. So I would expect to see some focus on the issue of cost, and on the cost of legal services, and on the economics of the practice of law surface from this conference. In addition, the conference confirmed the belief of many in the courts that there is a significant deficit in the public's full understanding of the importance of the court system and the role of the courts. The conference participants reiterated the interest of those in the courts in reaching out to the public and helping the public better understand the important role of the courts. And then finally, I would just indicate that public trust and confidence is not only the topic of this national conference, but is also the fifth and most important of the five trial court performance standards. These standards, adopted by the chief justices, state court administrators, and many courts around the country, are standards by which any court's overall performance can be evaluated by the court itself. And whether or not the public has trust or confidence in the work of that court is one of the five important standards by which the court's performance can be evaluated. And so I think the other important message that comes out of this conference is that courts need to do a better job, can do a better job, that there is room for improvement, and that in addition to the other steps that we've talked about, that the courts need to continue to improve the way in which they do their core work, in which they handle the criminal, civil, family, and juvenile cases that come before them.

CR: *Let me switch for a moment back to the National Center in a more general sense. You came to the National Center three years ago?*

WARREN: That's right – a little

over three years ago.

CR: *What was it you were hoping to accomplish by moving from being a judge for twenty years to the National Center?*

WARREN: I wanted to try to re-energize the National Center. As a judge who had come to be very involved in seeking to improve the administration of justice, both in my community in Sacramento and in the State of California, I knew how badly the courts around the country needed the work of the National Center and could benefit from the leadership and services of the National Center. And yet, during the mid-1990's, the National Center itself had gone through a period of downsizing, had lost staff, had closed offices, and, as a result, the courts had really lost the benefit of some of the vitality that the National Center enjoyed earlier in its life. I really wanted the opportunity to see if I couldn't energize the National Center and broaden its impact on the state courts and extend the opportunities for service to the state courts that I thought the National Center could provide.

CR: *What have you done to address that objective?*

WARREN: My judgment at the outset was that, in order to accomplish that objective, the National Center itself needed a tune-up. So I started at the top and sought, first of all, to free the board of directors of the National Center from the sort of management activities that

they had become involved in, so that the board could truly take charge of the organization and govern the organization effectively – their prime responsibility as a board of directors for a not-for-profit corporation. We then initiated a strategic planning process to provide a vision and direction and strategic priorities for the organization, got the finances in order, remodeled the principal facility in Williamsburg to create the new Education and Technology Center, moved the Washington, D.C., area office to a new facility to provide expanded square footage there, added a communications capability and focus on customer services, and upgraded the National Center's human resources program. By the end of the three years that I've been at the Center, and as we approach the new millennium, I feel that the National Center is really well positioned to provide a much richer and deeper and broader array of services to the state courts. The organization has a sense of direction; it's well governed; it has a talented and effective staff; we have totally upgraded our use of technology, both internally and in providing services to customers; it's a very customer-focused organization that's reaching out and trying to identify how it can most effectively help those in the courts; it's flexible, and has the ability to communicate effectively. So I'll be very disappointed if your readers and others out in the state courts don't, over the next year or two,

come to discover a large number of ways in which the National Center can be of real value to them.

CR: *Are there any top priorities that you'll be focusing on in the next two or three years?*

WARREN: Yes, we have identified those priorities as the result of the strategic planning process that I mentioned earlier, and those priorities are very consistent with the priorities which emerged from the recent conference on public trust and confidence. Our top priority is to strengthen judicial independence, especially through support of judicial leadership and the efforts of judicial leaders. Our second priority is the whole area of courts and the public – to strengthen the public's trust and confidence in the court system. Our third priority is to make greater use of state-of-the-art technology at the National Center and in delivering services to the state courts, and to support even more effectively than we have in the past the court technology improvement efforts of those in the state courts. And then our fourth priority is to strengthen public access and fairness in the state court community. So, I think you see that the priorities that we have established at the National Center parallel very closely the priorities that the participants at this recent conference established for the state courts themselves.

CR: *Thank you.*

For More Information About the National Center for State Courts

- A great deal of information can be found at the National Center's Internet site: <http://www.ncsc.dni.us>. There you can find an organizational overview of all of the National Center's divisions and programs, e-mail addresses for the Center's staff members, news items about the Center and the courts, information on the Center's publications, and listings of other Internet sites related to courts.
- To find out which National Center personnel may be the most knowledgeable in an area of interest to you, go to <http://www.ncsc.dni.us/Contacts.htm>. There you can find out which staff member is the appropriate person to contact in categories such as court technology, caseload management, court security, juries or court compliance with the Americans with Disabilities Act.
- For those who prefer regular mail to e-mail and telephone contact to cyberspace, contact the National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23185, phone (757) 253-2000, fax (757) 220-0449.

On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room

Gregory E. Mize¹

Our historically valued institution of trial by jury is now under attack, and yet relied upon with steady frequency in courts across the country. Recent celebrity trials and anomalous, but widely reported, high jury damage awards have spawned criticisms and the scrutiny of the jury trial process. I believe it is the abiding goodness of our citizenry and our national commitment to ensuring a truly just resolution of conflicts that keeps us relying upon the jury system. And, rather than rejecting the jury, many courts and communities across the land are figuring out ways to revitalize trials by jury and improve a basically sound democratic cornerstone.

I am proud to report that our nation's capital has joined the growing wave of jurisdictions that are seriously and methodically examining how we have traditionally been conducting jury trials in our land. Many are taking practical steps to promote the fairer, more efficient, and more effective use of citizens as jurors.

In March 1998, a unique collaboration of judges, trial lawyers, former jurors, and civic leaders released its study report, *Juries for the year 2000 and Beyond— Proposals to Improve the Jury Systems in Washington, DC.*² I enthusiastically commend the entirety of the report to our readers. The thirty-two recommendations contained in that report cover a wide spectrum. Some are completely practical, suggesting nuts and bolts steps for jury commissioners to obtain more accurate juror source lists. Others express simple, common-sense guides to promoting citizen comfort, pride and security. Another, Recommendation 19, urges major revisions in the jury selection process. I took the latter recommendation to heart, trying to implement a portion of it in my courtroom during the last nine months of 1998. When I recorded my efforts in a careful and studied way, I obtained some remarkably revealing and, I hope you'll agree, useful results.

Recommendation 19 said:

The D.C. Jury Project recommends that the fairness, efficiency and utility of the voir dire process in the trial courts of the District of Columbia be enhanced by:

a. *Increasing relevant information about jurors available*

to the Court and parties by use of a written jury questionnaire completed by all jurors and given to the Court and parties upon the jury panel's arrival in the courtroom;

- b. *Improving the ability of parties to ascertain grounds for strikes of jurors for cause by requiring that each juror be examined during the voir dire process and by giving attorneys a meaningful opportunity to ask follow-up questions of each juror;*
- c. *Assuring to the extent possible that prospective jurors who may be biased or partial are stricken for cause by establishing that when a prospective juror's demeanor or substantive response to a question during voir dire presents any reasonable doubt as to whether the juror can be fair and impartial, the trial judge shall strike the juror for cause at the request of any party, or on the court's own motion; and by*
- d. *Reducing improper discrimination against jurors, unnecessary inconvenience to them, needless delays in the trials, and excessive costs by eliminating, or drastically reducing the number of peremptory strikes.*

The D.C. Jury Project members believed that improved courtroom practice in jury selection (subsection b), combined with better information about the jurors at the start of voir dire (subsection a), would promote a more informed jury selection process, including the requirement that each juror be individually examined at least once during the voir dire with attorney follow-up questioning.

Recognizing that there are as many ways in our vast land to conduct voir dire as there are pronunciations of that French moniker, I want to explain the epiphany I experienced when I adjusted my jury selection practices (which already included attorney questioning following upon my general, open-court questioning of potential jurors) to include the individual interview of every citizen in the venire panel regardless of whether he or she responded to the generic opening questions.

Footnotes

1. The author expresses special gratitude to Professor Phoebe C. Ellsworth, the Robert B. Zajonc Professor of Psychology & the Kirkland & Ellis Professor of Law at the University of Michigan, for her encouragement and insights in the preparation of this article.
2. What made this assembly and report uncommon was that the recommendations for jury trial reforms targeted implementation in both local and federal trial courts. Unique also, the effort was

inspired and principally funded through a citizen-based, non-profit corporation, the Council for Court Excellence, Inc. A copy may be obtained by contacting the Council for Court Excellence at 1150 Connecticut Avenue, N.W., Suite 620, Washington, D.C. 20036-4104, phone (202) 785-5917, fax (202) 785-5922, or email jury@courtexcellence.org. The Council has an Internet site at <http://www.courtexcellence.org>.

I. VOIR DIRE FORMAT DURING THE TEST

During calendar year 1998, I was assigned to the felony branch of the Criminal Division of our general jurisdiction trial court.³ My cases typically demanded that I call at least a sixty-citizen venire panel from the jury lounge into my courtroom. Prior to their being seated in the courtroom in the order they were randomly listed on the jury commissioner's computer printout, I invited counsel for the prosecution and defense to review my standard voir dire questions, which are meant to be posed to citizens in open court at the beginning of jury selection. I entertained suggested additions or deletions to my proposed questions and usually settled upon approximately twelve to fifteen questions⁴ posed to the incoming panel of prospective jurors. These questions are designed to get an initial measure of whether any citizen's background or relevant life experience

would stand in the way of the juror candidate being fair and impartial in the instant case.

I customarily open each voir dire with a warm greeting and a plain-English, very abbreviated explanation of the purpose of the voir dire part of a trial. I emphasize the importance of the oath to tell the truth in response to each question I am about to ask in open court. The oath is administered slowly and clearly⁵ to all sixty persons standing with right hands raised. The venire panel is then seated again and told that, if the answer to any of the questions is "yes for you," then they should place the stated number of that question on a sheet of paper, which has been previously distributed by courtroom staff.⁶ The entire, open-court questioning procedure usually consumes ten to fifteen minutes. Thereafter, the prospective jurors are told that they will be called individually to the jury deliberation room adjoining the court-

3. D.C. Code §11-901 *et seq.* establishes the Superior Court of the District of Columbia as a consolidated trial court of general jurisdiction. Accordingly, every species of litigation, from landlord tenant disputes to divorces, to homicide prosecutions, to commercial controversies must come through the door of our courthouse. We judges divide our work by rotating each calendar year into one of the four main divisions of the Superior Court: Criminal, Civil, Family or Probate and Tax.

4. The typical format and questions asked in a felony narcotics or firearms case are:

Ladies and gentlemen, I will ask you a series of numbered questions, which are summarized on a sheet of paper which you have. After each question, if you have an affirmative response, I ask you to circle that question number on the paper which you are holding. After all questions have been posed to you in open court, I will then interview each of you in the jury room to find out how and why your answers to the circled questions are "yes."

Before any questions are asked, I first want to introduce persons who will have a role in this case. The attorneys representing the parties in this case are _____, on behalf of the government, and _____, on behalf of the defendant, _____.

This case involves a charge of _____. This offense is alleged to have occurred on _____ at the location of _____, in Washington, D.C.

TO THE ASSISTANT U.S. ATTORNEY: Counsel, would you bring in your potential witnesses so that they may be introduced to the jury panel?

TO THE DEFENSE ATTORNEY: Counsel, would you bring in your potential witnesses so that they may be introduced to the jury panel?

TO THE JURY PANEL:

- a. Do any of you know or in any way acquainted with any of the other jury panel members sitting there with you?
- b. Do any of you know or in any way acquainted with me, any of the parties, witnesses or attorneys in the case?
- c. Have any of you heard of the alleged offense(s), or do you live or work within a ten block radius of where the offense(s) are alleged to have occurred or are any of you peculiarly familiar with the immediate vicinity of where these alleged offenses occurred?
- d. Have any of you or a close relative or close friend, ever been employed to do criminal prosecution or defense work, for example, as a prosecutor or defense attorney, or investigator for either side in a criminal case?
- e. Are any of you, a close relative, or close friend, now or for-

merly employed by any law enforcement agency? By this I want you to include any police departments, inside or out of the District of Columbia, special police entity, security company, the U.S. Drug Enforcement Administration, the FBI, CIA, U.S. Marshall's Service, Internal Revenue Service, or the Secret Service.

- f. Have any of you ever served on a grand jury panel?
- g. Are there any of you who would more likely believe or disbelieve a witness merely because he or she is a police officer?
- h. Ladies and gentlemen, I estimate this case will take approximately ____ days to try. Does anyone have any pressing commitment that would make sitting on this jury a *substantial* hardship?
- i. Are any of you suffering from any illness, hearing or vision impairment, or taking any medications that might cause you to become drowsy or in any other way affect your ability to give your full time and attention to this case?
- j. Are there any of you, because of strong personal or religious convictions, who believe it is inappropriate for you personally to sit in judgment of another?
- k. Have any of you, a close friend or close relative been the victim of, a witness to, or charged with a criminal offense within the past ten years?
- l. This case involves the allegations concerning drugs. Do any of you have any experience with drug usage involving yourself, family members, friends, or acquaintances that might cause you to have strong feelings, one way or the other, about drug charges such that it would likely be difficult for you to be fair and impartial?
- m. This case involves allegations concerning a firearm (and ammunition). Do any of you have strong feelings concerning gun control laws, either favoring or opposing such legislation, or strong feelings concerning a person's alleged possession of firearms or ammunition such that it would likely be difficult for you to be fair and impartial?
- n. Finally, ladies and gentlemen, can any of you think of any reason not already brought out through prior questioning as to why you could not sit fairly, impartially and attentively to this case?

5. Do each of you solemnly swear or affirm that you will give truthful answers to the questions that are about to be asked of you by the court and counsel?

6. Each juror candidate is also directed to write his/her juror badge number on the paper, no matter whether there is an affirmative response to any question.

room. I tell them outright that I do this because I find that the likelihood of obtaining more full and candid responses is increased by hearing from everyone in the smaller circle of the parties and the court reporter in the smaller deliberation room in contrast to the large, heavily populated courtroom.⁷

Upon entering the jury deliberation room with the parties,⁸ I tell counsel that, in order to avoid burning up voir dire time unnecessarily, I will be the first to ask follow-up questions of each candidate after I state aloud which open-court questions, if any, were earlier marked down by that interviewee. If I hear a response that, in my estimation, is a patently good reason to immediately excuse that citizen and send him or her back to the jury lounge, I will simply say, as a code, to counsel, "Is there need for further questions?" If counsel agrees with me, each is to respond, "No." And, thereupon, the would-be juror will be thanked and dispatched. If counsel disagrees with me, they are told to simply ask any follow-up questions of their own, and I will consider any motions to strike that citizen for cause later in the interviewing process after we have thirty-six citizens interviewed who have not been struck by agreement for self-evident cause.

II STUDY RESULTS: WHAT WE LEARNED ABOUT OUR SILENT CITIZENS

In my first jury trial after the *Juries for the Year 2000* recommendations were released, I started to individually interview every potential juror in the jury room, after all general voir dire questions had been posed to the venire panel, regardless of whether they had an affirmative response to the battery of open-court voir dire questions. Prior to this time, I customarily had not called non-responders, *i.e.*, the silent citizens, to the jury room for an individual interview. This practice had been principally based on a desire to save time, the notion being that no news on the general voir dire questions was good news. The results of this study have shown how shortsighted that approach can be.

Under the new procedure, I would ask the jurors who had not responded to any of the general questions, "I notice you did not respond to any of my questions. I just wondered why. Could you explain?" If I did not get much of a response, I would say, "Is it because the questions did not apply to you?" Most jurors simply said that the questions did not apply, but others said they should have responded or that they had something else that they wanted to share.

I undertook this effort in order to test whether the individual questioning of all panelists indeed revealed new information important for making accurate decisions about strikes for cause and whether this new approach significantly affected the

time it took for jury selection to be completed. In a capsule, I found the individual voir dire of all citizens to be an indispensable way of ferreting out otherwise unknown juror qualities. Minimal questioning of each prospective juror has exposed problematic UFO's, so to speak, *without any significant increase in time consumption*. I will now recount some of the more illuminating responses that occurred and then provide a table of other significant findings.

A. Responses from Silent Jurors Who Were Excused Immediately for Cause

The information received by individually interviewing the prospective jurors who had not responded to any general voir dire questions was so illuminating that many were promptly excused by agreement of the court and all parties. Below is a brief synopsis of separate responses which caused that candidate to be excused:

- *I do not understand your questions or remember the past very well. I am afraid to answer questions and cannot remember dates very well.*
- *I definitely don't want to be here. I'd be resentful if I'm here.*
- *I'm the defendant's fiancée.*
- *I can't stand to talk about guns. My grandson was killed with a gun so the topic of guns makes my blood pressure go up.⁹*
- *We should not waste time prosecuting people just for gun possession charges. I was on a hung jury before - I don't know if I can follow instructions of the court for gun possession - that was the problem in my other trial.¹⁰*
- *I can't judge; I'm predisposed against the police.*
- *I have eight- and nine-year-old children I am not sure I can get child care.*
- *I don't want to be a juror - I've lied already. My mom was a juror and died on Christmas day. My back hurts and I am supposed to be in therapy at noon.*
- *Eight years ago I was a juror but I was excused because my brother committed suicide as a heroin and cocaine addict. He got drugs easily. Therefore I was and am angry. I'd start out with a bias in this case.¹¹*
- *I have leg trouble and need to go to a doctor in ten days. I can hardly walk to or inside the courthouse.*
- *I tend to feel that the system works in a biased way, for example I heard the defense attorney say to the defendant, "Just take your wife to a nice place for lunch."*
- *I was frightened to raise my hand. I have taken high blood pressure medications for twenty years. I am afraid I'll do what others tell me to do in the jury room.*

7. Again, I am trying to reinforce to them the need to be forthcoming and honest.

8. The room is a rectangle, approximately fifteen feet by nine feet in dimension, with a large rectangular table that can accommodate at least fourteen chairs. I sit at the head of the table nearest the doorway leading into the room. An empty chair for the prospective juror to occupy promptly upon entering the room is placed near me and the entryway. The official court stenographer is also

nearby. The prosecutor, defense counsel, defendant, and deputy U.S. Marshall are seated around the table but further away from the citizen than I am. My goal is to keep everyone in easy listening distance to each other, but to avoid any uncomfortable or unfair proximity of the parties to the would-be juror.

9. In this case, the defendant was charged with gun offenses.

10. In this case, the defendants were charged with gun offenses.

11. The defendant, in this case, was charged with narcotics offenses.

- I should have raised my hand - my grandfather was an FBI agent, therefore *I tend to believe cops*.
- I was hospitalized for headaches three months ago at Washington Hospital Center. (The juror had a very strange affect and strange speech patterns.)
- I'm in high school and don't want to miss any classes and affect graduation.
- *My religion tells me I cannot judge*. It is hard to believe people unless you are there. *I like videotape - it tells everything*.
- Two of my family members were locked up on drug charges. I heard they were roughed up by the cops. Therefore, I am more skeptical of police witnesses.¹²
- I have been in a Narcotics Anonymous Program for the last 4 years. *My past drug use may affect me. I am incapable of giving clear answers or making up my mind about drug charges*. I feel uncomfortable about talking about drugs.¹³
- *I know defendant*. He's a member of my church. I did not understand some of the questions.
- I take medicines for high blood pressure. *I am from Haiti. I only understand a few words of English*.
- *I have been harassed by police often*. So there is a cloud over police officers. *The hard part for me is what cops have to say*. [All five prosecution witnesses were police officers.]
- [In a drug case, a middle aged woman said she did not understand any of the questions asked in open court. She appeared to be mentally impaired by virtue of her speech pattern and unusual facial expressions.]
- [In a gun prosecution, a young adult gave blank stares to my initial questions in the jury deliberation room as to why she did not respond to the open-court inquiries. She could not even say yes or no without great prompting by me. I concluded she could not hear and likely could not comprehend my words spoken in the courtroom or in the deliberation room even though I was at a distance of four feet from her.]
- I don't want to be here. *I don't judge anyone without knowing everything that is outside of the paper*.

B. Responses from Silent Jurors Who Were Not Excused for Cause¹⁴

Other potential jurors, who ultimately were not excused, gave informative responses that provided the court and the parties with important background information about them. A synopsis of some of these responses is provided below. In some noted instances, several of these potential jurors were not struck for

cause, but were removed by a party through a peremptory strike:¹⁵

- I live twenty blocks away from the scene of the crime.
- *I have some discomfort about people holding guns*.¹⁶
- I am unemployed and looking for jobs. I used to be a mathematician at the Naval Research Lab.
- I have been in DC for three years. I am formerly from New York.
- My husband was mugged in Johannesburg, South Africa, three years ago but I am not biased against the accused.
- I am a lawyer in non-profit work.
- *My dog walker was shot in Georgetown*. I was a witness at the grand jury in a truck driver/ road rage case. I am a CEO in a real estate company. (The jury list said he was a police officer.)
- *My son was shot in the face six months ago*. He's fine now, but no one was ever apprehended. I have no problem judging.¹⁷
- I have presumptions about drugs, such as that *it is stupid to sell to anyone and that anyone found with drug paraphernalia would surely be a user or seller*.
- My uncle works at the Federal Protection Service at L'Enfant Plaza.
- My father worked for a small police department in California.
- My dear friend's husband is a homicide detective.
- I plan to travel Thursday night. *I'd be resentful if I was still here but I'd do my job correctly*.
- The "black bitch" statement jerked me, but I'd keep an open mind throughout.¹⁸
- I work at the U.S. Treasury Department.
- *I was charged with distribution of cocaine in 1991* but the charge was dropped.¹⁹
- I am against gun control and I am a self-employed computer consultant. Therefore, loss of income comes to mind, but will not stand in my way.²⁰
- Members of my husband's family are building contractors in Michigan and New York. My husband used to be in the business, therefore I have a greater understanding about building business than the average person.²¹
- I am a self-employed handy man.
- I know some people with the same last name as the defendant, but I do not know if they are related.
- I have glaucoma.
- I have strong feelings about gun control and have made donations to Handgun Control, Inc.²²

12. In this case, the defendant was charged with narcotics violations.

13. Here too, the defendant was charged with narcotics violations.

14. I decided to include these responses to illustrate the information that can be gathered through the implementation of Recommendation 19(b), rather than to reflect on the specific reasons why these people were not excused.

15. The District of Columbia Code gives each side in a felony case ten peremptories, plus one extra peremptory strike to be applied to alternate jurors. In misdemeanor and civil trials, each side has three peremptory strikes.

16. In this case, the defendant was charged with gun offenses.

17. This case involved gun offenses.

18. In an assault with a dangerous weapon case, a statement allegedly made by the defendant was shared and asked about during general voir dire questioning.

19. This case involved an armed robbery.

20. This case involved an armed robbery.

21. In this case, the defendant was a home improvement contractor who was charged with offenses relating to his work.

22. This case involved drug offenses.

DISCOVERING INFORMATION FROM INITIALLY SILENT PROSPECTIVE JURORS

Type of Case	Silent jurors/ total in panel	Jurors with relevant comments/ silent jurors	Number of excused jurors/ jurors with relevant comments	Trial Outcome
Gun	15 / 59	3 / 15	2 / 3	Guilty verdict
Gun	26 / 60	4 / 24 ²³	2 / 4	Hung jury ²⁴
Gun (multiple counts)	19 / 60	5 / 19	3 / 5	Acquittal on 1 count & hung jury on other
Gun	12 / 60	5 / 12	3 / 5	Mistrial ²⁵
Narcotics	25 / 59	4 / 25	2 / 4	Guilty verdict
Narcotics	18 / 55	3 / 17 ²³	1 / 3	Not guilty verdict
Assault	19 / 60	4 / 18 ²³	1 / 4	Guilty verdict
Armed Robbery	20 / 60	2 / 17 ²³	0 / 2	Guilty verdict
Theft/ Burglary	9 / 60	1 / 9	1 / 1	Guilty verdict
Theft/ Uttering	11 / 58	4 / 11	2 / 4	Guilty verdict
Gun	16 / 59	4 / 14 ²³	0 / 4	Hung jury
Assault (knife)	29/56	2/24 ²³	0/2	Guilty verdict
Murder	12/59	6/12	4/6	Guilty verdict
Narcotics	17/60	3/15 ²³	1/3	Defendant plead guilty before 1st witness
Receiving Stolen Property & Unauthorized Use of Vehicle	14/55	2/14	0/2	Not guilty on receiving stolen property; hung jury on unauthorized use of vehicle
Narcotics	8/57	0/8	N/A	Guilty verdict Not guilty verdict (2 co-defendants)
Gun	24/54	2/24	0/2	Hung jury
Narcotics	15/57	3/14 ²³	2/3	Guilty verdict
Gun	18/60	4/16 ²³	3/4	Not guilty verdict
Gun & Escape	12/60	2/9 ²³	1/2	Not guilty – gun Guilty – escape
Narcotics (multiple counts) & Failure to Appear	17/60	1/3 ²³	1/1	Guilty verdict on all but one count, jury hung on one drug count
Assault with Intent to Kill & Gun	15/59	4/15	4/4	Guilty verdict
Gun	15/60	2/13 ²³	1/2	Not guilty verdict
Gun	19/60	3/17 ²³	0/3	Not guilty verdict
Assault with Intent to Kill & Gun	13/59	3/12 ²³	2/3	Guilty verdict
Narcotics	19/63	2/15 ²³	1/2	Guilty verdict
Gun	9/46	2/9	0/2	Not guilty verdict
Assault (knife)	21/57	5/17 ²³	1/5	Hung jury (11/1 for guilt)
Narcotics (multiple counts)	12/56	1/12	0/1	Guilty verdict on one count, hung jury on other count (7/5 for guilt)
Narcotics (multiple counts)	15/75	3/15	1/3	Not guilty on 13 counts; hung jury on 4 counts

- I live in the area where the crime allegedly occurred.
- I should have answered two questions. *I was an investigator for the D.C. Public Defender Service from January 1998 to May 1998 while I was in my last semester of law school. At PDS, I worked on cases like this one – assault with intent to kill. [This person was peremptorily struck by the prosecutor.]*
- Spanish is my native tongue. I have been in the United States ten years and speak both Spanish and English.
- *I have multiple sclerosis. It does not affect me currently but heat affects me badly. I hope the courtroom is cool. I also have pressure from my boss, in a two-person office, to get back to work soon. But I want to serve in this case. It appears very interesting. I'll serve anyway. [In this assault-with-intent-to-kill case, this person was struck by the prosecutor's peremptory.]*
- I sell autos. *I would believe a cop more* because I came to America from the Middle East 30 years ago. I admire this country greatly. I believe in the system. But I would follow the court's instructions not to treat a police officer's testimony differently than a civilian's testimony.

C. Other Significant Findings

The accompanying table summarizes data about our inquiries of the silent jurors in thirty trials. It is significant that, on average, about twenty-eight percent of the members of each venire panel did not respond affirmatively to the dozen or more questions posed in open court. Put another way, about sixteen people in an average size venire panel of fifty-nine citizens remained unresponsive. As I repeatedly brought the silent ones into the jury deliberation room for a brief and friendly “why so?” interview, three persons, on average (just under one in five of the quiet ones), had very relevant personal information to share. This resulted in at least one and as many as four persons being promptly struck for cause — by consensus of the parties — in twenty-seven of the thirty trials! That represents ninety percent of the cases. The elimination of these people, who all agreed should not have served on those particular juries, was

made possible by the switch to individualized voir dire even for these previously silent jurors.

As I ponder where my research takes me and others who are concerned about improving the voir dire process, I believe this study underlines the importance of pursuing a careful, information-oriented jury selection process. I also believe the data support the larger dimensions of Recommendation 19 of the *Juries for the Year 2000* report,²⁶ which urges greater reliance on reason-based, for-cause elimination of biased jurors, rather than on the inherently irrational use of peremptory challenges.²⁷

In view of these results, one cannot help but get a strong sense of the essential and revealing juror data that can be obtained by interviewing citizens who do not initially respond to open-court voir dire questions. The sometimes shocking, and always noteworthy, quality of the statements given above, have caused me to require that I interview all silent venire members. I am convinced that even if individual questioning took up significant amounts of time (which it has not for me), it would be well worth expending the effort in order to avoid juror UFO's and the consequent danger of mistrials caused by impaneling biased or disabled citizens.²⁸



Gregory E. Mize has been a trial judge on the Superior Court of the District of Columbia since 1990. In 1997, he was co-chair of the D.C. Jury Project, which produced the detailed report, Juries for the Year 2000 and Beyond – Proposals to Improve the Jury Systems in Washington, D.C. Mize is a 1973 graduate of the Georgetown University Law Center

Judge Mize invites any questions, comments, or recommendations that any readers may have regarding findings set forth in this article, their implications, and the prospects for useful follow-up research. He can be reached at the Superior Court of the District of Columbia, 500 Indiana Avenue, NW, Room 2600, Washington, DC 20001.

23. In this case and several others, I did not call all of the jurors who had not responded to the general questions because we had already enough jurors, not struck for cause, to proceed to the peremptory challenge stage. I have calculated that, in felony cases, thirty-six citizens are needed in order to end up with fourteen jurors in the jury box if each party exercised all available peremptory strikes. D.C. Code §23-105 affords each side in a felony case ten peremptory challenges plus one additional peremptory strike for each pair of alternate jurors who are impaneled.
24. A mistrial was declared because of a hung jury, with eleven to one for acquittal.
25. A mistrial was declared because of prejudicial prosecutorial misconduct during opening statement.
26. The D.C. Jury Project members favoring elimination of peremptory challenges enthusiastically adopted and incorporated by reference the scholarly article of Colorado judge Morris B. Hoffman. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997). After charting the history of peremptories in medieval England and the United States, Judge Hoffman demonstrates that

the peremptory challenge has neither a democratic lineage nor a Constitutional underpinning. He argues forcefully that the peremptory challenge is inconsistent with fundamental principles of an impartial jury because: (1) it reflects an inappropriate distrust of jurors, causing “perfectly acceptable, perfectly fair and perfectly impartial prospective jurors to be excluded in droves” and to become frustrated and cynical about the justice system, *id.* at 854-859; (2) it improperly shifts the focus of jury selection from the individual to the group, *id.* at 860-865; and (3) it injects an inappropriate level of adversariness into the jury selection process, tending to result not in the selection of impartial jurors, but jurors biased for one or another side, *id.* at 865-870.

27. I am speaking only for myself and not on behalf of the court on which I proudly serve.
28. I do not believe that these results are especially attributable to my mannerisms or style of interviewing. The methods I have used and described in this article are really quite simple. These kinds of revelations await any judge or attorney who wants to take an extra moment to ask a citizen, in a calmly neutral way, why he or she did not respond to any of the general questions posed in the beginning of voir dire.

Sex Offender Recidivism: A Challenge for the Court

Laurie Robinson

It is stating the obvious that citizens want to feel safe in their homes and neighborhoods. They place their trust in those of us in the justice profession to help provide that safety, but, in their view, we have not always lived up to those expectations. More than four years ago, in deliberating on the issues of citizen disenchantment with the criminal justice system, three strikes laws, and the rush to incarcerate more offenders for longer and longer periods, it struck me that much of the public's *general* distrust of criminal justice and sentencing derives from its fear of *specific* offender populations, and highest among them, sex offenders.

Since that time, others at the Office of Justice Programs (OJP) and I have been working with researchers, practitioners, and policy makers from across the country to promote more effective policies and practices regarding sex offender management.

What follows is a discussion of some of the lessons we have drawn from the experiences of jurisdictions around the country that are working to combat this problem – particularly the key role judges can play in the effective management of sex offenders in the community in preventing sexual assault, and in promoting public safety.

Background

In recent years, highly visible crimes – many of them sexual assault cases – have sparked concern for public safety among lawmakers. In response to these crimes, legislatures have enacted new laws designed to protect the public from sex offenders. These laws have significantly impacted the criminal justice system, offenders, and victims by increasing sentencing, requiring sex offender registration and community notification, lifetime supervision of some offender groups, and involuntary civil commitment. Today, more sex offenders have been arrested and incarcerated, and are under the criminal justice system's supervision, than ever before.

Data collected by the U.S. Department of Justice, Bureau of Justice Statistics (BJS), in 1996 indicate that approximately 234,000 sex offenders were under the care, custody, or control of correctional agencies in the United States.¹ Of those, almost sixty percent were under some form of conditional supervision. By 1997, this number was estimated to have increased to

260,000. Again, nearly sixty percent of these offenders were in the community under some form of supervision.

Most sex offenders will be released into our communities at some point – whether directly following sentencing, or after a term of incarceration in jail or prison. The prevalence of these cases and their seriousness, both in terms of the enormous impact on individual victims and the general fear and mistrust of the criminal justice system engendered by these incidents, demand that criminal justice professionals focus on ways to more effectively address this problem.

The Current State of Knowledge

The Rate of Sexual Violence: What Is the True Extent of Sexual Assault?

There is little current information about the true extent of sexual victimization. A 1992 study by the National Victim Center found that as few as twelve percent of all rapes were reported.² The BJS 1994-1995 National Crime Victimization Surveys indicated that only thirty-two percent of the offenses committed against victims twelve or older were reported to law enforcement.³ A recent National Violence Against Women Survey reflected that seventy-six percent of 8,000 women surveyed reported that they had been raped or physically assaulted by a current or former husband, live-in partner, or date.⁴ And these numbers do not address the critical issue of child victimization rates. What these data clearly point to is the urgent need for approaches to sex offender management that reduce the likelihood of reoffending and offer the greatest promise of ensuring public safety.

Typologies of Sex Offenders: Are All Sex Offenders Alike?

Like so many other offender populations, sex offenders are not all alike. Sex offenders can be of any age, race, religion, profession, or gender. Depending upon a variety of factors, sex offenders pose varying risks to the community. While many typologies of sex offenders have been described by researchers in the past two decades, sex offenders can be thought of in roughly three categories: those who sexually assault adult women, those who are primarily characterized as intra-familial child molesters (incest perpetrators), and those who molest

Footnotes

1. L. GREENFELD, *SEX OFFENSES AND OFFENDERS* at 15 (1997). This report is available from the Office of Justice Programs, Bureau of Justice Statistics (NCJ-163392).
2. D. G. KILPATRICK, C. N. EDMUNDS, & A. K. SEYMOUR, *RAPE IN AMERICA: A REPORT TO THE NATION* (1992). This report is available from the National Victim Center, Arlington, VA.

3. B. M. TAYLOR, *CHANGES IN CRIMINAL VICTIMIZATION 1994-95* (1997). This report is available from the Office of Justice Programs, Bureau of Justice Statistics (NCJ-162032).
4. P. TJADEN & N. THOENNES, *PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY* (1998). This report is available from the National Institute of Justice (NCJ-172837).

WHAT DO WE KNOW ABOUT SEX OFFENDERS?

- Sex offenders are not all alike.
- Sex offenders fall roughly into three categories: those who sexually assault adult women, intra-familial child molesters, and extra-familial child molesters.
- Some sex offenders, once caught, are unlikely to reoffend. The most serious offenders will victimize again, regardless of any criminal justice or treatment intervention.
- Through a combination of effective criminal justice intervention and appropriate treatment, it is believed that we can reduce the likelihood that many will reoffend.

chopathic. These individuals pose the greatest risk to the community. As with most other criminal justice decisions, it is the offenders who fall in the middle of this continuum who cause us the greatest degree of uncertainty.

Recidivism Rates

While the field is in a better position today to make distinctions among the universe of sex offenders, identifying the category a particular offender fits into or assessing an individual's risk to reoffend remain an inexact science. Recidivism rates vary among the categories and characteristics of sex offenders. For instance, a recent meta-analysis reported sexual recidivism rates of thirteen percent for child molesters and nineteen percent for rapists.⁵ However, given that these rates were based upon a four to five-year follow-up period, and that we know from victimization data that sexual assault is underreported, many believe that these rates also are underestimates. Within categories of sex offenders, individual characteristics lead to varying recidivism rates. For example, studies have found that among child molesters, males who target young boys have much higher reoffense rates than those who target girls, and that extra-familial offenders have higher reoffense rates than intra-familial offenders.⁶

When sex offender recidivism rates are taken as a whole, it is

children who are not in their families. We are beginning to understand that these offenders pose varying risks, and accordingly, respond to varying treatment approaches.

It is helpful to think about sex offenders on a continuum. On one end are those sex offenders who, once caught, are unlikely to reoffend. Their risk of harming others in the future is low. For these offenders, the criminal justice intervention itself may be sufficient to stop future abuse. On the opposite end of the continuum are sex offenders who are extremely violent, aggressive, dangerous, or psy-

extraordinarily rare to find data that suggest recidivism higher than fifty percent over the span of an offender's lifetime. Thus, research indicates that at least half of all sex offenders will not be rearrested for another sexual offense.

The Roots of Sexual Deviancy

There are many theories regarding the development of sexual deviancy. For example, some professionals believe that sexual offending is a learned behavior and that, through appropriate treatment, more responsible behaviors can replace sexual offending. Others postulate that sexual drive – including deviant sexual arousal – is imprinted at birth and therefore cannot be eradicated, but may be controlled. (For example, some believe that sexual urges can be controlled through a combination of medication and psychotherapy.) Additionally, some suggest that the absence of proper bonding and attachment in early childhood – or the exposure to violence or sexual assault in youth – can be factors that predispose some persons to sexually abusive behavior. Most experts believe that there are various developmental paths that can lead a person to become a sex offender.

The Effectiveness of Treatment

The lack of empirical information in this field results in emphatic claims. It is not uncommon to hear officials assert that there is no cure for sexual offending, and that treatment does not work. However, at present, there is little scientific basis to support these statements. The simple truth is that, at this time, we do not know whether sex offenders can be “cured.”

However, some studies present optimistic conclusions about the effectiveness of treatment programs that are empirically based, offense-specific, and comprehensive.⁷ The only meta-analysis on treatment outcome studies to date found a small, yet significant treatment effect.⁸ This 1995 meta-analysis included twelve studies with some form of control group. The results of the meta-analysis indicated an eight percent reduction in the recidivism rate for offenders in the treatment group.

The majority of sex offender-specific programs in the United States and Canada now use a combination of cognitive-behavioral treatment and relapse prevention strategies. While there is still much to be learned about the effectiveness of these approaches, it is believed that treatment success is often related to the type of sexual offender, the treatment model being used, the specific modalities employed, and the effectiveness of related interventions from probation and parole. Although the effectiveness of treatment for sex offenders has not been confirmed, failure to complete treatment has proven to be a significant predictor of recidivism. As Hanson and Bussière noted in their meta-analysis, “One of our most important findings is that

5. R. K. Hanson & M. T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOLOGY 348-362 (1998).

6. R. K. HANSON & M. T. BUSSIÈRE, PREDICTORS OF SEXUAL OFFENDER RECIDIVISM: A META-ANALYSIS (1996). This report is available from the Department of the Solicitor General of Canada, Ottawa, Ontario (User Report 96-04). See also V. L. Quinsey, M. L. Lalumière, M. E. Rice, & G. T. Harris, *Predicting Sexual Offenses*,

in ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS 114-137 (J. C. Campbell, ed.) (1995).

7. R. Lieb, V. L. Quinsey, & L. Berliner, *Sexual Predators and Social Policy*, in CRIME AND JUSTICE 43-114 (M. Tonry, ed.) (1998).

8. G. C. N. Hall, *Sex Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOLOGY 802-809 (1995).

offenders who failed to complete treatment were at increased risk for both sexual and general recidivism.”⁹

The Critical Role of Community Supervision for Sex Offenders

Given the lack of clear and convincing information about sex offenders and our inability to predict with precision which offenders will reoffend, many advocate for the longest possible sentences for these offenders. While this may be the best alternative for some offenders – particularly those who commit the most heinous offenses and are the most likely to reoffend – it may not be the most compelling course of action for many of the cases coming through our courts today.

The simple truth is that the majority of sex offenders are released into the community *at some point*, and many are only briefly incarcerated or are not detained at all. Given this, we must ask ourselves two questions: “Under what circumstances is a sex offender least likely to reoffend?” and “What can we do to reduce the likelihood of reoffense?” While we cannot assuredly say that sex offender-specific treatment completely eliminates the likelihood of reoffense, we can say with assurance that those offenders who are under correctional supervision – in combination with sex offender-specific treatment – are *less likely* to reoffend. Thus, the field is fairly well united in the belief that the responsible management of sex offenders includes rigorous supervision and sex offender-specific treatment. This provides a compelling argument – and a call to each community in this country – to make the establishment of a comprehensive system to manage these offenders a high priority.

The Elements of a Comprehensive Management System

Experience in jurisdictions across the country suggests that there are two essential elements to the effective management of sex offenders under community supervision. In general terms, these two elements are the supervision of sex offenders by professional staff who are expert in working with these cases, and the provision of sex offender-specific treatment by professional staff who also have expertise in working with this population.

Effective Supervision

Sex offenders are different from most other offenders under community supervision. As one judge noted, “The person you expect in the courtroom when you think of a sex offender is not the one who typically stands before you.” Most sex offenders do not look the part of our stereotyped sex offender, or even act the part most of the time. They often do not present themselves as individuals who are likely to cause serious harm. In many cases, they can appear as among the most “mainstream” of all offenders: they often have families, are well educated, and have stable employment. Until recently, supervision staff may have observed that sex offenders were among the easiest, most compliant offenders on their caseloads. However, it is this very para-

dox – that sex offenders can and often do lead dual lives – that requires a unique approach to community supervision.

Standard conditions and methods of supervision are not sufficient to effectively manage these cases. Instead, community supervision officers must be educated about sexual offending patterns, must develop a keen awareness of the history and patterns of these offenders, and must move supervision out of the office and into the community. They must be especially observant and vigilant in enforcing supervision conditions and acting upon violations.

The following is a sampling of the kind of special conditions that are unique to sex offenders but routinely added to “standard conditions” in communities around the country:¹⁰

- Active participation in specific treatment for sex offenders until successfully discharged by the treatment team.
- No contact with the victim and/or the victim’s family.
- Payment for victim treatment through a probation escrow account.
- No contact with those under eighteen; full, appropriate dress when public view is possible; no non-therapeutic contact with other known sex offenders; no contact with pornographic materials.
- No work or volunteer activity where those under eighteen are likely to be encountered.
- Driving after dark prohibited; prohibited from areas where children are likely to congregate; prohibited from hitchhiking; restricted travel outside of the community.
- Disclosure of offense history is required to landlord, employer, police department, and school authorities, as applicable.
- Residence must be approved by the supervision agency; no unapproved visits with family; curfew may be imposed.
- No purchase, possession, or consumption of alcohol or drugs; testing as requested.

Appropriate Treatment

Because sex offenders are unlike other types of criminals, standard mental health treatment practices are not adequate to address their needs. Therapists who are not trained to work with this special population are ill prepared to deal with the complexity of these cases, the offenders’ seemingly paradoxical behavior, their highly manipulative personalities, and their secretive lifestyles. Conventional therapeutic approaches can allow the behavior of these offenders to remain unchecked, even after criminal justice intervention. Worse, inexperienced or ill-qualified therapists can be manipulated by sex offenders, just as others can be so manipulated. The best experience and current research tell us that only with sex offender-specific treatment, provided by professionals offering services that conform to the most recent literature about effective therapeutic interventions with this population, can we hope to disrupt the patterns of behavior that lead to reoffense.

9. Hanson & Bussière, *supra* note 5, at 358.

10. K. English, S. Pullen, L. Jones, & B. Krauth, *A Model Process: A Containment Approach*, in *MANAGING ADULT SEX OFFENDERS: A*

CONTAINMENT APPROACH, sect. 1, pt. 2, p. 30 (K. English, S. Pullen, & L. Jones, eds.) (1996). This report is available from the American Probation and Parole Association, Lexington, Kentucky.

Collaboration: The Key to Effective Management

As we look at jurisdictions across the nation and examine the approaches to sex offender management developed over the past several decades, the most common denominator, the thread that can be found throughout, is collaboration.

When systems collaborate, they work together toward a common goal. Each entity within that system upholds their piece of the process, but does so in harmony with others. In this instance, the factions of a system do not work at cross purposes or make the work of the other more difficult. Instead, members of the system strive to achieve the optimal outcome, and increase their likelihood of doing so through a cohesive response.

One of the lessons learned about sex offenders is that information and disclosure are key ingredients to breaking the sexual offending pattern. Sex offenders rely on a system that allows them to keep the nature of their activities secret. Only through the confrontation of those secrets does the offender begin to deal with the behavior that jeopardizes the safety of victims. Thus, each of us in the system carries specific responsibility for dealing with sex offenders:

- Law enforcement officers serve as critical examiners of evidence to determine whether a crime contains a sexual component, and, when this is the case, to seek as much factual information as possible.
- Prosecutors must make appropriate charging decisions and refuse to plead sexual assault cases to non-sexual assault cases. The negotiation of such pleas by the prosecution, or the acceptance of them by the court, diminishes the likelihood that sex offenders will be confronted by the very behavior that resulted in their arrest.
- Community supervision agencies must recognize the extraordinary complexity of sex offender cases. They must ensure that talented, trained staff assume responsibility for these offenders, and they must support their officers in doing so. Officers must carefully monitor sex offenders on their caseloads and become proactive problem-solvers, ever vigilant in ensuring that the offender is held accountable and is in compliance with the court's orders.
- Treatment professionals must hold themselves to the highest standards as well, and remain current on emerging research and practice in this area. They must let go of traditional codes of confidentiality. In most therapist/client relationships, information obtained during treatment sessions is confidential; however, in the field of sex offender management, there can be no promise of confidentiality when further victimization is at stake. This kind of information must be exchanged between treatment providers and supervising officials in order to ensure all possible steps are taken to reduce the likelihood of reoffense. Secrets are the power base of the sex offender. In the field of sex offender management, secrets are carefully avoided.
- In communities across the country, we see barriers dissolve that once kept criminal justice and victims on opposite

sides of the fence. Victim advocates are now partnering with criminal justice professionals in a wide array of activities. There are even victim advocates in the offices of supervision staff, partnering in the monitoring and supervision of cases.

- In responding to cases of adolescent sex offenders, the collaboration expands to a network of others, including families, school staff, and social services workers. With both adult and adolescent offenders, families and significant others become key members of a network of community members who assume responsibility for supervising the offender.

The Court's Role in the Collaborative Process

Judges are uniquely positioned to ensure that offenders receive the supervision and treatment that is paramount to reducing recidivism risk. It is critical that judges set special conditions that are uniquely designed for these offenders and monitor compliance with those requirements to increase the likelihood of successful outcomes. Judges can play a key role in ending the cycle of abuse by requiring that offenders actively participate in treatment services offered by qualified providers. Finally, judges must insist that the community supervision agency monitor the offender carefully.

In order to make appropriate sentencing decisions on sex offender cases, judges must understand the cases before them. Some of the information judges should have at their disposal in sex offense cases include:

- Complete information about the offender's criminal history to determine whether there is a known pattern of sexual offending;
- Complete information about the current offense – to determine the offender's motivations, and the extent and nature of the victimization;
- The preparedness of the supervision agency to provide careful monitoring and supervision of the offender; and
- The availability of sex offender-specific treatment services.

When deciding sex offense cases, judges must consider whether the acceptance of a plea will result in masking the true nature of the crime. By allowing a sex offender to plead to a non-sexual offense, or to enter a no-contest plea (also known as an *Alford* plea), an offender may be able to avoid treatment, diminishing the likelihood that the cycle of abuse will come to an end. No-contest pleas can also result in offenders denying their offenses once in treatment; those in denial are often the most difficult offenders to treat. This type of plea can also hinder resolution of the crime for the victim.

Judges must also consider the length of community supervision to impose – either in lieu of or in addition to incarceration – that is appropriate in each case. Longer periods of supervision provide a greater safety net with sexual offenders; it is wiser to decrease initial probation terms than to lack the ability to increase them when more supervision and surveillance is necessary. Some states have addressed this issue by developing lifetime supervision laws for sexual offenders.¹¹ However, no

11. Arizona, Colorado, New Hampshire, and Rhode Island all have implemented such laws.

empirical information is yet available to indicate the "ideal" period of supervision for sex offenders.

In the collaborative process, the court must require that the supervision and treatment agencies work closely together to monitor these cases and that they are steadfast in requiring compliance with conditions. Judges need to ensure that both supervision and treatment respond quickly when those conditions are violated. When violations occur, sound counsel should be provided regarding the appropriate response to the violation and the imposition of tighter controls where continued community supervision appears appropriate.

Preventing Revictimization

Without question, sexual assault is among the worst kinds of victimization. An alarmingly high number of victims of sexual assault know their assailants, and research tells us that this is the most difficult kind of victimization to overcome.

There is much to learn from victimization surveys. These data tell us that most victims of sexual assault do not come forward. It is believed that this is largely due to the shame the victims feel, their fear of persecution, and, where the perpetrator is a family member, a sense of responsibility for disrupting the family.

The criminal justice system is designed to reduce victimization. Yet the system too often results in the revictimization of the innocent. Recognizing this, many jurisdictions around the country are forming stronger partnerships with victim advocacy organizations to provide support to victims and to establish court and supervision processes that guard their safety.

Assistance to the Courts and the Field

Today, increasingly greater resources are being invested in exploring the issue of sex offender management. Over the past several years, the Justice Department and others have begun to assist courts and other criminal justice professionals to enhance their sex offender management practices.

In 1997, the Office of Justice Programs at the U.S. Department of Justice, in cooperation with the State Justice Institute and the National Institute of Corrections, established the Center for Sex Offender Management (CSOM) to serve as a national training and technical assistance resource. CSOM is working to implement recommendations that emerged from a National Summit that OJP convened in November 1996, and is collaborating with a number of jurisdictions around the country that have already developed promising, collaborative approaches to sex offender management. CSOM is monitoring, learning from, and supporting these "resource sites," as well as disseminating information about effective approaches to the rest of the criminal justice and treatment communities. CSOM is also designing and delivering a series of training programs around the country, and providing technical assistance to

selected jurisdictions as they undertake new efforts to develop comprehensive, collaborative strategies to respond to sex offenders in their communities.

In addition to these efforts, the Justice Department's Office of Justice Programs is also supporting several major research initiatives to better understand the adult sex offender population and the risk of recidivism, as well as the typologies of adolescent sex offenders and their treatment needs. And one of OJP's collaborating partners, the State Justice Institute, is supporting the development of a video-based training curriculum for judges on sentencing issues related to sex offenders, which will be pilot-tested later this year, and then made available to the judicial educator in each state and all of SJI's libraries in late 1999.

Conclusion

There are additional steps the judiciary should be taking to address this issue. First, I would encourage judges to educate themselves about the issues involved in dealing with this special population of offenders.¹² Second, the court has a critical role as a leader in this area. So I urge you to reach out to those in your jurisdictions who are also concerned about this issue: prosecutors, the defense bar, probation, treatment providers, and the victims community. Work together to understand the issues and to develop practices in your community that promote justice and safety in these cases. By working together, we can find ways to effectively manage sex offenders, to care for victims, and to ensure the safety of our communities.

For Additional Resources

For additional information about the Center for Sex Offender Management (CSOM) or the video-taped seminar for judges on sentencing sex offenders, visit the CSOM Website at www.csom.org or call (301) 589-9383.



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12. The literature in this area is evolving. Three current texts that offer a fuller discussion on many of the issues presented here are: W. L. Marshall, D. R. Laws, & H. E. Barbaree (Eds.), *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (1990); B.K. Schwartz & H. R. Cellini (Eds.), *The Sex Offender:*

New Insights, Treatment Innovations and Legal Developments, Volume II (1997); and K. English, S. Pullen, & L. Jones (Eds.), *Managing Adult Sex Offenders: A Containment Approach* (1996). This report is available from the American Probation and Parole Association, Lexington, KY.

The Legislature's Prerogative to Determine Impeachable Offenses

Mathew Paulose Jr.

In *United States v. Bayless*,¹ United States Judge Harold Baer of the Southern District of New York held – contrary to a significant amount of later criticism – that two New York City police officers had violated an alleged drug trafficker's right to be free from an unwarranted search and seizure.² Disbelieving the incredible testimonies of the police officers,³ he found no other recourse but to suppress the cocaine and heroine seized by the officers.⁴

Criticism of Judge Baer's decision came first from the United States Congress, where two hundred legislators demanded Judge Baer's resignation.⁵ Criticism came next from the Executive Branch, where, according to news reports, the White House "put [Judge Baer] on public notice . . . that if he did not reverse [his] decision . . . the President might seek his resignation."⁶ Robert Dole, then-Senate Majority Leader and Presidential candidate, added, notwithstanding the President's message, that Judge Baer "ought to be impeached."⁷

Response from Judge Baer's defenders was immediate. First came a statement from the judiciary, where four judges on the



Second Circuit Court of Appeals stated that the criticism of Judge Baer had "gone too far."⁸ Chief Justice William Rehnquist issued a similar statement: "[T]here are a very few essentials that are vital to the functioning of the federal court system . . . Surely one of these essentials is the independence of the judges who sit on these courts."⁹ Finally, the leaders of seventy-six bar associations issued a statement, holding that the threats imperiled the entire United States system of government.¹⁰

The lines had clearly been drawn – on one side were the Legislative and Executive branches, on the other was the Judicial Branch. But the lines would eventually unravel. On March 11, 1997, House Majority Whip Tom DeLay proposed that the Congress should turn to the impeachment process against federal judges like Judge Baer.¹¹ He defined impeachable offenses as "whatever a majority of the House of Representatives consider[ed] it to be."¹² Unlike the previous remarks of legislators, DeLay's proposal, particularly his definition, evoked animosity from both sides of the discussion.

Footnotes

1. 913 F. Supp. 232 (S.D.N.Y.), vacated, 921 F. Supp. 211 (S.D.N.Y. 1996).
2. See *id.* at 234.
3. See *id.* at 239 ("The testimony offered by Officer Carroll about how the events . . . unfolded . . . is at best suspect."); see also *id.* at 239-40 ("[O]ne cannot keep from finding [Officer] Carroll's story incredible").
4. See *id.* at 243 (ruling that because of the Fourth Amendment violation, "seizure of the drugs from the trunk and defendant's post arrest statements being the fruits of a tainted search must and will be suppressed").
5. See Letter from Congressman Fred Upton to President Bill Clinton (Mar. 20, 1996), available at 1996 WL 8784817 (stating Judge Baer "demonstrated a level of ideological blindness that render[ed] him unfit for the proper discharge of his judicial duties").
6. Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1 (quoting White House Spokesman Michael McCurry).
7. Katharine Q. Seelye, *A Get-Tough Message at California's Death Row*, N.Y. TIMES, Mar. 24, 1996, at 29 (quoting Sen. Robert Dole).
8. *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L.J., Mar. 29, 1996, at 4 (quoting statement of present and former Chief Judges Jon O. Newman, J. Edward Lumbard, Wilfred Feinberg, and James L. Oakes).
9. William H. Rehnquist, address at Washington College of Law, American University (April 9, 1996), in VITAL SPEECHES, May 1, 1996, at 418.
10. See *Bar Urges Protection of Judges' Decisions*, N.Y. TIMES, April 7, 1997, at A11 (reporting statement of bar associations).
11. See Ralph Z. Hallow, *Republicans Out to Impeach 'Activist' Jurists*, WASH. TIMES, March 12, 1997, at A1.
12. Rep. Tom DeLay, *Letter to the Editor: Impeachment Is a Valid Answer to a Judiciary Run Amok*, N.Y. TIMES, April 6, 1997, § 4, at 18. Rep. DeLay borrowed the definition from Gerald Ford. See 116 CONG. REC. 11913 (1970) (reporting then-Rep. Ford's urging impeachment of Justice William Douglas).

Critics called DeLay's proposal and definition of impeachable offenses "dangerous,"¹³ "callous,"¹⁴ and "a passing fantasy."¹⁵

What had begun as a political discourse evolved into a contentious debate – focusing on whether the Congress could define impeachable offenses as whatever they considered them to be. Scholars have consistently stated that when it comes to the province of judicial independence, a fine line exists between appropriate criticism and interference,¹⁶ and that, therefore, any person advancing a threat as "dangerous" as DeLay's should do so with extreme caution. At the same time, however, scholars also have argued that there are, indeed, several constitutionally proper ways of controlling judicial independence,¹⁷ one among them, the impeachment process. Given this last premise, then, it would seem that if DeLay's definition – that an impeachable offense is whatever the Congress considers it to be – is constitutionally proper, then DeLay's proposal to use the impeachment process is likewise proper.

This article argues that DeLay's definition is constitutionally proper. Part I discusses the definition, origin, purpose, and importance of judicial independence. Part I also discusses that, notwithstanding the importance of judicial independence, there are several constitutionally proper ways of controlling judicial independence. Part II elaborates on DeLay's proposal and its criticisms. Part III concludes that DeLay's definition is constitutionally proper and that his proposal to use the impeachment process is likewise proper.

JUDICIAL INDEPENDENCE

A. The Definition, Origin, and Purpose of Judicial Independence

Judicial independence is a judge's ability to decide a case free from outside influence.¹⁸ It has been described as a "principle,"¹⁹ a "theme,"²⁰ a "notion,"²¹ and a "crown jewel."²² While it may be one of the "least understood concepts"²³ in law, it also has been said that "we all know what it means."²⁴

Judicial independence originated in England during the Seventeenth Century, at a time when English kings had the authority to summarily dismiss their judges.²⁵ The most celebrated abuse of this authority involved King James I and Lord Coke, the chief justice of the King's Bench.²⁶ Displeased with one of the chief justice's decisions, the King summarily dismissed the justice and forced the decision in his favor.²⁷ Two subsequent kings inherited similar penchants for summary dismissals.²⁸

The kings, however, were eventually deposed and, with them, the practice of summary dismissals.²⁹ Instead, the practice of life tenure, coupled with the guarantee of undiminishable compensation, was instituted and eventually codified.³⁰ The rationale behind the new practice was to prevent encroachment upon the judicial decision-making authority, as it had happened in the case of Lord Coke.³¹

In the United States, judicial independence originated during the development of the Constitution.³² Like the English

13. Hallow, *supra* note 11, at A1 (quoting Laura W. Murphy, director of the Washington Office of the American Civil Liberties Union).

14. Laurie Kellman, *Republicans Rally 'Round Judge Impeachment Idea*, WASH. TIMES, Mar. 13, 1997, at A1 (quoting U.S. Rep. James P. Moran).

15. Katherine Q. Seelye, *House GOP Begins Listing a Few Judges to Impeach*, N.Y. TIMES, Mar. 14, 1997, at A24 (quoting N. Lee Cooper, president of the American Bar Association).

16. See e.g., Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions*, 72 N.Y.U. L. REV. 308 (1997) (distinguishing between fair criticism and intimidation of judges).

17. See, e.g., Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988) (reviewing history of appointment process's influence over judicial independence).

18. See L. Ralph Mecham, *Introduction to Mercer Law Review Symposium on Federal Judicial Independence*, 46 MERCER L. REV. 637, 638 (1995) (defining judicial independence as a "judge's ability to decide a case free from pressures or inducements").

19. See Penny J. White, *Judges and Public Opinion*, CURRENT, June 1, 1997, at 35 (defining judicial independence as "the principle that judges must be free to decide individual cases according to the judge's view of the law, not public opinion about it").

20. See Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996) (defining judicial independence as the "theme of how to assure that judges decide according to the law, rather than according to their own whims or to the will of the political branches of government").

21. See Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 130 (1994) (defining judicial independence as the "notion that judges must have physical and emotional space to render impartial decisions,

without fear of retribution (either formal or informal) for unpopular, yet sound, decisions").

22. See Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A4 (quoting Chief Justice William Rehnquist).

23. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 607 (1996).

24. THEODORE BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF COURTS* 1-8 (1970).

25. See White, *supra* note 19, at 35 (discussing origin of judicial independence).

26. See BERNARD SCHWARTZ, *THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 121-22* (1967) (discussing controversy between King James I and Lord Coke).

27. See *id.* at 122 (discussing discharge of Lord Coke).

28. See *id.* at 190 (discussing Charles II and James II's "free use" of summary dismissal).

29. See White, *supra* note 19, at 35 (discussing Glorious Revolution of 1688); Schwratz, *supra* note 25, at 199 (discussing repeal of appointing judges at king's pleasure).

30. See Act of Settlement 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.) ("Judge's Commission be made Quam diu se bene Gesserint and their Salaries ascertained and established"), *quoted in* Schwartz, *supra* note 26, at 199.

31. See Schwartz, *supra* note 26, at 199 ("Thus was definitely ended the Crown's power to dismiss judges who withstood the royal will – a power that too often had made the Stuart judges mere servile creatures of the king.").

32. See Breyer, *supra* note 20, at 989 (finding the "primary basis" of judicial independence in Article III of the Constitution).

Preventing encroachments upon the judicial decision-making authority is vital ...

codification of judicial independence, Article III of the Constitution provided for life tenure and undiminishable compensation.³³ The similarity between the English and United States versions demonstrates a commensurate similarity in rationales, that is, to prevent encroachment upon the judicial decision-making authority.³⁴

B. The Importance of Judicial Independence

Preventing encroachments upon the judicial decision-making authority is vital to maintaining an impartial administration of the law. As Alexander Hamilton said, preventing encroachment is “the best expedient . . . to secure a steady, upright, and impartial administration of the laws.”³⁵ Likewise, in *Bradley v. Fisher*,³⁶ the Supreme Court observed that judicial independence was a “principle of the highest importance to the proper administration of justice.”³⁷

With the proper administration of justice secured by judicial independence, the public’s faith in the government is correspondingly secured. George Washington said that “the true administration of justice is the firmest pillar of good government.”³⁸ Similarly, Alexander Hamilton argued that “the ordinary administration of criminal and civil justice . . . contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.”³⁹ Judicial independence, being the linchpin to the impartial administration of the law, is vital to secure the public’s faith in government.

C. Traditional Methods of Controlling Judicial Independence

Given the importance of judicial independence, the framers nevertheless instituted several methods of controlling it.⁴⁰ Limits on jurisdiction, which for lower federal courts are established by statute, and the impeachment process are two examples. The framers did not intend other methods to function as checks on the judiciary, but, through historical use, these have become tantamount to checks. These include the appointment and compensation processes. These four processes constitute the most affective methods of controlling judicial independence.⁴¹

D. The Appointment Process

Article II, Section 2, clause 2, of the United States Constitution provides that the President, with the consent of the Senate, shall have the power to appoint federal judges.⁴² With the power to appoint judges comes a proportionate power to control judicial independence. This is because the President and Senate generally appoint an individual with similar views and ideals, whether moral or political.⁴³ A judge with similar views and ideals will generally decide a case in a manner consistent with the way the President and Senate that appointed the judge would have decided the case.⁴⁴ Thus, while a judge may appear to be independent, he is actually under an indirect form of political influence. The appointment process, consequently, as one scholar has found, may be “the most striking intrusion” on judicial independence.⁴⁵

E. The Compensation Process

Article III, Section 1, of the Constitution provides that federal judges shall receive an undiminishable compensation.⁴⁶ Scholars generally conclude that the undiminishable compen-

33. See U.S. CONST., Art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

34. See Douglas W. Hillman, *Judicial Independence: Linchpin of Our Constitutional Democracy*, 76 Mich. B.J. 1300, 1300-01 (1997) (arguing that similarity between codifications of judicial independence demonstrates hereditary origin); see also Breyer, *supra* note 19, at 989 (stating that provisions of life tenure and undiminishable salary assure that “Congress or the executive cannot directly affect the outcome of judicial proceedings by threatening removal or reduction of salary”).

35. The Federalist No. 78, at 230 (Alexander Hamilton) (Robert Maynard Hutchins, ed. 1952).

36. 80 U.S. (13 Wall.) 335 (1871).

37. *Id.* at 347.

38. See Charles Warren, *The Supreme Court in United States History* 31-32 (1926) (quoting George Washington).

39. The Federalist No. 17, at 70 (Alexander Hamilton) (Robert Maynard Hutchins, ed. 1952).

40. See Gerald E. Rosen, address at Kalamazoo College (Nov. 21, 1996), in *Vital Speeches*, Jan. 15, 1997, at 194 (stating that framers were fearful of providing Judges with unlimited independence).

41. See Berkeley N. Riggs & Tamera D. Westerberg, *Judicial*

Independence: An Historical Perspective the Independence of Judges Is . . . Requisite to Guard the Constitution and the Rights of the Individuals. . ., 74 DENV. U. L. REV. 337, 340 (1997) (stating that the processes of appointment, tenure and compensation, impeachment, and jurisdiction “most affect” judicial independence).

42. See U.S. CONST., Art. II, § 2, cl. 2 (stating that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States. . .”).

43. See John D. Feerick, *Judicial Independence and the Impartial Administration of Justice*, N.Y.L.J., Apr. 3, 1996, at 2 (1996) (“Candidates for national office have criticized judges whose determinations they disagree with and have made campaign promises to exercise the power of appointment by choosing their own judges.”).

44. See Riggs & Westerberg, *supra* 41, at 341 (discussing influence of appointment power on direction of Supreme Court).

45. *Id.*

46. See U.S. CONST., Art. III, § 1 (“Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished . . .”).

47. See Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1765-66 (1984) (arguing that undiminishable compensation is essential element of judicial independence).

sation clause is an essential element of judicial independence.⁴⁷ At the same time, however, at least one scholar has argued that the clause may alternatively function as a control on judicial independence.⁴⁸

The argument is that while the Constitution prohibits diminishing compensation, the Constitution does not prohibit diminishing support services, such as law clerks and secretarial services.⁴⁹ Thus, Congress could diminish support services to such an extent that a judge would have to struggle to perform his judicial function.⁵⁰ The argument continues that the Constitution also does not prohibit failing to increase compensation.⁵¹ Under this view, Congress could refuse to increase compensation for such an extended period that a judge would have to struggle to maintain his judicial position.⁵² Both methods function as controls on judicial independence because a judge would be forced to comply with legislative demands to avoid the decrease in services or to obtain the increase in compensation.

F. The Jurisdiction Process

Article III, Section 1, of the Constitution provides that Congress has the sole power to create the lower federal courts.⁵³ This provision functions as a control on judicial independence by providing Congress with the ability to not create federal courts, or, if created, to end them.⁵⁴ The provision also provides Congress with some ability to remove from federal courts some of the jurisdiction provided for under the Constitution.⁵⁵

G. The Impeachment Process

Article I, Section 2, clause 5, of the Constitution provides that the House of Representatives shall have the power to approve a judge for impeachment.⁵⁶ Section 3, clause 6, provides that the Senate shall have the power to try the judge for

impeachment.⁵⁷ Section 3, clause 6, also provides that no judge shall be impeached without a two-thirds vote of the Senate.⁵⁸ Article II, section 4, provides that a judge may be impeached on two-thirds vote only for treason, bribery, or high crimes and misdemeanors.⁵⁹ Article I, Section 3, clause 7, provides that any judge impeached shall face the sanction of removal from office and no further sanction.⁶⁰

The impeachment process is a clear method of controlling judicial independence.

These five provisions provide the sole process for removing a federal judge from office.⁶¹ The impeachment process is a clear method of controlling judicial independence. If a judge is found guilty of treason, bribery, or any other high crime and misdemeanor – in essence, exercising unfettered independence – then the Legislative Branch may confiscate the judge's independence and remove him from office.

Scholars assert that the framers intended the legislature to use the impeachment process sparingly.⁶² As of 1997, the House had subjected only forty-seven federal judges to impeachment proceedings. The Senate had tried fourteen and convicted only seven of the forty-seven. The Senate had never impeached a judge for his rulings.⁶³

THE NEW ATTEMPT AT CONTROLLING JUDICIAL INDEPENDENCE

On March 11, 1997, House Majority Whip Tom DeLay, announced that Congress would begin using the impeachment process to remove federal judges who exceeded their constitutional authority.⁶⁴ DeLay explained that the Constitution provided federal judges with the power to decide cases and con-

48. See Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 700-06 (1995) (discussing Compensation Clause's affect on judicial independence).
49. See *id.* at 702 (arguing that since framers never contemplated concept of support services, they did not intend Compensation Clause to encompass such services).
50. See *id.* at 702-03 (arguing that the legislature "could so drastically reduce judicial support services so as to render impossible performance of the judicial function").
51. See *id.* at 704 (arguing that refusal to increase compensation does not violate the Constitution).
52. See *id.* (stating "if judges' salaries are not increased, their real incomes decline").
53. See U.S. CONST., Art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
54. See Lawrence Gene Sager, *Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of Federal Courts*, 95 *HARV. L. REV.* 17, 23 (1981) (discussing constitutional provision of Congress' power to create lower federal courts).
55. See *id.* at 25-26. See also RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §

2.10 (1992 & Supp. 1999).
56. See U.S. CONST., Art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").
57. See U.S. CONST., Art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").
58. See *id.* ("[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.").
59. See U.S. CONST., Art. II, § 4 ("[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").
60. See U.S. CONST., Art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office . . .").
61. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 83-86 (1996) (arguing that judges may not be removed by any other means).
62. See Carl E. Stewart, *Contemporary Challenges to Judicial Independence*, 43 *LOY. L. REV.* 293, 304 (1997) (stating that framers "intended removal of judges to be a rare occurrence").
63. See *id.*
64. See Hallow, *supra* note 11, at A1 (discussing conversation of Mar. 11, 1997, between Rep. DeLay and editors of Washington Times).

Congress can, indeed, define an impeachable offense as whatever it considers it to be.

troveries, not the power to make political decisions. DeLay argued that federal judges were ignoring their restricted power and were instead accelerating their way into the legislative province.⁶⁵ DeLay cited as an example United States District Judge Fred Biery, who indefinitely postponed

the swearing-in of two Republicans who had won their respective races for sheriff and county commissioner. DeLay also cited Judge Thelton Henderson, who blocked a voter-approved ban on race and sex preferences in state hiring and college admissions. DeLay argued that the judges' actions were legislative in nature, beyond the scope of their constitutional authority.⁶⁶

Critics denounced DeLay's announcement. The White House argued that DeLay's proposal was an improper form of influence by one government branch over another.⁶⁷ The American Bar Association argued that DeLay's proposal was constitutionally unsupportable. Then-ABA President N. Lee Cooper said that the Constitution's impeachment power did not encompass impeachment for "political correctness or incorrectness."⁶⁸ Several constitutional scholars agreed, arguing that DeLay's proposal was "bizarre," that it would "go nowhere," and that its use was merely "to intimidate the judiciary."⁶⁹

DeLay responded with a letter to the *New York Times*.⁷⁰ He argued in more detail that precedent supported the use of the impeachment power to remove judges for exceeding their constitutional authority. For example, he argued, Chief Justice Marshall observed that "a Judge giving opinion contrary to the opinion of the legislature is liable to impeachment."⁷¹ He also cited Gerald Ford, who observed that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."⁷²

DeLay's critics countered that DeLay had taken Marshall's and Ford's statements out of context.⁷³ Others continued to argue that, even if the legislature could define an impeachable offense, using the impeachment power to remove judges for individual decisions threatened to destroy the United States system of government.⁷⁴ DeLay, meanwhile, continued to maintain his position: "It is my opinion that anybody can be impeached for anything."⁷⁵

THE VALIDITY OF DELAY'S DEFINITION

Congress can, indeed, define an impeachable offense as whatever it considers it to be. Several premises, however, are required to come to that conclusion. First, the Constitution provides that the legislature shall have the "sole" power to try an impeachment. The general weight of authority agrees that by using the word "sole," the framers of the Constitution intended that no other body possess the power to try an impeachment.⁷⁶

Second, the Constitution provides that the legislature shall try an impeachment only for treason, bribery, or high crimes and misdemeanors, and that the legislature shall convict for such offenses only upon two-thirds of a supermajority vote. The Constitution also provides that the legislature shall try an impeachment under oath or affirmation, and that the legislature may not punish a judge further than removal. The Constitution provides for no other procedural rules regarding impeachment. Here, the general weight of authority agrees that by the inclusion of such few procedures, the framers intended for the legislature to fill the gaps through the legislature's Rules of Proceedings Clause.⁷⁷

Next, the Constitution provides that the judiciary shall have no authority to review the legislature's use of the Rules of Proceedings Clause. It follows naturally that the Constitution therefore provides the judiciary with no authority to review the procedures installed by the legislature to try an impeachment. The general weight of authority agrees that by including the Speech and Debate Clause, which protects legislative activities

65. See *id.* (quoting Rep. DeLay as stating that "[i]f judges are going to make political decisions, it is within the precedent of this country and the precedent of Congress to impeach them for making political decisions").

66. See *id.* (listing Rep. DeLay's examples of judges exercising legislative rather than judicial authority).

67. See Kellman, *supra* note 14, at A1 (reporting that the White House denounced DeLay's statements as improper influence of the judiciary).

68. See Hallow, *supra* note 11, at A1 (quoting N. Lee Cooper).

69. Herman Schwartz, *The War Against Judicial Independence*, L.A. TIMES, May 11, 1997, at 2.

70. See DeLay, *supra* note 12, at 18.

71. *Id.* (quoting Chief Justice Marshall).

72. *Id.* (quoting Gerald Ford).

73. See, e.g., Anthony Lewis, *Destroy the Guardians*, N.Y. TIMES, Apr. 7, 1997, at A15 (analyzing context of Marshall's and Ford's statements and arguing that DeLay used them improperly).

74. See, e.g., *Bar Urges Protection of Judges' Decisions*, *supra* note 10, at A11 ("Moving to impeach judges for individual decisions . . .

threatens to destroy [the] delicately crafted balance [of separation of powers].").

75. See Greg McDonald, *Some Republicans Mull Impeachment*, HOU. CHRON., Jan. 30, 1998, at 12 (1998) (quoting Rep. DeLay).

76. See, e.g., Merrill E. Otis, *A PROPOSED TRIBUNAL: IS IT CONSTITUTIONAL?* 29-30 (1939) ("The Framers certainly would not have been so meticulous in the use of words, so careful to use this particularly strong word in the vesting of the impeachment power, unless they had in mind . . . to make it clear to all forever that, in the American system, no significance should be given to any English precedent, if there were any, whereby the power to charge misconduct for the purpose of obtaining removal of a civil officer from office was held to be lodged in any other than that legislative body directly representing the whole people.").

77. See U.S. CONST., Art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . ."); see, e.g., Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 TEX. L. REV. 1, 94 (1989) ("The gap that is left as to the rest of the specifics of the Senate's trial is to be filled according to the discretion of the Senate, as provided in article I, section 5 . . .").

from judicial review, and by vesting the “sole” power of impeachment in the legislative branch, the framers intended the judiciary to remain out of the impeachment process.⁷⁸ The Supreme Court agreed in *Nixon v. United States*,⁷⁹ in which the Court held that the Constitution provided the judiciary with no authority to review the legislature’s impeachment process. The Court stated that there was not “a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers This silence is quite meaningful”⁸⁰

The argument, then, is that if (1) the legislature has the sole power to try an impeachment, along with (2) the sole power to establish the procedures relating to an impeachment, and (3) the appropriateness of the procedures are nonjusticiable, then the legislature must also have the power to establish the procedure that define an “impeachable offense.”

DeLay’s proposal that “an impeachable offense is whatever a majority of the House of Representatives considers it to be” is thus proper. DeLay’s proposal is merely a legislative procedure that defines an impeachable offense, which is well within the sole province of the legislature and removed from judicial review.

Precedent supports the syllogism. Scholars have stated that the framers intentionally phrased “high crimes and misdemeanors” abstractly to reach any attempt to subvert the Constitution.⁸¹ Given the abstract quality of the phrase, scholars have agreed that the framers intended “the delineation of the [impeachment] offense”⁸² to rest with the legislature.⁸³ This is because the framers viewed the legislature as better

equipped than any other body to deal with the political issues raised in impeachments.⁸⁴ DeLay’s definition, thus, is consistent with the framers’ intentions.

CONCLUSION

Although this article has argued that Representative DeLay’s definition of impeachable offenses is constitutionally valid, the author takes no position as to whether DeLay and his colleagues actually should define as an impeachable offense a disagreed-with decision, such as in the cases of Judges Baer, Biery, and Henderson. It is one thing to be able to define a constitutional offense, but it is entirely another thing to abuse that ability. That abuse, hopefully, will never pan out. For as DeLay himself has stated, his strategy was only to “intimidate” the judiciary.⁸⁵

[T]he framers intended the judiciary to remain out of the impeachment process.



Mathew Paulose Jr. wrote this article for the American Judges Association’s law student writing competition. He is a 1998 graduate of Fordham University Law School and is currently working in New York City.

78. See *id.* at 97-101 (discussing constitutional proscription of judicial review of impeachment process).

79. 506 U.S. 224 (1993).

80. *Id.* at 233.

81. See Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 722-24 (1987-1988) (discussing Convention debate defining impeachment).

82. The Federalist No. 65, at 199 (Alexander Hamilton) (Robert

Maynard Hutchins, ed. 1952).

83. See Rotunda, *supra* note 81, at 723-24 (arguing for exclusion of Supreme Court from impeachment process).

84. See Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachment After Nixon*, 44 Duke L.J. 231, 255-56 (1994) (discussing framer’s views of impeachment process).

85. See John Aloysius Farrell, *Republicans Take Aim at Federal Judiciary*, Boston Globe, Sept. 24, 1997, at A1 (quoting Rep. DeLay).

1999 Annual Educational Conference

American Judges Association/American Judges Foundation

October 10-15, 1999

Cleveland Marriott Downtown, Cleveland, Ohio

Sunday, October 10

9:00 a.m. - Noon

Budget Committee Meeting

Noon - 6:00 p.m.

Registration

1:00 - 3:00 p.m.

Executive Committee Meeting

3:00 - 5:00 p.m.

Board of Governors Meeting

4:00 - 5:30 p.m.

Optional Red Mass at St. John's Church

(Bring your judicial robe!)

6:00 - 7:00 p.m.

Welcome Reception Sponsored by the Municipal Court Association

Monday, October 11

7:00 a.m. - 6:00 p.m.

Registration

7:30 - 8:30 a.m.

Welcome/Orientation for new members and first-time attendees

8:30 - 8:45 a.m.

Opening Ceremonies

Speakers: Hon. Paul Beighle,

President, AJA

Hon. Shirley Strickland-Saffold,

Conference Host

8:45 - 9:45 a.m.

The Honorable Tom C. Clark Lecture

Speaker: Hon. Nathaniel R. Jones,

Circuit Judge, U.S. Court of Appeals

Topic: Judicial Challenge for the New

Millennium: Respecting the First

Amendment and Resuscitating the Rest.

9:45 - 10:45 a.m.

Educational Session

Speaker: Judge Ronald B. Adrine,

Cleveland Municipal Court

Topic: Domestic Violence

10:45 - 11:00 a.m.

Coffee Break

11:00 a.m. - Noon

Educational Session

Speaker: Prof. Gordon Beggs,

Cleveland State Univ. College of Law

Topic: Biblical Law/Present Day Law

Noon - 1:15 p.m.

Awards Luncheon

Speaker: Chief Justice Thomas A. Zlaket, Supreme Court of Arizona

Topic: Public Trust & Confidence in the Courts

1:15 - 3:45 p.m.

Educational Session

Speaker: Judge Robert Pirraglia,

Rhode Island District Court

Topic: Courts Under Attack

3:45 - 4:00 p.m.

Coffee Break

4:00 - 6:00pm

Educational Session

Speaker: Dr. Wade Davis

Topic: The Drug War and the Courts

6:30 - 7:30 p.m.

Reception sponsored by Vorys, Sater, Seymour & Pease

Tuesday, October 12

7:30 - 9:00 a.m.

AJF Officers & Trustees Meeting

7:30 - 9:00 a.m.

House of Delegates Meeting

9:00 a.m. - Noon

Educational Session

Speakers: Dr. Donald Vereen,

Deputy Director, White House Office on

Drug Control Policy

Hon. Jeffrey Tauber, President, National

Association of Drug Court Professionals

Hon. Jeffrey Rosinek, Miami Drug Court

Dr. Lucille Fleming, State Director, Ohio

Substance Abuse Agency

Dr. C. Dennis Simpson, Director,

Western Michigan University Specialty

Program in Alcohol and Drug Abuse

Topic: Substance Abuse Treatment and

the Courts

Noon - 1:00 p.m.

AJF Luncheon/Installation of Officers

1:15 - 2:15 p.m.

Educational Session

Speaker: Dr. Henry Butler, University of

Kansas, Law and Organizational

Economics Institute

Topic: Law & Economics

2:15 - 4:45 p.m.

Committee Meetings

7:00 - 11:00 p.m.

An Evening at the Rock & Roll Hall of

Fame & Museum

Wednesday, October 13

8:00 a.m. - 2:00 p.m.

Vendor Show

2:00 - 4:00 p.m.

Educational Session

Speaker: Prof. Charles Whitebread,

University of Southern California

Law Center

Topic: Recent Decisions of the U.S.

Supreme Court

4:00 - 4:15 p.m.

Coffee Break

4:15 - 5:15 p.m.

Educational Session:

Speaker: Rosanne Russo, Federal Bureau

of Investigation

Topic: Drugs, Children, Delinquency and

Gangs

5:30 - 7:30 p.m.

Courtroom Technology - Cleveland's

Electronic Courtroom

Greetings: Judge Kathleen O'Malley

Speaker: Sam Solomon, President, DOAR

Communications, Rockville Centre, New

York

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Judge Kathleen O'Malley for a first hand

look at the latest in justice technology.

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impacted the future of our justice system.

Find out more about federal and state ini-

tiatives to implement these technologies

across the country, as we prepare for the

challenges of the millennium. Reception to

follow, sponsored by DOAR

Communications.

Thursday, October 14

9:00 a.m. - Noon

General Assembly

Free Afternoon

7:00 - 8:00 p.m.

President's Reception

8:00 - 11:00 a.m.

Installation Banquet

Friday, October 15

8:00 - 9:00 a.m.

Committee Meetings

9:00 a.m. - Noon

Board of Governors Meeting

Noon - 1:00 p.m.

Executive Committee Meeting

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Court Review Author Submission Guidelines

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.

Court Review is received by the 3,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges and administrative law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 16th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 764-8484 ext. 5582. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

The Resource Page: Focus on Jury Reform



THREE PLACES TO START

B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 IND. L.J. 1229 (1993).

In this article, Arizona Superior Court Judge Mike Dann presents a compelling argument that the traditional legal model of juror behavior – in which jurors must act passively throughout a trial – is contrary to overwhelming social science and education research about how people, jurors included, learn best. He presents a reality-based behavior model of the juror, discusses the lessons we can learn from educators, and then discusses the implications of these lessons for jury reform. For an overview of the theory and practice of jury reform, this article is a great place to start. If you can't find a copy, contact the COURT REVIEW editor and we'll send you one.

D.C. JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEM IN WASHINGTON, D.C. (1998)(112 pp.).

This jury reform manual was the work product of a unique committee that looked into reforms needed in both federal and state courts. The report includes detailed references and analysis. Copies are available from the Council for Court Excellence, 1150 Connecticut Ave., N.W., Suite 620, Washington, D.C. 200-36-4104 - (202) 785-5917. The Council requests payment of \$5 to cover postage and handling.

G. THOMAS MUNSTERMAN, ET AL., JURY TRIAL INNOVATIONS (1997)(334 pp.)

All of the proposals for jury reform are catalogued here with pros, cons and citations to cases and articles discussing each one. Topics covered include juror questioning of witnesses, juror note-taking, and juror

discussion of evidence during trial. More than one hundred pages of appendices include sample preliminary jury instructions, instructions about the deliberation process, and jury exit questionnaires. To order, send \$18 (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@aidcvt.com.



OTHER BOOKS, ARTICLES OF NOTE

Paula L. Hannaford, B. Michael Dann & G. Thomas Munsterman, *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247 (1998)(part of a symposium issue on the jury, the authors provide a thoughtful commentary on the approaches judges take to civil juries).

Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997).

Morris B. Hoffman, *Viewpoint: Abolish Peremptory Challenges*, 82 JUDICATURE 202 (1999).

Whether you want to look at his full argument, in a 63-page law review article, or just read a synopsis, found in the 4-page excerpt, it's worth the time to consider this trial judge's views on the problems inherent in current peremptory challenge practice.

Nancy J. King, *Why Should We Care How Judges View Civil Juries?*, 48 DEPAUL L. REV. 419 (1998)(brief response to the Hannaford, et al. piece listed above, arguing that the views of judges influence the way jurors do their work and that judicial attitudes are the key to the success of any jury reform agenda).

Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the*

Jury Instruction Process, 3 PSYCH. PUB. POL. & L. 589 (1997)(reviewing research regarding juror understanding of instructions and the potential steps for improvement).

ROBERT E. LITAN (ED.), *VERDICT: ASSESSING THE CIVIL JURY SYSTEM*. Brookings Institution, 1993 (\$34.75). 542 pp.

This book includes the papers presented at a major 1992 symposium on the future of the civil jury system – the seventeen contributors represent many of the nation's leading experts on the American jury system.

Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 49 (1998)(based on surveys of jurors in actual trials, the author makes a series of recommendations to improve juror comprehension of jury instructions).

William W. Schwarzer, *Reforming Jury Trials*, 132 ER.D. 575 (1991)(reviewing various reform proposals).

Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997)(provides a comprehensive review of jury reform literature and proposals, including comparison to civil law inquisitorial system of finding facts).

Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 LOY. L.A. L. REV. 1249 (1997)(reviewing surveys of judicial opinion on juries and jury reform proposals, focusing on a large-scale survey of the California judiciary).

Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998)(reviewing research regarding the competence of juries to find facts and concluding that they are equal or superior to judges).



The Resource Page



NEW BOOKS

Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*. Harvard Univ. Press, 1999 (\$29.95). 320 pp.

Professor Sunstein endorses the judicial inclination to avoid sweeping constitutional pronouncements, preferring instead for the court to decide only the issue presented in the case before it. He reviews cases in a variety of areas, including affirmative action, free speech and the right to die, showing how the Supreme Court has avoided rulings that were broader than necessary and arguing that this was the proper choice.

Richard R. Posner, *The Problematics of Moral and Legal Theory*. Harvard Univ. Press, 1999 (\$29.95). 336 pp.

How does the chief judge of a busy, federal appellate court keep churning out book after book, including ones that examine virtually every important topic of legal theory? We have no earthly idea. If all he did was to issue revised editions of his prior work (see next book listing), the task would be daunting enough. But Judge Posner constantly offers new approaches and comments on the

views of other theorists as well. In this book, Posner argues against reliance on moral philosophy in deciding legal cases. Instead, he urges a pragmatic approach based on a full understanding of the social, economic and political facts out of which legal controversies arise. His publisher promotes the book as one "that pulls no punches and leaves no pieties unpunctured or sacred cows un-kicked." No replies have yet been recorded from the cows.

Richard R. Posner, *Law and Literature* (Rev. ed.). Harvard Univ. Press, 1998 (\$18.95 paper). 416 pp.

Revising his first edition, published in 1988, Judge Posner surveys the intersection between literature and the law. Classic works by Sophocles, Shakespeare, Dostoevsky, Melville and Kafka are discussed along with contemporary fiction by William Gaddis, Tom Wolfe and John Grisham. New to this edition is a discussion of efforts by legal scholars to enrich their scholarship by borrowing the methods and insights of literature. A large section of the book also reviews the extent to which judicial opinions can be viewed as literature.



INTERNET SITES OF INTEREST

Judicial Independence Resources

<http://www.courts.state.co.us/scao/judind.htm>

Resources on judicial independence have been collected at this page on the Colorado state courts' Web site. Among the resources listed are the November 1998 symposium on judicial independence held at the USC law school (found at <http://www.usc.edu/dept/law/>), remarks by three members of the U.S. Supreme Court on different occasions, an ABA report, and links to other sites with materials on judicial independence.

Another Judicial Independence Page

<http://www.abanet.org/judind/What.html>

The ABA's Judicial Division hosts this judicial independence site, which includes model speeches, talking points, guest editorials and a good bibliography on the topic. The site also provides updates regarding ABA activities related to judicial independence.

Citizens for Independent Courts

<http://www.faircourts.org/>

This is the bi-partisan group announced with some fanfare in June 1998 by former New York Governor Mario Cuomo, former Congressman Mickey Edwards, former Senator Alan Simpson and former White House Counsel Lloyd Cutler. Its Web site includes news releases put out by the group during the 1998 election cycle about perceived risks to judicial independence from campaigns in California, Michigan, Ohio, Oklahoma and Texas; the site also includes links to other sites and articles of interest. You can sign up at the site for notice of posting of the site's biweekly Web newsletter.

American Judicature Society Center for Judicial Independence

<http://www.ajs.org/independ1.html>

The American Judicature Society has a collection of materials on judicial independence at this site. The most interesting aspect of the site is its "Judges Under Fire" section, which details and documents attacks on judges throughout the country. These real life examples of attacks on judges present many lessons for us all.

FOCUS ON JURY REFORM

The Resource Page focuses on resources about jury reform on page 31.

SUGGESTIONS FOR THE RESOURCE PAGE

Each issue of *Court Review* features The Resource Page, 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.