

Court Review

Volume 39, Issue 1
Spring 2002

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Judicial Campaign Speech and the First Amendment:

- A Supreme Court Decision's Impact
- Views of Judges and the Public

A Report Card on Problem- Solving Courts

Recent Decisions of the U.S. Supreme Court



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Daniel J. Becker and Maura D. Corrigan

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EDITOR'S NOTE

Most state court judges in the United States stand for election, whether it be one in which an opposing candidate can run or one in which an appointed judge stands for retention. Accordingly, questions concerning what judicial candidates can say during an election campaign are of great significance. At the end of its past term, the United States Supreme Court issued its first decision regarding the tension between the First Amendment and restrictions that have been placed by states on the speech of judicial candidates.

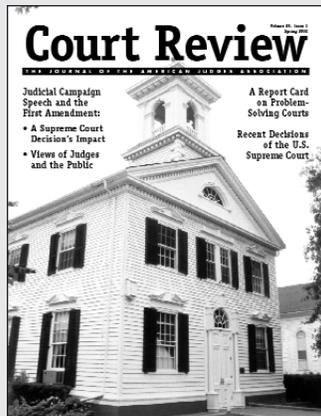
We asked two leading experts on judicial campaigns to write in response to that decision, *Republican Party of Minnesota v. White*. We are extremely pleased that they agreed to write for us in response to this decision and we think you'll find their views of interest. Both authors—Georgetown University law professor Roy Schotland and Washington lawyer Jan Baran—wrote Supreme Court amicus briefs in *White*, Schotland for the Conference of Chief Justices and Baran for the U.S. Chamber of Commerce. (For additional background on judicial campaign conduct and the First Amendment, see the *Indiana Law Review*, Volume 35, No. 3 (2002), which contains a series of papers presented at the National Symposium on Judicial Campaign Conduct and the First Amendment, held in November 2001 before the *White* case was accepted by the Supreme Court.)

In addition to this review of the *White* decision and its legal impact, David Rottman presents the results of an opinion survey of both judges and the general public regarding judicial campaign issues. While the public and the judges agree on many things, there are also some intriguing differences.

The issue also includes:

- Professor Charles Whitebread's annual review of all of the significant cases of the past term of the U.S. Supreme Court;
- A report from the CCJ-COSCA Problem-Solving Courts Committee, authored by Utah court administrator Daniel Becker and Michigan Chief Justice Maura Corrigan; and
- Another effort by legal writing professor Joseph Kimble, a prior *Court Review* contributor, to keep the key concepts of good writing in our minds, this time reviewing the drafting of the USA Patriot Act.

As you read the issue, keep in mind that we're happy to print letters to the editor or other contributions from readers. —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, Canada, and Mexico. 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 43 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Court Review is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

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

Bonnie Sudderth

In my previous column, I asked a simple question: If we would agree that the lawyer who represents himself has a fool for a client, then why are we spending so much time and money trying to assist non-law-trained pro se litigants in representing themselves in court? If we would agree that, generally speaking, justice is best served by access to quality legal representation, then why not focus our efforts on achieving that? Instead of trying to figure out how to make the courthouse more easily maneuverable to pro se litigants, perhaps we should concentrate on making attorneys accessible and affordable to all persons who seek justice.

The ABA Code of Professional Responsibility states that "the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer." What can lawyers and judges do to live up to our responsibility to make legal representation accessible and affordable? What's being done now?

At least one law firm, Vinson & Elkins, an international law firm with headquarters in Texas, is trying to answer that challenge. At Vinson & Elkins, every hour an attorney spends working on a pro bono case is recorded and treated as though that time were reported, billed, and collected at the standard hourly rate. There are no asterisks, no differentiation between hours recorded for paying clients and those recorded for pro bono clients when it comes to an attorney getting credit for work performed at the firm. With this approach, attorneys can provide pro bono assistance when needed without having to be concerned with the appearance of decreased productivity or longer work hours to make up for the lost time spent on pro bono matters. Rather than being penalized for pro bono efforts, pro bono hours and community involvement are actually included in the factors to be considered in evaluation and compensation decisions at the law firm.

Does it work? According to the law firm, in 2000, Vinson & Elkins lawyers provided more than 33,116 hours (an average of about 50 hours per lawyer) of free legal services. These services ranged from cases as serious as habeas appeals, death penalty litigation, political asylum, and civil rights cases to matters involving family, juvenile, criminal, elder, mental health, tax, and environmental law, as well as Social Security, pension benefits, and landlord/tenant disputes.

If every lawyer and every law firm in every state in the United States would take a lesson from Vinson & Elkins and step up to the challenge of providing quality and affordable pro bono representation, millions of hours of free legal representation would be available to those in need. This kind of pro bono effort would go a long way toward achieving the goal of access to justice for all persons.

Several states have also taken up the challenge. Many states include a voluntary contribution to pro bono legal services in

their billing for bar dues and license renewals. Most states leave it up to the individual lawyer to add a suggested amount to their payment, but at least two states, Texas and South Carolina, factor a contribution amount into the total bill, requiring lawyers to "opt-out" of contributing if they do not desire to do so. As a general rule, the "opt-out" approach results in more contributions than those allowing an "opt-in." Either way, all across our nation, attorneys are voluntarily contributing millions of dollars to pro bono efforts. Yet, it appears that less than 50% of the lawyers in the nation chose to voluntarily participate in this way.

What can judges do? Obviously, the ethical constraints of most states would prevent judges from offering traditional pro bono legal services. However, that doesn't mean that judges can't contribute. First, judges, as leaders in the legal community, should encourage pro bono representation at every turn. Judges should speak out about the need for attorneys to provide pro bono legal services in order to achieve a fair and accessible justice system for all.

Second, judges should seriously consider selecting a pro bono organization or effort and designating it as their number-one priority for charitable giving. Because medical and health issues affect everyone from every walk of life, there will always be broad support for health-related charities. Americans can always be counted on to contribute to disaster relief. And as long as there are graduates, schools across this country will be able to count on alumni support.

The support base for pro bono organizations, however, is much more narrow. Public support is virtually nonexistent, which is understandable, since few persons outside the justice system can appreciate firsthand the need for legal representation. Not everyone comprehends how vital it is that our court systems provide access to justice, which includes affordable legal representation. But judges do.

So, it's not surprising that, aside from government subsidies, virtually the only funding sources for pro bono charities are judges and lawyers. If we are one of only a few who understand the need to contribute to these efforts, then we need to give more. That's why we, as judges, should focus our charitable contributions on pro bono charities. Give a little to health issues, disaster relief, alma maters, and other worthy causes, but give most where others will not, because if we won't, no one else will.

If we do our part to speak out whenever possible on the need for accessible and affordable legal representation and to dig deeply into our pockets and contribute toward this worthy effort, then the vision of our forefathers of assistance of counsel in our justice system will be realized. And in doing so, we will take a giant step forward in providing justice for all.



Moving Problem-Solving Courts into the Mainstream:

A Report Card from the CCJ-COSCA Problem-Solving Courts Committee

Daniel J. Becker and Maura D. Corrigan

Five years ago the term “problem-solving courts” was not commonly used or understood in the court community. Today, however, the term describes over a thousand courts around the country. Problem-solving courts generally focus on the underlying chronic behaviors of criminal defendants. Acting on the input of a team of experts from the community, a problem-solving court judge orders the defendant to comply with an individualized plan and then the judge (with the assistance of the community team) exercises intensive supervision over the defendant to ensure compliance with the terms of the plan. Individualized plans may include participating in a treatment program, submitting to periodic substance abuse screenings, and providing restitution. If the defendant successfully complies with the terms of the individualized plan, criminal charges are favorably resolved either by dismissal of charges, reduction of sentence, or the imposition of some lesser penalty. Examples of problem-solving courts in operation in the United States include drug courts, mental health courts, domestic violence courts, homeless courts, teen courts, tobacco courts, and some forms of family courts.

ORIGIN OF PROBLEM-SOLVING COURTS

Problem-solving courts originated with the drug court movement. After judges and other community leaders first learned about the anecdotal successes of drug courts, they applied the same techniques to other types of cases, including mental health, domestic violence, and gun violence.

The movement began and flourished at the local level in trial courts. The

speed and acceptance of the problem-solving courts movement surprised many court observers. The speed and acceptance of these courts was fueled, in large part, by the availability of federal dollars to plan and implement these courts and the large number of anecdotal success stories across the nation.

ROLE OF STATE COURT LEADERS

State court leaders were initially skeptical about the long-term viability of these courts and concerned about their impact on unified court systems. In 1999, however, it was obvious that problem-solving courts had been proliferating both in numbers and in types of cases handled. Recognizing this, the Conference of State Court Administrators (COSCA) developed a white paper to present to their membership in August 1999. The white paper hypothesized that state court leaders were “playing catch up” with this movement that had developed and flourished under the direction of local court judges. The white paper established a framework for state court leaders to discuss their appropriate role in the administration and expansion of problem-solving courts. The consensus was that the Conference of Chief Justices (CCJ) and COSCA should assume a leadership role in providing direction and the appropriate court-based focus for these courts.

CCJ and COSCA jointly appointed a Task Force on Therapeutic Justice in August 1999 and charged them with developing specific recommendations and an action plan for the two conferences. The task force presented their recommendations to the two conferences in August 2000 in the form of a resolution. The resolution clearly identified an agenda for the two conferences. The

main points of the resolution were:

- (1) Call these new courts and calendars “problem-solving courts,” recognizing that courts have always been involved in attempting to resolve disputes and problems in society, but understanding that the collaborative nature of these new efforts deserves recognition.
- (2) Take steps, nationally and locally, to expand and better integrate the principles and methods of well-functioning drug courts into ongoing court operations.
- (3) Advance the careful study and evaluation of the principles and methods employed in problem-solving courts and their application to other significant issues facing state courts.
- (4) Encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims, and the community.
- (5) Support national and local education and training regarding the principles and methods employed in problem-solving courts and collaboration with other community and government agencies and organizations.

- (6) Advocate for the resources necessary to advance and apply the principles and methods of problem-solving courts in the general court systems of the various states.
- (7) Establish a national agenda consistent with the resolution.

The most significant aspect of the resolution was the vision and challenge contained in its fourth point—to encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice. This aspect is significant because it articulated a proactive vision and goal for the future on the part of both organizations and it encompassed a statement of responsibility on the part of both conferences for realizing that vision. The task force was renamed the Problem-Solving Courts Committee and continued for the purpose of overseeing the implementation of the resolution and realization of the vision.

Evaluating the various approaches taken in designing and implementing problem-solving courts is an integral part of ensuring the integration of their principles and methods into the administration of justice. Although, for example, every state either has a drug court or is planning a drug court,¹ few jurisdictions have utilized the same approach in the design and implementation of those courts. As of June 2001, 38 states had enacted or introduced legislation regarding the planning, operating, or funding of drug courts, including three states that allocated tobacco settlement funds for drug courts.² Ten states had enacted court rules regarding drug courts.³ The various approaches allow experimentation, which in turn allows the evaluation of the effectiveness of various models of implementation and the unique challenges each model raises.

THREE APPROACHES TO THE INSTITUTIONALIZATION OF PROBLEM-SOLVING COURTS

This section explores three different approaches to the institutionalization of problem-solving courts: local court-initiated implementation, statewide implementation, and higher court-led implementation. These approaches are illustrated through a discussion of the implementation of problem-solving courts in three states: Michigan, Idaho, and New York. We will briefly describe each of these problem-solving courts and the steps taken to integrate these courts into the judicial system. The experience of these courts is instructive and points the way to further innovation.

A. Michigan: Local Court-Initiated Implementation

Problem-solving courts, especially drug courts, have proliferated in Michigan.⁴ Originally, these drug courts were initiated and implemented by the local district courts, with minimal guidance or direction from state court leaders or the legislature. In addition, some district courts—the rough equivalent, in other states, of municipal courts—started problem-solving courts to deal with other issues, including domestic violence courts and family drug courts, aimed at combating parents' drug problems that threatened their children's health and safety. Michigan's problem-solving courts have developed rules and procedures well suited for local problems, because the state allows district courts some latitude to address local issues and budget priorities. That same flexibility, however, raises some concerns. In extending the scope of problem-solving courts, district courts may inadvertently develop rules that create due process and separation of powers problems.

The potential for serious problems stems, in part, from the lack of explicit statutory authority for problem-solving courts. The state legislature has not yet addressed this issue. The judiciary budget, which provides funding for problem-solving courts, states that problem-solving courts are responsible for “. . . handling cases involving substance-abusing nonviolent offenders through comprehensive supervision, testing, treatment, services, immediate sanctions, and incentives.”⁵ The legislature apparently believes that problem-solving courts are important, but it has not yet set up a structural framework to ensure that constitutional rights are protected and that each court follows similar sentencing and operational guidelines. The State Court Administrative Office, which administers grant programs for problem-solving courts, and the federal government both require the courts to meet 10 key criteria for funding. Although these guidelines describe a minimum level of services, they do not provide the sentencing and other safeguards that an institutional change of this magnitude requires. In creating committees to design and implement problem-solving courts, many district courts appointed respected defense attorneys to protect defendants' due process rights.⁶ Attorney participation in local experiments, however, will not guarantee a properly structured court system.

The judges who sit on Michigan's problem-solving courts are among the best in the state. But even the best judges benefit from a clear statutory or rule-based framework from which to operate their courts. Proponents of problem-solving courts believe that flexibility is crucial to their effectiveness. The current challenge facing Michigan's problem-solving courts is to provide a basic framework while preserving flexibility.

Footnotes

1. Press Release, United States Department of Justice, Communities Nationwide to Receive Federal Funds for Drug Courts (June 6, 2002), available at <http://www.ojp.usdoj.gov/dcpo/publications.htm>.
2. OJP DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, DRUG COURT ACTIVITY UPDATE: SUMMARY INFORMATION ON ALL PROGRAMS AND DETAILED INFORMATION ON ADULT DRUG COURTS (June 20, 2001), available at <http://www.american.edu/justice/publications/allcourtactivity.pdf>.

3. *Id.*

4. See L.L. Braiser, *Addicts Turn to Court for Help; Program Strives for Participants' Recovery, No Jail*, DETROIT FREE PRESS, Jan. 22, 2002, at 1B.

5. H.R. 5648, 91st Leg., Reg. Sess. (Mich. 2002), available at <http://courts.michigan.gov/supremecourt/AboutCourt/Budget.htm>.

6. Heather H. Wilson, *Sobriety Courts Are Gaining Momentum in Michigan*, MICH. LAW. WKLY., May 20, 2002, at 16.

B. Idaho: Statewide Implementation

In Idaho, all three branches of state government worked together to design, implement, and oversee problem-solving courts. Indeed, the chief justice, governor, and legislature have embarked on a joint venture to ensure that every county has a drug court. Governor Dirk Kempthorne has made it a priority in a tight budget year to fully fund state drug courts, despite a substantial decrease in federal grants for the programs.⁷ Idaho's judicial leadership has been deeply involved in the development of these courts. Chief Justice Linda Trout, in her address to the state legislature, spoke of her desire to extend the benefits of drug courts to every county.⁸

Despite this push for drug courts from the judicial, executive, and legislative branches, local courts have maintained their flexibility. First District Court Judge James Michaud has tailored his program to the particular drugs that plague his jurisdiction.⁹ He believes that successful drug courts all share certain characteristics, but retain the flexibility to respond to local problems.¹⁰ "It's a regional thing," according to Judge Michaud: local laws and problems call for a variety of treatment and enforcement options.¹¹ It appears that Idaho has worked diligently to strike the right balance between flexibility for local communities and judicial, legislative, and executive involvement from the top down.

At the same time, Idaho's experience highlights a problem faced by every state: a tight budget year. While the legislature has increased funding for the drug court system, it has given relatively smaller increases to the rest of the judiciary, and is cutting funding in some areas. The executive branch and the judiciary are pushing to expand drug courts to all counties, but a budget shortfall may arise elsewhere. If drug courts are effective in the long term, they can save the taxpayers money. At the same time, problem-solv-

ing courts should not be funded at the expense of the rest of the justice system.

C. New York: Higher Court-Led Implementation

Under the leadership of Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, New York has been a national leader in adopting a problem-solving model of jurisprudence. New York is home to dozens of drug courts, community courts, domestic violence courts, and other problem-solving experiments. These include the nation's first community court, opened in 1993 in the Times Square neighborhood of Manhattan; the first multi-jurisdictional community court, hearing civil, criminal, and family court cases in the same courtroom; one of the largest drug treatment courts in the country in Brooklyn; and several new experiments known as "integrated domestic violence courts," in which a single judge hears civil, criminal, and matrimonial matters involving a single family.

Based on the independently documented results of New York's first generation of problem-solving experiments, the state court system has embarked on perhaps the most ambitious effort in the country to "go to scale" with problem-solving. In October 2000, Judge Kaye and Judge Lippman launched a statewide initiative that seeks to forever change the way that courts handle cases involving addicted offenders. The goal is to make the drug court approach—links to drug treatment, rigorous judicial monitoring, graduated sanctions and rewards—standard operating practice in the courts. As a first step to achieving this goal, the court system will create at least one drug court in each of New York's 62 counties by 2003. A year into the effort, the number of drug treatment courts operating in New York had gone up 39%, to 43; an additional 50 are in the planning stages. In addition to promoting drug court

replication, the state court system is investing in an infrastructure to support a new system-wide approach to drugs, creating statewide trainings for practitioners, a state-of-the-art technology application, and an evaluation plan to track results.

In addition to the statewide drug reform effort, New York has embarked on a series of other initiatives designed to embed problem-solving within the judicial culture of the state:

- *Integrated Domestic Violence Courts:* There are currently six integrated domestic violence courts in operation or in the planning stages in New York. These courts address a fundamental concern expressed by court users—the difficulty of navigating the jurisdictional boundaries of the court system, which frequently require the same family to appear in front of multiple decision makers in multiple locations. While these experiments are still new, they have already generated significant enthusiasm among users for streamlining court processes. Accordingly, the court system is currently exploring "going to scale" with this model, in much the same way it has sought to institutionalize a new approach to drug cases.
- *Additional Experiments:* The court system's research and development arm, the Center for Court Innovation, has been charged with testing additional adaptations of the problem-solving model (demonstration projects currently in the works include a mental health court, a juvenile intervention court, and a parole reentry court).

These efforts represent a multifaceted institutional effort to move problem-solving justice from the margins to the mainstream of court operations.

7. Governor Dirk Kempthorne, Budget Speech to the Idaho Legislature (Jan. 9, 2002), available at <http://www2.state.id.us/legislat/sday3.pdf> (noting prior year's funding to begin "to implement drug courts in every judicial district").

8. Linda Copple Trout, *State of the Judiciary Address – 1999*, ADVOC. (Idaho), May 1999, at 21.

9. Susan Drumheller, *Counties Drug Court Plan Gets Boost*,

Governor's Initiative Promises Funding; To Change Approach to Meth "Epidemic," SPOKESMAN-REV. (Spokane, Idaho), Mar. 31, 2001, at A1.

10. *Id.*

11. *Id.*

CONCLUSION

Overall, our “report card” shows promising results as these three states develop long-term plans to integrate problem-solving courts into their established judicial systems. Experimentation throughout the states will allow jurisdictions to evaluate the effectiveness of various implementation approaches and models. Although the results are promising, the unique challenges posed by problem-solving courts still need to be addressed:

- What makes a problem-solving court effective?
- How can problem-solving courts set standards to protect constitutional rights?
- How can these courts be funded, without depriving traditional courts?
- What degree of specialization is necessary and when does specialization become harmful and make courts unnecessarily complex?

The CCJ and COSCA Problem-Solving Courts Committee will continue to address these and other related issues so that the vision of “broad integration of the principles and methods of problem-solving courts” is realized.



Daniel J. Becker has been the top administrator for the Utah state court system since 1995. Before that, he was deputy director of the North Carolina Administrative Office of the Courts and held other court administration positions in North Carolina and Georgia. Becker is a member of the board of directors of the National Center for State Courts and received a distinguished service award from the National Center in 2001. He also is vice president and a member of the board of directors of the Conference of State Court Administrators. Becker received his bachelor's degree in political science in 1974 and his master's of public administration in 1976 from Florida Atlantic University.



Maura D. Corrigan was elected to the Michigan Supreme Court in 1998 for an eight-year term. She was elected chief justice in 2001. In practice, she was an assistant prosecuting attorney in Wayne County, Michigan from 1974 to 1979; in 1979, she became chief of appeals in the United States Attorney's Office in Detroit; in 1986, she became the first woman to be Chief Assistant United States Attorney in Detroit; and in 1989, she entered private practice as a partner in the firm of Plunkett & Cooney. She was appointed to the Michigan Court of Appeals in 1992 and became its chief judge in 1997. Corrigan graduated magna cum laude from Marygrove College in Detroit in 1969 and cum laude from the University of Detroit Law School in 1973.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

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Should Judges Be More Like Politicians?

Roy A. Scotland

Judges sometimes are unrealistic. Whatever one's view of the recent Pledge of Allegiance decision, do you remember *Clinton v. Jones*,¹ in which eight justices had no doubt that there were no serious risks in allowing Paula Jones' lawsuit to proceed against a sitting President?²

The Supreme Court's decision about judicial elections³ shows how unrealistic five justices can be about what happens in election campaigns, and also—ironically—about how much judges differ from legislators and others who run for office. Reality was captured concisely by Robert Hirshon, president of the American Bar Association, who said, "This is a bad decision. It will open a Pandora's Box . . ." ⁴ The decision will make a change in judicial election campaigns that will downgrade the pool of candidates for the bench, reduce the willingness of good judges to seek reelection, add to the cynical view that judges are merely "another group of politicians," and thus directly hurt state courts and indirectly hurt all our courts.

After noting the majority and separate opinions (which, unsurprisingly, open many questions), I predict what litigation lies ahead, then describe the judicial election scene and prospects for reform, and last, suggestions to candidates and all judges. The decision is not reducible to the simplistic, misleading proposition that "[n]otwithstanding ABA policy to the

contrary, the law of the land now holds that the First Amendment trumps all other considerations when it comes to judicial elections."⁵

Justice Scalia's majority opinion held that Minnesota could not prohibit a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues."⁶ Although that "announce clause" has been law in only nine states, the decision will impact all but one of the 39 states in which at least some judges face some type of elections, because all states have canons limiting what candidates may say in campaigns.⁷ Another limitation, as Justice Scalia wrote, bars judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"—a prohibition that, as he wrote, "is not challenged here and on which we express no view."⁸ As for a third limitation, "[t]he Court's treatment of the ['commit clause'] precluding a candidate from making 'statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court' was, unfortunately, not a model of clarity."⁹

Justice Stevens, writing for four dissenters, said this:

By obscuring the fundamental distinction between campaigns for the judiciary and the political branches,

Footnotes

1. 520 U.S. 681 (1997).
2. As the Court put it in reversing the lower court's stay order, "We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impingement upon the President's conduct of his office was shown here." *Id.* at 708.
3. Republican Party of Minnesota v. White, 122 S. Ct. 2528 (2002).
4. David G. Savage, *Running Stance*, A.B.A. J., Aug. 2002, at 32.
5. Diarmuid F. O'Scannlain, *Chair's Column*, JUDICIAL DIV. RECORD (ABA), Summer 2002, at 2.
6. 122 S. Ct. at 2542.
7. *Id.* at 2541, n. 13. Justice Scalia erred in excluding Idaho, which at the end of 2001 adopted the "pledge or promise" clause.

Jan Baran overstates, and at once corrects his overstatement, that "[c]andidates cannot be gagged by Canon 5." Jan Witold Baran, *Judicial Candidate Speech After Republican Party of Minnesota v. White*, COURT REVIEW, Spring 2002, at 12. Two sentences later, he rightly notes that only "the version of Canon 5 used by the Minnesota courts" was at issue here, and only one part of Minnesota's canon. *Id.*

Baran misstates how Minnesota had treated the "announce clause." He says that "the clause can be read—and was read by the Minnesota disciplinary committee—to prohibit virtually any commentary about legal or political issues." But Justice Scalia

wrote this:

The Lawyers Board dismissed the complaint [against plaintiff Wersal]; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make.

122 S. Ct. at 2531-32.

And as Justice Stevens noted, "no candidate has yet been sanctioned for violating the announce clause." *Id.* at 2547, n.2 (emphasis added). In fact, we cannot find any case in any state (in the last decade or so) involving a finding of violation of the "announce clause," except for *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991), in which the clause was held unconstitutional. For that fact, I am indebted to Cynthia Gray of the American Judicature Society, an outstanding authority on the canons.

But put aside Baran's tiny errors. Never has anyone so well captured the whole matter as he does, saying: "[J]udges must judge. They cannot prejudge." Baran, *supra*, at 13.

8. 122 S. Ct. at 2532.
9. National Center for State Courts, Ad Hoc Committee on Judicial

and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.¹⁰

Arguably the most significant point about the majority opinion is that, whether or not they “obscur[ed]” the distinction between judicial and nonjudicial elections, they did not ignore it. They did not adopt what Justice Ginsberg (also writing for four dissenters) called “the unilocular, ‘an election is an election,’ approach.”¹¹ As an example of that approach, she quoted the dissenting judge below: “When a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association.”¹²

The majority’s reply reveals that one or more justices are unwilling or at least unready to strike more (or much more) regulation of judicial campaigns:

Justice Ginsburg [attacks] arguments we do not make. [W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.¹³

Of course, one cannot say how many of the five majority justices would strike how much more of the canons, but it is hard to see why their opinion would have included any such limitation if all five agreed with what Justice Kennedy said alone.

Justice Kennedy, joining the majority but also writing alone, views judicial elections as like (or not materially different from) nonjudicial elections, and so he would strike all limits on candidate speech. But he made two important points about what can be done to meet injudicious conduct in judicial campaigns. First, he said that states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”¹⁴ In the most significant step since *White*—a step rich with promise for the overwhelming majority of candidates who want to campaign judiciously—the Missouri Supreme Court has taken up the justice’s invitation, as noted below. Second, Kennedy also encouraged what is often called “more speech to meet speech”:

The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment Freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so.¹⁵

Justice Stevens made the same point, adding that even official bodies like the defendant board in this case “may surely advise the electorate that such announcements demonstrate the speaker’s unfitness for judicial office. If the solution to harmful speech must be more speech, so be it.”¹⁶

Justice O’Connor, who also joined the majority and wrote alone, took a familiar and simple approach: we shouldn’t have judicial elections, because of the fundamental tension between judicial independence and elections. But she ignored reality: the difficulty of ending judicial elections. For example, Florida’s voters in 2000 (“Yes, Virginia, there were other things on the ballot!”) overwhelmingly rejected changing from contestable elections for their trial judges to the same system of merit-appointment and “retention” elections that they have for their appellate judges (with voters deciding only whether a sitting judge continues or not). The opposition to the change was led by all the women’s and minorities’ bar associations; similarly in 1987, Ohio voters overwhelmingly agreed with the opposition’s key advertisement against change: “Don’t let them take away your vote!”¹⁷

The surest result of the *White* decision is (for a change) more litigation, of three types. First, there will be two kinds of lawsuits about the surviving provisions that regulate judicial campaign speech, the “commit clause” and the “pledge or promise Clause.” There will be attacks on the facial constitutionality of each clause, and there will be disputes about whether this or that particular statement violated one or both of those clauses. Second, there will be litigation over whether the 17 states that have chosen nonpartisan elections for all or some of their judges can preserve the nonpartisanship they prefer. Minnesota, like most or all these states, bans party endorsements—indeed, the plaintiff who brought the *White* case was joined by the Republican Party of Minnesota because of that provision. Their attack on it was rejected in the lower courts, and the Supreme Court excluded that issue when it granted certiorari—but now that we have *White*, surely courts will be asked to revisit this issue. In addition, the nonpartisan states limit judicial candidates from announcing their own

Arguably the most significant point about the majority opinion is that, whether or not they “obscur[ed]” the distinction between judicial and nonjudicial elections, they did not ignore it.

Election Law, July 12, 2002 memo analyzing the case (on file with the author).

10. 122 S. Ct. at 2546.

11. 122 S. Ct. at 2550, 2551.

12. *Id.* at 2550-51 (quoting Judge Beam, dissenting, 247 F.3d 854, 885, 897 (8th Cir. 2001)). Judge Reinhardt has also taken the “unilocular” approach. See *Geary v. Renne*, 911 F.2d 280, 286, 291-96 (9th Cir. 1990) (concurring opinion). For other examples, see Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 663-65 (2002) (on “An

Election is an Election is an Election’: The mantra that passed for analysis in the decisions limiting Canon provisions”).

13. 122 S. Ct. at 2539.

14. *Id.* at 2544, 2545.

15. *Id.* at 2545.

16. *Id.* at 2546.

17. For the Florida and Ohio developments, see Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 M.S.U.-D.C.L. L. REV. 849, 886-90.

party affiliation.¹⁸ Will that limitation stand up? Last, all but four of the 39 states bar judicial candidates from personally soliciting campaign funds; most of these states also limit the time period for fund-raising.¹⁹ Will these limitations survive?

One other prediction: *White* will figure, perhaps substantially, in the next U.S. Senate confirmation hearing of any nominee for a federal judgeship who holds back in answering senators' questions. Justice Ginsburg drew upon several of the briefs for, as Justice Scalia put it, "repeated invocation of instances in which nominees to this Court declined to announce [views on disputed legal issues] during Senate confirmation hearings . . ." ²⁰ Scalia answers that the majority "do [not] assert that candidates for judicial office should be *compelled* to announce their views . . ." ²¹ Stay posted!

Justice O'Connor's call to change the current scene must be realistic about the scene. Of the nation's 10,000 state judges (appellate and general-jurisdiction trial), 87% face elections of some type: 53% of appellate judges face contestable elections, partisan or nonpartisan, and another 34% face retention elec-

tions. Of our trial judges, 77% face contestable elections, only 10% face retention elections. That's after a century of major effort by the bar and good-government groups for adoption of the "merit" retention system. At that rate of change, we need 160 years to end contestable elections for appellate judges and 770 years for trial judges. "Judicial reform is not for the short-winded," as New Jersey's great Chief Justice Arthur T. Vanderbilt taught. But true as it is that for the last generation legislators and voters have rejected "merit" systems, perhaps we are entering a new era, perhaps recent changes in judicial elections will increase voters' willingness to change systems. *Meanwhile*, don't we need to work at reducing the problematic aspects of judicial elections?

Until 1978, judicial elections were as uneventful as "playing checkers by mail." That year in Los Angeles County, a number of Jerry Brown-appointed trial judges were defeated. Then in the 1980s in Texas, campaign spending soared. But the biggest change occurred in 2000 when campaign spending set sharply higher records in 10 of the 20 states with high-court elections; nationally, high-court candidates raised 61% more than ever before. And outside groups like the Chamber of Commerce spent about \$16 million in just the five liveliest states: Alabama, Illinois, Michigan, Mississippi, and Ohio. The campaigning in 2000, "nastier and noisier," was more like nonjudicial campaigns than ever before.²²

The states that chose judicial elections did *not* want them to be like other elections. Elections seemed less problematic than appointments, which seemed elitist or mere political patronage or both. But those states accompanied judicial elections with constitutional provisions unthinkable for other elective officials—like uniquely long terms. The constitutions of the 39 states in which judges face elections have an array of such provisions, unique to the judiciary, to accommodate the choice of popular selection with the constitutional value of judicial independence. In all 39 (except Nebraska), judges' terms are longer than those of any other elective official. In 37 of these states, only judges are subject to both impeachment and special disciplinary process. In 33, only judges are required to have training or experience or both (with the minor

SELECTION AND RETENTION SYSTEMS FOR STATE COURT JUDGES	
APPELLATE COURTS	
Total appellate judges: 1,243	
Total that stand for some form of election: 1,084 (87%)	
Total that stand for contestable election: 659 (53%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 582 (47%)	Appointment: 133 (11%)
Partisan Election: 495 (40%)	Partisan Election: 400 (32%)
Nonpartisan Election: 166 (13%)	Nonpartisan Election: 166 (13%)
	Retention Election: 518 (43%)
GENERAL JURISDICTION TRIAL COURTS	
Total trial judges: 8,489	
Total that stand for some form of election: 7,378 (87%)	
Total that stand for contestable election: 6,650 (77%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 2,061 (24%)	Appointment: 1,013 (12%)
Partisan Election: 3,669 (43%)	Partisan Election: 2,360 (28%)
Nonpartisan Election: 2,759 (33%)	Nonpartisan Election: 2,891 (35%)
	Retention Election: 2,127 (25%)

18. In *Washington*, a judge put out material that included this: "Bearing in mind the nonpartisan position a judge must maintain while on the bench, it may be useful for you to know that Judge Kaiser's family have been lifelong Democrats. Indeed, Judge Kaiser has doorbelled for Democrats in the past." *Matter of Kaiser*, 111 Wash.2d 275, 278, 759 P.2d 392, 394 (1988) (censuring the judge for that and other statements).

19. ABA TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, REPORT, PART 2 (1998), at n. 73 and at 47-49. The former limitation was sustained in the lower courts here and not appealed. 247 F.3d 854, 883-84 (8th Cir. 2001). The latter limitation was stricken in

Zeller v. The Florida Bar, 909 F. Supp. 1518 (N.D. Fla. 1995), severely criticized in the Report, n. 83.

20. 122 S. Ct. at 2539, n. 11.

21. *Id.* (emphasis in original)

22. See Schotland, *Financing Judicial Elections*, *supra* note 17, which was cited by Justice O'Connor for this point. 122 S. Ct. at 2541, 2542. She also cited the important 1998 ABA Report (Part 2) of the Task Force on Lawyers' Political Contributions, which led to the Model Code of Judicial Conduct's 1999 amendments with respect to campaign contributions. For the earlier events, see Report at 13-18.

exception that in ten of those, the attorney general is subject to similar requirements). In 23, only judges are subject to mandatory age retirement. In 21, only judicial nominations go through nominating commissions; in six states, this applies even to interim appointments. Last, in 18 states, only judges cannot run for a nonjudicial office without first resigning.²³

The impact of elections on judicial independence is amplified because so many states have such short terms for judges. Although terms are uniquely long in some states (e.g., 14 years in New York, 12 in California), in 15 states even the high courts have only six-year terms; in 25 states, trial judges have six-year terms and in another nine states, only four years.²⁴ Can one avoid being deeply troubled by what short terms may mean for nonroutine cases at all levels, and at the trial level, for example, for sentencing and rulings on bail?

Of appellate judges who face elections, 38.5% have terms of 10 to 15 years and another 60.6% have six-to-eight-year terms. Of trial judges who face elections, 13% have terms of 10 to 15 years, and another 67.6% have six-to-eight-year terms. This pattern shows that the choice of elections, “while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly.”²⁵ The 39 states have recognized that, far from fulfilling the historic purpose in allowing for the popular election of judges, any effort to treat judicial elections like others acutely undermines the judiciaries’ independent role under their constitutions. These states’ balanced approach to the proper structure for an elected judiciary embodies the understanding that

the word “representative” connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf* of the people. Judges do that in a sense—but not in the ordinary sense. . . . The judge represents the Law—which often requires him to rule against the People.²⁶

Five justices have decided that judicial election campaigns cannot be kept as different as the states want. The Pandora’s Box that ABA president Hirshon predicts, will be opened by the small minority of judicial candidates who simply want to win—but given the dynamics of campaigns, those few candidates may fuel a race for media coverage and appeals to single-issue groups.

Keeping judicial elections judicious involves not only the First Amendment, but also the due process rights of litigants to open-minded judges. Further, as judicial campaigns become more like other campaigns, more judges will become more like politicians—and more people will so view judges generally. Do we want decisions on, say, the First Amendment (and other constitutional protections) made by people who are more like legislators . . . or different from legislators? If judges are more like legislators, won’t that threaten the legitimacy of having

courts review the constitutionality of actions by the political branches?

Perhaps more states will end contestable judicial elections. But meanwhile? First, what should candidates do now? Take advantage of what the Missouri Supreme Court ordered in response to *White*: After noting which of their provisions will no longer be enforced and which remain in full force and effect, they provided (to finish their less-than-two-page order) as follows:

Recusal [which there includes disqualification], or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.²⁷

That is an inspired step. It supports the overwhelming majority of candidates who want to campaign judiciously—they’ll be able to say, “I know what you’d like me to say, but if I go into that then I’ll be unable to sit in just the cases you care about most.” In addition, it enables any candidate whose opponent has stretched the envelope (with some variant of “I’ll hang them all,” or “I believe that anyone convicted of child abuse should receive the maximum sentence allowed by law,” or “I’m a tenant, not a landlord”) to respond with, “My opponent has told you what he thinks you want, but hasn’t told you that he won’t be able to deliver, because he’ll be disqualified from the cases you care about.”

The most important single step to meet the challenges inherent in judicial elections was urged in May by Ohio Chief Justice Thomas J. Moyer—lengthen judicial terms to eight or 10 years. That single step will not only reduce the problems inherent in judicial elections but also go far to enlarge and enrich the pool of people willing to seek to serve as judges, and to induce good judges to continue serving. After all, improving the caliber of who serves as judges is the whole goal of all judicial selection reform.



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23. See amicus brief submitted in *White* on behalf of the Conference of Chief Justices, at 6-7.

24. See Roy A. Schotland, *Comment*, 61 LAW & CONTEMP. PROBS. 149,154-55 (1998).

25. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991).

26. *Chisom v. Roemer*, 501 U.S. 380, 404, 410-11 (1991) (Scalia, J., dissenting) (emphases in original).

27. *In re Enforcement of Rule 2.03, Canon 5.B.(1)(c)* (July 18, 2002). More than half of Missouri’s trial judges run in partisan elections.

Judicial Candidate Speech After *Republican Party of Minnesota v. White*

Jan Witold Baran

The people want to elect judges. Notwithstanding a typical Washington lawyer's view of the judiciary enshrined in Article III of the Constitution, the citizens of 39 states insist that judges should be subject to electoral accountability and not be given lifetime appointments by the government elites. For that reason, 53% of state appellate judges must run in contested elections for an initial term on the bench (out of 1,243 judges). Likewise, 66% of state trial court judges (8,489) must first run in contested elections. Eight-seven percent of all state appellate and trial judges face some type of election for subsequent terms.¹ This insistence on elections creates a tension that Professor Stephen Gillers calls the "on the one hand, on the other hand" dilemma.² On the one hand, we expect that judges not make extrajudicial or prejudicial comments about the law, particularly controversial legal principles, while on the other hand voters want information in order to cast an informed vote. Likewise, there is a constitutional dilemma. The due process rights of litigants must be preserved, but the First Amendment rights of candidates and their supporters must be honored. The Supreme Court of the United States in *Republican Party of Minnesota v. White*,³ has weighed in in favor of First Amendment rights. Candidates cannot be gagged by Canon 5.

The *Minnesota* case brought the dilemmas into focus, but not

in the best of circumstances. First, the version of Canon 5 used by the Minnesota courts was the broadest and most unreasonable. Minnesota used the 1972 version of the model code, which has long been abandoned by the ABA. The contested clause prohibited any candidate for election to judicial office to "announce his or her views on disputed legal or political issues." The clause can be read—and was read by the Minnesota disciplinary committee—to prohibit virtually any commentary about legal or political issues.⁴ This resulted in what Professor Gillers described as the "rule of silence." In order to avoid any possible claim of a violation of Canon 5, a candidate limited herself to discussing only safe topics such as one's credentials (she graduated from the state law school, law review, Order of the Coif, but probably without mention of any law review articles authored by the candidate), or innocuous statements such as, "I promise to uphold the rule of law," although that statement can become controversial if stated in the context of a discussion of a subject such as abortion.

We are familiar with the oft-repeated observations of Judge Richard Posner in *Buckley v. Illinois Judicial Inquiry Board*,⁵ in which he noted that every issue is potentially subject to litigation that may come before an elected judge. Similarly, the "rule of silence" was impractical because it gave voters no valuable

Footnotes

1. See chart on page 10 of this issue of COURT REVIEW. See also Roy A. Schotland, *Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1365 (2001).
2. See Stephen Gillers, *If Elected, I Promise [_____]* — *What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725, 725 (2002).
3. 122 S.Ct. 2528 (2002).
4. Professor Schotland suggests that the Minnesota announce clause was not broadly interpreted by the Minnesota disciplinary committee to prohibit commentary about legal or political issues. Roy A. Schotland, *Should Judges Be More Like Politicians?*, COURT REVIEW, Spring 2002, at 8 n.7. Schotland correctly quotes from the majority opinion and Justice Stevens's dissent regarding the history of the board's treatment of plaintiff Wersal and the lack of sanctions for violations of the clause, respectively.
Schotland does not mention, however, that the Court also made this statement: "There are, however, some limitations that the Minnesota Supreme Court has placed upon the scope of the announce clause that are not (to put it politely) immediately apparent from the text." 122 S. Ct. at 2532. Indeed, the Court concluded with respect to both the state court and lawyers board actions that "these limitations upon the text of the announce clause are not all that they appear to be." *Id.* at 2533. The Court noted that at oral argument Minnesota stated that it could sanction

a candidate for critical statements of past judicial decisions even if Wersal was not so sanctioned. *Id.* The Court found: "In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by stare decisis." *Id.* at 2534.

What the opinion "politely" did not elaborate is the practice of Minnesota to speak out of both sides of its mouth. The lawyers board may not have sanctioned Wersal for some statements but it interpreted the announce clause broadly, not at all, or, as Schotland notes from the Court's opinion, "equivocally." The effect is to make the announce clause as broad as described by the Court. Candidates, who are most likely to debate issues, are challengers and practicing attorneys. The reason why there are so few enforcement cases under the announce clause is the in terrorem effect of broad or ambiguous interpretations. Candidates, including Wersal, succumb to the "rule of silence" rather than risk complaints and the resulting damage to their careers. It is precisely this Dickensian type of gamesmanship by disciplinary committees that may result in additional First Amendment court decisions striking down "pledges and promises" provisions.

5. 997 F.2d 224, 229 (7th Cir. 1993).

information and actually distorted the sources and flow of information, not from the candidates and their campaigns, but from others, so-called third-party independent speakers, or in the modern vernacular of campaign finance reform, the “special interests.” Perhaps the reason the issue of the “announce” clause became so prominent—and perhaps even the reason the Supreme Court took the *Minnesota* case—is that judicial elections have become more like all other elections. In more and more states, the courts (especially supreme courts) have become lightning rods for dissatisfied constituencies. As a result of public policy issues being resolved in courts rather than in legislatures, the bench is increasingly viewed as a political participant. One need not claim that any particular judicial decision is wrong or not within the province of a court. Assuming that the courts are performing their proper roles, they nonetheless are making big policy decisions that are creating large numbers of dissatisfied citizens who are responding by mobilizing in the elections. The consequences are many. First, it means that judges, particularly statewide elected judges, must raise more and more money. Second, in those states with partisan elections, the political parties see judicial elections as part of an overall political agenda. This has made races for the bench in some states merely a part of the overall partisan electoral warfare.

In addition, independent interest groups have waded into the breach. Business organizations, trial lawyers, organized labor, and others increasingly sponsor advertising in connection with judicial elections. In this escalating environment, the question is, what can the candidates themselves say about their own campaigns when more and more other voices are commenting on the race? Some have suggested that the rule of silence could silence everyone.⁶ Yet the *Minnesota* case answered an important question: If candidates cannot be restricted in what they say based on due process concerns, then similar due process concerns would not justify restrictions on what third parties might say. The Court’s decision striking down the announce clause certainly seems to bolster the view that the speech of third parties cannot be restricted.

Now that Minnesota’s “rule of silence” has been struck down, where can a line be drawn? What are the implications for restricting candidate statements? What is the future of judicial campaigns?

First, perhaps a new approach to the announce clause is possible. Professor Gillers once proposed a revision to the Canon 5 announce clause. His proposed rule is as follows: “A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views are tentative and subject to arguments of counsel and deliberation.”⁷

The proposed Gillers rule has the advantage of permitting candidates to speak, but also reinforces to the voters the fact that judges must judge. They cannot prejudge. At the same time the proposed revised rule does not silence candidates. It

allows candidates to exercise their prerogative to state their views about legal issues, but requires them to express a commonsense caveat. A rule that requires a candidate to say something, of course, may have its own First Amendment deficiencies.

Regardless of whether the announce clause can or should be modified, there still remains in Canon 5 the provision that prohibits candidates from making “pledges or promises.” The *Minnesota* case did not challenge that clause and there is much sympathy for the concept of banning promises. Nevertheless, the clause presents problems of its own. First, there is the issue of vagueness. What constitutes a pledge or promise? In Texas, a judge was issued a public warning because his campaign literature stated: “I’m very tough on crimes where there are victims who have been physically harmed I have no feelings for the criminal.”⁸ The Texas Commission on Judicial Conduct considered these statements as a pledge “not to show leniency toward violent criminals.”⁹ But is it a pledge? Was the judge pledging or was he announcing his view on the legal issue of whether there should be tough sentencing of violent criminals?

In New York, a civil court judge was censured for violating the pledges or promises clause because his “campaign literature gave the unmistakable impression that he would favor tenants over landlords in housing matters.”¹⁰ The candidate (who won) created the “unmistakable impression” by pointing out that he was a tenant while his opponent was a landlord, and by using testimonials from tenants who complimented his handling of cases as a housing judge. At what point did the candidate step over the line? Was it when he accurately described himself as a tenant and his opponent as a landlord, when he stated that he was a housing judge, or when he introduced the testimonials? Will housing judges who rent apartments in New York not be allowed to share this information with the public because it would create the “unmistakable impression” that they are pro-tenant?

The vagueness of the “pledges and promises” clause could be compounded by uneven or sweeping enforcement. If judicial commissions apply the pledges and promises clause as broadly as the Minnesota commission interpreted its announce clause, it will suffer a similar constitutional fate. At oral argument in *Minnesota*, Justice O’Connor cynically guessed that the announce clause was being used to “maintain incumbent judges.” In the short term, the state supreme courts will have to grapple with defining the remainder of Canon 5 to give can-

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6. See Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755, 765-766 (2002); but see Jan Baran, *Compelled Disclosure of Independent Political Speech and Constitutional Limitations*, 35 IND. L. REV. 769 (2002).

7. See Gillers, *supra* note 2, at 733.

8. Bruce Hight, *Judge Violated Conduct Code, Panel Decides*, AUSTIN-AMERICAN STATESMAN, Jan. 31, 2001.

9. *Id.*

10. NEW YORK LAW JOURNAL, Oct. 17, 1997.

didates sufficient clarity while acknowledging that candidates have a constitutional right to discuss political and legal issues. That will be a daunting task.

At the same time, candidates must grapple with their new “freedom.” It is one thing to have freedom of speech. What to say is something else. In an election campaign, a candidate will be asked, “What is your position on X?” In the past the candidate could say, “I cannot comment on that topic because it is a legal or political issue.” While a candidate no longer can point to Canon 5 for justification, she can still make a similar response. Judicial candidates can adopt the time-honored practice of other politicians by evading direct answers. Unlike most other politicians, judicial candidates will have a good political reason to evade answers. The public has different expectations of judicial candidates. They want their judges to be fair, evenhanded, and unprejudiced. Judicial candidates should capitalize on that expectation whenever possible. Therefore, when asked, “What is your position on X?,” a candidate, even after *Minnesota*, should consider stating (even if she has already opined in past opinions or articles), “I don’t think it is appropriate for a judge [or prospective judge] to make statements on this issue. It may come before the court when I will hear and consider all the arguments.” This type of response at times may not be possible, or may require further explanation with some “neutral” comment about “issue X.” However, free speech is not compulsory speech and voters expect something from a judge that is not expected of a governor or congressman—fewer press releases and more decorum.

As for questions from or advertising “attacks” by third-party organizations, the candidate will have to exercise even more restraint. Experience suggests that candidates in such circumstances benefit from backlash and sympathy. Supporting

groups tend to respond to such advertising in defense of the candidate. The American Bar Association, for example, is encouraging the creation of civic groups for exactly such purposes.¹¹

Finally, there is a clear solution to the dilemmas created by judicial elections. Justice O’Connor devoted her concurring opinion to the history of judicial elections. In adopting elections, she noted that “the State has voluntarily taken on the risks to judicial bias.”¹² Implicitly, she was suggesting that elections be replaced with judicial selections. In light of historical public insistence on elections, merit selection is a difficult proposition, but not one to abandon.

In sum, the *Minnesota* case creates the opportunity for more debate. The quantity of additional debate will increasingly depend on the candidates. The “rule of silence” has been struck down, but there still may be occasions where silence will be golden—and prudent politics.



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11. Recommendation of the ABA Standing Committees on Judicial Independence and Election Law, at <http://www.abanet.org/>

leadership/recommendations02/113.pdf (Aug. 2002).
12. 122 S. Ct. at 2544.

COURT REVIEW

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The *White* Decision in the Court of Opinion: Views of Judges and the General Public

David B. Rottman

The U.S. Supreme Court's first decision on judicial elections—*Republican Party of Minnesota v. White*¹—came on the heels of the first national opinion survey devoted entirely to judicial selection issues. In late 2001, 1,000 randomly selected members of the public and 2,500 state appellate and trial judges answered questions about their participation in judicial elections, opinions about current practices, and support for various reform proposals. Some questions were asked of judges and public alike, while other questions concentrated on their respective roles in the election process. The surveys were conducted on behalf of the Justice at Stake Campaign, a nationwide coalition of legal and citizen organizations concerned with preserving judicial independence.²

These surveys present a unique opportunity to evaluate empirically some of the explicit and implicit assertions made by respondents, lower courts, amici curiae, and the Supreme Court justices concerning what the public thinks and wants, and how judges experience campaigning and the canons. Indeed, the survey's findings are a part of the record in the *White* decision. One amicus brief (filed by the Brennan Center)³ and Justice O'Connor's concurring opinion cited the survey. All references are to survey questions about the influence of judicial campaign fundraising. Justice O'Connor noted that:

Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary. See Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001), available at <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> (describing survey results indicating that 76 percent of registered vot-

ers believe that campaign contributions influence judicial decisions); *id.*, at 7 (describing survey results indicating that two-thirds of registered voters believe individuals and groups who give money to judicial candidates often receive favorable treatment).⁴

The surveys have more to say on the topic of campaign fundraising by judges, and include questions that describe judicial and voter behavior at election time. Survey participants were also asked to indicate their support for various proposals for improving judicial elections.

Other questions sought more abstract impressions of what it means to be a judge. The status of the judge as a politician was a particular theme. Questions ask how judges *should* campaign and how judges compare to other public officials who run for office. The survey thus allows some exploration of fundamental concerns about judicial independence and accountability. The result is a complex image of judges. Both judges and the public hold equivocal views of where the judge as decision-maker intersects with the judge as fundraiser and campaigner.

THE SURVEY

The firm of Greenberg Quinlan Rosner Research, Inc. designed and administered the telephone survey of 1,000 randomly selected sample of (self-identified) registered voters. American Viewpoint, a survey firm with a largely Republican client base, collaborated with Greenberg Quinlan, which has a largely Democratic client base, to ensure bipartisanship in the choice of questions and question wording. Four focus groups were used to fine-tune the questions. The survey was conducted October 30–November 7, 2001.⁵

The same collaboration carried out the separate, national survey of state judges by mail from November 5, 2001 to

Footnotes

1. 122 S. Ct. 2528 (2002).
2. Justice at Stake is a nonpartisan national partnership working to keep courts fair and impartial. Partner organizations include the American Bar Association, the Constitution Project, the League of Women Voters, and the National Center for State Courts, as well as various state-specific organizations. For more information consult the Justice at Stake website at www.justiceatstake.org.
3. In addition to citing the two questions asked of the public used in Justice O'Connor's concurring opinion, the Brennan Center brief also reported on three questions from the judges' survey in support of the claim that "[m]any judges are acutely aware of the role of money in judicial elections." Brief for the Brennan Center for Justice at New York University School of Law as Amicus Curiae in Support of Respondents at 16, *Republican Party of Minn. v. White*, 122 S.Ct. 2528 (2002) (No. 01-1521).
4. 122 S. Ct. at 2543 (O'Connor, J., concurring). Justice O'Connor paired her survey-derived evidence with anecdotal evidence about the actual role of campaign contributions in influencing decisions.
5. Telephone numbers were generated by a random digit dial process, which allowed access to all listed and unlisted phones. The list was stratified by state. Quotas were assigned to reflect the percentage of households within these states. The data were weighted by gender, region, education, age, and race to ensure the sample is an accurate reflection of the population. Findings are subject to a margin of error of +/- 3.1 percent. To maximize the number of questions that could be asked, some questions are based on 500 respondents. This increases the margin of error to +/- 4.4 percent.

January 2, 2002. Survey questionnaires were completed and returned by 61 percent of the recipients, a strikingly high rate of participation.⁶ The 2,428 participating judges included 188 state supreme court justices, 527 intermediate appellate court judges, and 1,713 trial court judges. Survey participants include about one judge in ten.

ASSERTIONS ABOUT WHAT JUDGES EXPERIENCE AS CANDIDATES

The judge’s survey inquired about experiences as a candidate, preferences in terms of reform, evaluation of their state’s canons, their view of the judicial role, and concerns about judicial elections. How judges respond is shown in tables and charts. Each table and chart repeats the exact wording of the question. The views of supreme court justices, intermediate appellate court judges, and trial judges tend to be similar. The text notes instances where the world looked differently depending on the level of court a judge occupied.

(1) *Judicial elections today are “nastier, nosier, and costlier.”*

“Nastier, nosier, and costlier” is a punchy description of how judicial elections have changed in recent years.⁷ That change is evident in a number of states, especially for supreme court races. A survey question asked the judges if they believe the conduct and tone of judicial campaigns has changed over the past 5 years (see Table 1). The majority of judges (61%) perceive a decline in the conduct and tone of judicial campaigns over the past 5 years. Thirty percent of the judges saw no change. One judge in ten sensed an improvement.

Do you think the conduct and tone of judicial campaigns has gotten better or worse over the past 5 years?	
Much better	2 %
Somewhat better	7
Stayed the same	30
Somewhat worse	38
Much worse	23
Total	100 %

The responses suggest that concern over declining standards in judicial campaign conduct is widespread, certainly present in many states and at all court levels, but not universal.

The survey also asked judges if they were satisfied with the way judicial campaigns are conducted. Despite the sense of decline just noted, judges are evenly split between those satisfied and those dissatisfied with the conduct and tone of campaigns (see Table 2).

(2) *Judges are preoccupied with raising campaign funds.*

It is recognized that in some states a viable judicial candidate, especially for a supreme court seat, must raise very large sums of money. The survey asked the judges if they felt under

6. The total judges’ sample is subject to a margin of error (MOE) of +/- 2 percent, and each separate sample to a higher margin of error (supreme court sample, MOE = +/- 7.2 percent; appellate sample, MOE = +/- 4.3 percent; lower court sample, MOE = +/- 2.4 percent).

How satisfied are you with the conduct and tone of judicial campaigns?	
Very satisfied	14 %
Somewhat satisfied	39
Somewhat dissatisfied	31
Very dissatisfied	17
Total	100 %

pressure to raise campaign money (see Table 3). Of judges running for election, 59% describe themselves as being under pressure to raise money for their campaign during election years. Most report being under “a great deal of pressure” (57% of supreme court justices, 49% of intermediate appellate court judges, and 40% of trial judges). Few (only 10% for supreme court justices) describe the pressure as “just a little” or “none at all.” Thus, it appears that the demands of fundraising are being experienced throughout the judiciary.

If under pressure to raise money: How much pressure are you under to raise money for your campaign during election years?			
	Supreme Court	Intermediate Appellate	Trial
Great deal	57%	49 %	40%
Some	33	32	40
Just a little	3	6	7
None at all	7	14	13
	100 %	100 %	100%

The survey strongly suggests the pressure to raise campaign funds is pervasive, experienced by the majority of judges, both trial and appellate.

(3) *Judges face public criticism from within and outside their state.*

The majority of judges report having been publicly criticized in their role of judge. This was most often the case among supreme court justices (76%) but common among intermediate appellate court justices (54%) and trial judges (56%). The survey asked participants to identify the source of the criticism (see Table 4). The media and within-state special interest groups were the most frequent sources of criticism. Other officials ranked third as the most frequent critics. Public criticism from other judicial candidates was rare, even among supreme court justices. Nearly one-half of supreme court justices report receiving criticism from special interest groups within their state, as do about one-fourth of other judges. Criticism from national interest groups is less common but experienced by about one in five supreme court justices. Eighteen percent of

7. See David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOYOLA L.A. L. REV. 1369 (2001) (quoting Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1998, at 74 (noting that recent changes in judicial elections had made them “noisier, nastier, and costlier”).

supreme court justices, 5% of intermediate appellate judges, and 3% of trial judges reported criticism from national special interest groups.

Have you ever been publicly criticized in your role as judge by any of the following individuals or groups?			
	Supreme Court	Intermediate Appellate	Trial
The media	56%	34%	38%
Special interest group in state	46	24	22
Other public official	38	18	20
Other judicial candidate	23	9	11
National special interest group	18	5	3

(4) *The canons restrict the ability of judicial candidates to counter speech with more speech.*

The overwhelming majority (89%) of judges who had been criticized felt that they “held back or felt restrained” in responding. The canons were the most frequently cited reason for restraint, mentioned by 73% of those reporting criticism.⁸ The other commonly cited reasons were “a personal belief that judges should not respond” (cited by 43%) and “the criticism wasn’t worthy of a response” (34%).

Another question sought an evaluation of the impact of the canons on judicial behavior. The response varied by type of court: 51% of supreme court justices, 60% of intermediate appellate judges, and 71% of trial judges agreed with the statement (see Table 5). It appears that supreme court justices are subject to more criticism than judges at other levels but are less concerned with restrictions imposed by the canons.

Do you feel that your state’s Code of Judicial Conduct prevents judges from adequately responding to unfair or misleading criticism of decisions?			
	Supreme Court	Intermediate Appellate	Trial
Yes	51%	60%	71%
No	49	40	29
Total	100%	100%	100%

The sense of being restrained does not necessarily indicate a desire to weaken or even change the canons. Most judges at all levels felt that their state’s code contained the right amount and type of restrictions (see Table 6).

Judges who feel their state’s canons are too restrictive greatly outnumber those who perceive too few restrictions. Yet most

judges—nearly two-thirds—view the canons as being of the right amount and type.

Do you feel that your state’s Code of Judicial Conduct contains too many restrictions on judicial campaign speech, too few restrictions, or the right amount and type of restrictions on judicial campaign speech?	
The right amount and type	64 %
Too many restrictions?	30
Too few restrictions.	6
	100 %

(5) *Judges place boundaries on their own campaign behavior.*

The survey identifies some areas in which nearly all judges believe a judicial candidate cannot stray. One question dealt with the “pledge or promise” provision in many canons, unaffected by the *White* decision. Judges were asked how strongly they support or oppose the following statement: “Judicial candidates should never make promises during elections about how they will rule in cases that may come before them.” Strong support was offered by 97% of the judges. Only a handful (out of nearly 2,500 judge participants) strongly opposed the statement.

Another area was examined in a question that sought the degree of support for the proposition, “Judicial candidates should commit to not making misleading or unfair accusations about opponents during elections.” Strong support came from 93% of the judges surveyed.

For the most part, supreme court, intermediate appellate judges, and trial judges reported similar experiences and expressed similar opinions. A striking finding is the pervasiveness of pressure to raise funds and public criticism. The relatively small number of high-profile supreme court races tells only a part of the story of how judicial elections are being conducted.

WHAT THE PUBLIC THINKS AND WANTS

The telephone survey of the public included more questions than the postal survey completed by judges. A wide range of topics was covered. These include the record of voting for judicial candidates, evaluations of judges, courts, and other organizations, concerns over judicial selection and decision making, and preferences among various reform proposals. Most topics were approached through several types of questions, enriching what the survey findings can tell us. The benefit of such a multifaceted approach comes in what we can learn about core issues like whether being elected makes a judge a politician in the same sense as legislators and governors.

(1) *Judges are politicians*

One survey question took a direct approach to the issue of whether judges are politicians. The survey participants were read a series of words and phrases that people use to describe

8. The question read, “If yes, what are the two most important reasons that you held back or felt restrained in responding to criticism?”

judges and then asked to say how well each describes judges (the choices were “very well,” “well,” “not too well,” and “not well at all”). “Political” was included in the list. Most survey participants felt that “political” describes judges “very well” (34%) or “well” (44%). Only 4% felt “political” describes judges “not well at all.” The identification of judge with “political” is striking because of the 12 words and phrases (including “impartial,” “committed to the public interest,” and “qualified”) that were tested, “political” attracted the largest proportion of describes “very well” responses.⁹

(2) *But judges are a special kind of politician.*

Although judges are seen as “political,” it may be that the public attaches some caveats that distinguish judges from executive and legislative branch officials. Other questions pursued the meaning of political in the judicial context through an abstract approach, addressing concerns such as judicial independence. One question of that kind involved a statement:

Judges should be treated differently than other public officials since they must make independent decisions about what the law says. Judges should not have to raise money like politicians, make campaign promises like politicians, or answer to special interests. We must take concrete steps to ensure that judges can make unpopular decisions based only on the facts and the law.¹⁰

Respondents were asked if they found the statement very convincing, somewhat convincing, a little convincing, or not at all convincing. Eighty-two percent found the statement either very convincing (52%) or somewhat convincing (30%).¹¹

A less wordy, but again somewhat abstract approach to public sentiment on the uniqueness of the judiciary was taken by asking survey participants to choose between a pair of statements. One statement describes courts as institutions that should be free of political and public pressure and the other posits that courts are just like other institutions and thus should *not* be free of those pressures (see Table 7). Survey participants were asked to say which statement is closer to their own view.

The responses suggest the public sees the judiciary as unique, rather than similar to other institutions. Eighty-one percent opt for the statement that courts are unique.

9. Other proportions of “very well” responses include “independent” (13%), “honest and trustworthy” (14%), and “qualified” (24%). It is possible that the context provided by earlier survey questions heightened sensitivity to the role of judge as political candidate.

10. The information contained in the statement might be seen as making the case for treating judges as different. Other questions, however, use wording that might be seen as arguing in the opposite direction.

11. That statement was read to one half of the survey participants. The other half was read a statement that ended with, “We must take concrete steps to ensure that judges are shielded from excessive partisan political pressure that other public officials face.” The majority of respondents found that a convincing argument, but to a lesser degree than for the notion of judges as free to make

TABLE 7

Courts are unique institutions of government that should be free of political and public pressure.	
Courts are just like other institutions of government and should not be free of political and public pressure.	
First statement much more convincing	62 %
First statement somewhat more convincing	19
Second statement somewhat more convincing	10
Second statement much more convincing	9
	<hr/> 100 %

The survey finds that the public image of the courts and judges contains a strong political component. The image also contains a strong sense that the judicial branch is unique. Such ambiguities and complexities are characteristic of public opinion on the courts and generally. Consistency is not the most prominent feature of public opinion.

(3) *Judicial elections damage the public standing of the judiciary.*

As Justice O’Connor noted, a considerable majority of Americans express concern over judges as campaign fundraisers. Does that concern translate into lower levels of trust in courts and judges? The survey evidence suggests that it might. Survey participants were asked, “How much trust and confidence do you have in courts and judges in your state?” The response choices offered to survey participants were “a great deal” (25%), “some” (53%), “just a little” (16%), or “none at all” (5%).

Whether people believe campaign fundraising influences judges is related to their trust in the courts (see Chart 1). “A great deal” of trust in the courts is expressed by 16% of participants who perceive “a great deal” of influence from campaign fundraising and by 40% of those who see no influence from campaign contributions.¹²

There is a statistically significant relationship between concern over fundraising and trust in the courts. The relationship is negative because the greater the concern over contributions, the lower the trust. Statistical significance gives us confidence that even if we asked the same questions of another group of 1,000 randomly selected adults, the relationship of perceived influence with trust would be about the same.

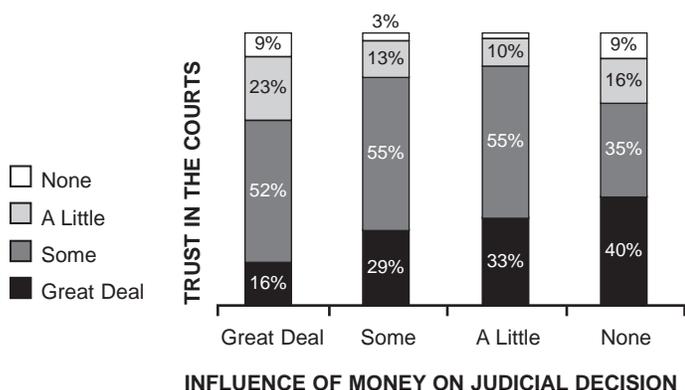
The strength of the relationship between perceived influence

unpopular decisions. Overall, 73% of respondents found the statement on partisanship convincing (split evenly between very and somewhat so).

12. Other recent surveys confirm the public’s unease with judges as campaign fundraisers and the association between that unease and levels of trust in the courts. Relevant surveys include AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM (1999) and NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999). Reports on both surveys have appeared in previous issues of *Court Review*. See *An Interview with Phil Anderson and Marilyn Goldman*, COURT REVIEW, Winter 1998, at 8; and David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, COURT REVIEW, Fall 1999, at 24.

CHART 1

Level of Trust in the Courts by Perceived Influence of Money on Judicial Decisions



and trust is measured separately. That relationship is weak. Here, we measured how well knowing a person's views about campaign fundraising correlates with their evaluation of the judiciary. A score of 1.0 indicates a perfect relationship—if you know how a person feels about campaign fundraising, you can exactly predict their trust in the courts. A score of zero means knowing a person's view on fundraising tells us nothing about their level of trust. The correlation between the influence and trust is on the low side: $-.21$.¹³

While those who disapprove of fundraising by judges are less likely to trust the courts, that is only a small part of a much larger story. There is no reason to single out campaign fundraising as looming larger in importance to the public than other issues related to the role and performance of the judiciary.

(4) *Voters fail to participate in judicial elections because they lack adequate information to choose among the candidates.*

The survey offers some support for the belief that a lack of information on the candidates is a factor underlying the reluctance to participate in judicial elections. First, the survey confirms the relatively low amount of information potential voters have on judicial candidates (see Table 8).

The public divides evenly between those who have at least "some" information and those who have "just a little" or less information.

TABLE 8

Thinking back to the last time there was an election for judges in your state, how much information would you say you had about the candidates in those election?

A great deal of information	13 %
Some information	38
Just a little information	35
No information at all	14
	<u>100 %</u>

Second, the survey measures the relatively low rate of voter participation in judicial elections (see Table 9).

TABLE 9

Thinking specifically about judicial elections, how frequently do you vote in elections for judges?

Almost always	59 %
Sometimes	17
Not often	6
Almost never	16
	<u>100 %</u>

The survey provides two benchmarks to compare voting in judicial elections to the rates in other types of elections. Eighty-seven percent of participants said they had voted in the 2000 presidential election. When asked to look ahead to the 2002 congressional elections, 72% said they were "almost certain" to vote, 18% said they would probably vote, and 8% gave the probability as 50-50. Three percent said they did not think they would vote. The survey findings are consistent with actual voting percentages.¹⁴ There is a voter "roll-off" in which voters who cast ballots for "top-of-the-ticket" races like those for governor, but fail to vote in any judicial election.¹⁵

The most commonly offered reason survey participants give for not voting is that they "don't know enough about the candidates" (cited by 18% of the survey participants). "Don't have time" was the second most common answer (cited by 11% of participants).

Third, those who claim possession of a great deal of information are more likely to vote in judicial elections (see Chart 2). Those claiming possession of "a great deal" of candidate infor-

13. The statistic is Spearman's rho, a measure of the strength of the relationship between two variables appropriate for ordinal data (where responses to a question go from high to low but at intervals that are not fixed). For example, we do not know if in a response to a question asking about support for, say, merit selection, the distance between strongly support and somewhat support is the same as the distance between somewhat support and somewhat oppose.

14. It is likely that there is some exaggeration of frequency with which participants actually vote in judicial elections. Survey responses can be affected by what people think they should do. An indirect measure of voting can be obtained from the survey. About one in four (38%) survey respondents said they "always vote" in response to the question of why they did not vote in judicial elections. This compares with the 59% who stated that they

"almost always vote" in judicial races. According to the U.S. Census, 86% of registered voters cast their ballot for President in 2000. Press Release, Bureau of the Census, Registered Voter Turnout Improved in 2000 Presidential Election, Census Bureau Reports (Feb. 27, 2002), available at <http://www.census.gov/Press-Release/www/2002/cb02-31.html>.

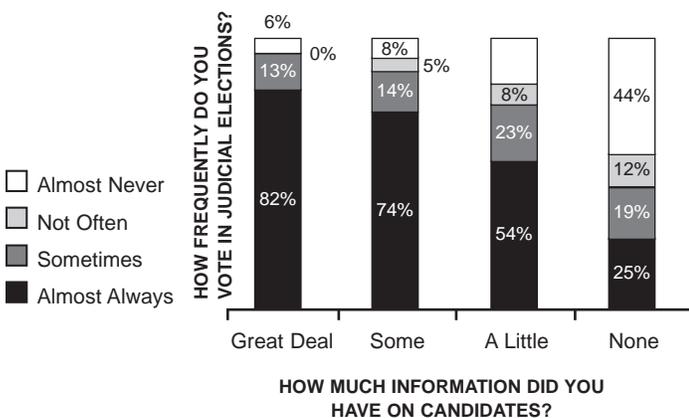
15. Roll-off rates during the 1990s ranged from 15% to 25% in retention elections (Florida), 33% to 42% in nonpartisan elections (Washington state), and 8% to 14% in partisan elections (Texas). Straight-party votes are more responsible for the low roll-offs found in partisan elections than the excitement generated by contested, hard-fought campaigns. Charles H. Sheldon & Linda S. Maule, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 63, 83, 143 (1999).

mation claim that they almost always vote in judicial elections. Among potential voters with no candidate information, only one in four report being “almost always” likely to vote.

Having information on judicial candidates is related to the extent to which people take an active interest in political life generally. Survey participants were asked if contributed money to political parties or candidates. About 40% were contributing and they claimed greater knowledge about judicial candidates and about how the courts work. Being a campaign contributor is related to a person’s education. Concern over influence of campaign contributions, however, was the same among political contributors and noncontributors.

CHART 2

Likelihood of Voting in Judicial Elections by Information About Candidate



(5) *The public is unwilling to give up the right to vote in the judicial selection process.*

The public prefers to elect judges despite a lack of information about the candidates, concern about campaign fundraising by judges, and low rates of voter participation in judicial elections. The preference to vote emerges clearly from the responses survey participants gave when offered a direct choice (see Table 10). The question offered two statements about how judges should be selected and asked which they found the most convincing.

TABLE 10

Judges in my state should be elected to office.	
Judges in my state should be appointed to office.	
First statement much more convincing	63 %
First statement somewhat more convincing	18
Second statement somewhat more convincing	8
Second statement much more convincing	12
Total	100 %

16. The balance weighed less in favor of elections when it was paired against “Judges in my state should be initially appointed to office, then voters should have a chance to decide whether the judge

Elected judges were preferred to appointed judges. The first statement was closer to the views of 80% of respondents.

(6) *The public values judicial accountability.*

Two questions, one on public criticism and the other on free speech, provide insight into the public’s thinking about the appropriate balance between judicial independence and accountability. The question on public criticism took the form of paired statements. Participants indicate which statement is the more convincing (see Table 11).

TABLE 11

Public criticism of judges makes judges more accountable and leads to better decisions.	
Public criticism of judges often intimidates them and leads to worse decisions.	
First statement much more convincing	39 %
First statement somewhat more convincing	31
Second statement somewhat more convincing	19
Second statement much more convincing	12
Total	100 %

Two-thirds of the public survey respondents were convinced by the notion that criticism is conducive to accountability. Few saw criticism as intimidation.

Another survey question used a more abstract form of words to investigate the importance placed on judicial accountability relative to other considerations. A statement was read and the participants were asked to say how convincing they found it to be (see Table 12).

TABLE 12

Our courts and judges must be accountable to the people.	
So-called reforms that limit the ability of citizens to educate others about the decisions of judges are a fundamental assault on the Constitution. People who say they’re out to reform the system are really just trying to take away your right to vote.	
Very convincing	26 %
Somewhat convincing	36
A little convincing	19
Not at all convincing	19
Total	100 %

The response to the statement is mixed. The statement convinces the majority of respondents. The balance was tipped toward the side of “somewhat” rather than “very” convincing.

Overall, the public is equivocal in how it views the judiciary. On the one hand, it appears to see judges as political and to desire that judges be held accountable through the electoral process. On the other hand, it regards judges as different from other elected officials. Somehow campaign funding by a judicial candidate is qualitatively different that fundraising by a leg-

stays in office.” Fifty-four percent favored the first statement and 42% the second.

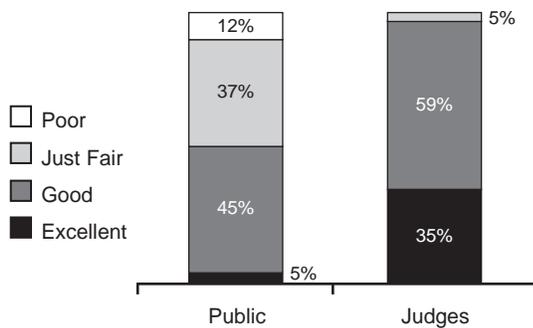
islative or executive candidate. Perhaps the public image of the judiciary contains the elements that many groups and individuals concerned with the *White* case sought to reconcile.

(7) *The public and the judges disagree on how judges should be selected.*

The surveys identify some points of agreement and disagreement in the priorities of judges and the public for improving judicial elections. That difference may be related to a fundamental divergence in the opinions of judges and public. Judges give themselves high marks, while the public gives far lower marks to the quality of the job being done by the courts in their state (see Chart 3). A judge is seven times more likely than members of the public to rate courts and judges as doing an excellent job (35% versus 5%). The public is evenly split between those holding positive and negative views of the judiciary, while 96% of judges describe the courts as doing an excellent or good job.

CHART 3

How would you rate the job being done by courts and judges in your state?



Such a fundamental difference is likely to color how each group approaches the topic of judicial selection.

The gap between what the public and judges think is also found in the question of whether campaign contributions influence judges' decisions. The public's assessment of the impact campaign contributions made to judges have on their decisions is at odds with the judiciary's view (see Chart 4). Thirty-eight percent of the public and 5% of the judges surveyed attribute "a great deal of influence" to campaign contributions.

Eight specific reform proposals were presented to judges and the general public (see Table 13). The reaction to five of the proposals was roughly similar among judges and the public. Most proposals were either strongly or somewhat supported by judges and the public alike.

There were two main points of difference. First, the public is more supportive than judges of proposals that would bring more information or more public participation into the judicial election process. This is particularly true of voters' guides that would provide a standard source of information on candidates (51% of judges and 72% of the public strongly agreed with that proposal). There is also greater public support for establishing independent citizen boards to inform the public about misleading advertising in judicial campaigns. These are differences in degree. Both proposals receive support ("strong" or "some-

CHART 4

How much influence do you think campaign contributions made to judges have on their decisions?

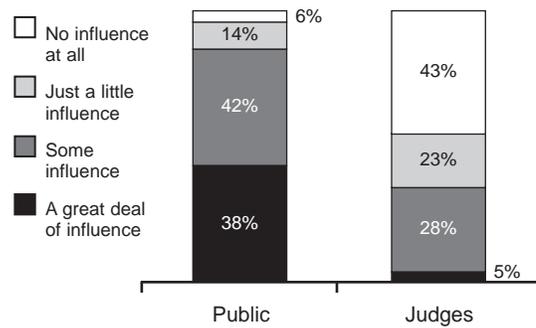


TABLE 13

EIGHT REFORM PROPOSALS: SUPPORT BY JUDGES AND PUBLIC

A series of proposals have been made to help improve the way we elect judges. For each one, please mark whether you strongly support, somewhat support, somewhat oppose, or strongly oppose the proposal.

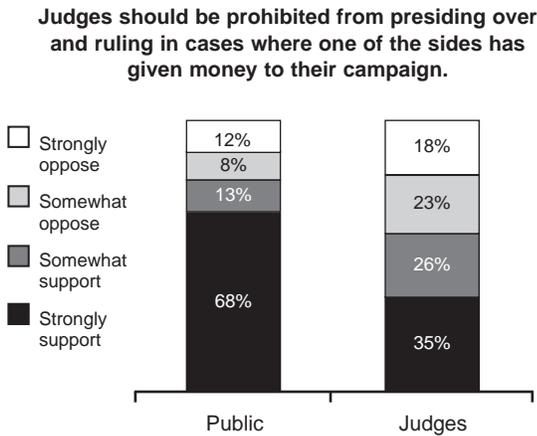
	Proportion Giving Strong Support	
	Public	Judges
States should provide voter guides prior to judicial elections to help inform voters about the candidates in each race	72 %	51 %
States should require that all judicial candidates disclose the individuals, parties, or organizations who donate money to their campaigns	72	80
States should require that all political advertisements in judicial elections clearly state who is paying for the ad	74	87
Independent citizen boards should be established to inform the public about misleading or inaccurate advertising in judicial campaigns	56	45
States should limit campaign contributions to judicial candidates	55	45
Judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign	68	35
Judicial candidates should condemn negative or misleading advertising done on their behalf	60	83
Judicial candidates should commit to not making misleading or unfair accusations about opponents during elections	72	93

what”) from a sizable majority of judges and members of the public.

The second point of difference is in the behavior of judges in relation to or in response to campaigning. Judges are stronger supporters of a proposal that judicial candidates should condemn negative or misleading advertising done on their 83% percent of judges and 60% of the public gave “strong support” to that proposal.

The sharpest difference between judges and the public is about a prohibition on presiding over cases in which one of the sides contributed to their election campaign. The public was more supportive than judges of the proposal that “Judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign” (see Chart 5). Two-thirds of the public but only one-third of judges strongly support a prohibition on presiding over cases when one side has given money to a judge’s campaign. Even so, a majority of judges (61%) gave either some or strong support to that proposal. The public was also more supportive of establishing independent citizen boards to inform the public about misleading or inaccurate advertising in judicial campaigns.

CHART 5



A majority of both judges and the public agreed that “[j]udicial candidates should commit to not making misleading or unfair accusations about opponents during elections.”

(8) *The judicial selection reform agenda is divisive.*

Although the public and judges responded similarly to some specific proposals for improving judicial elections, their views diverged when it came to assessing merit selection. Both judge and public survey respondents were given a summary of a proposal based on the merit selection model: a nonpartisan citizen panel evaluates and then recommends a slate of potential judges to the governor, who selects a nominee for confirmation by the state legislature. If confirmed, subsequent terms are secured through retention elections. The proposal receives substantial support from the public but a less positive reaction from intermediate appellate and trial court judges, who are evenly split on the supporting and opposing positions. Supreme court justices have a distinctive reaction to the proposal: one-third strongly support and one-third strongly oppose merit selection, with an overall majority (59%) in support (see Chart 6). This is one of the instances in which the

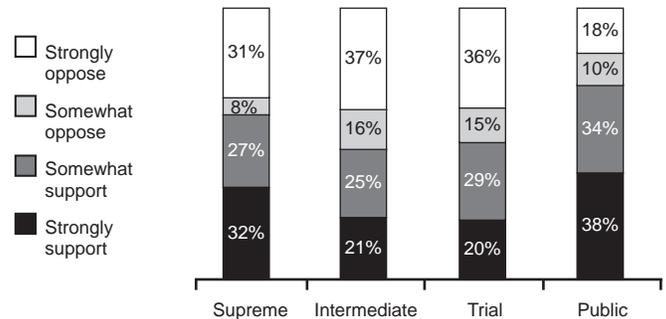
level of court is related to a judge’s opinions about judicial selection.

CHART 6

Here is a summary of a proposal that deals with the way judges are selected.

Under this proposal, a nonpartisan panel of citizens, legal professionals, and civic leaders evaluates and recommends potential judges to the governor. The governor then chooses a nominee from the list who must then be confirmed by the state legislature. After each term, the public then votes on whether a judge should keep the seat or be removed from office. If a judge is rejected, the selection process starts again.

Based on this statement, would you strongly support, somewhat support, somewhat oppose, or strongly oppose such a proposal?



CONCLUSION

The survey data challenge some assertions made in connection with the *White* case and support other assertions. Both challenges and support often come with clarification or modification.

There is support for the depiction of judicial election campaigns as “nastier, nosier, and costlier” than before. The striking finding from the judges’ survey is the extent to which concern over elections and campaign fundraising activity is so pervasive. Concern is not limited to the small number of states that have made the news. It is also not limited to supreme court races. Still, public criticism by other candidates or by national interest groups is infrequent.

The data also support the claim that the canons restrict responses to criticism. However, there is no consensus among judges that such restrictions need to be loosened. The majority of judges believe that the existing canons in their state are just right.

The survey also suggests that there is a commitment on the part of virtually all judges to keep judicial elections different. Pledges or promises are viewed as improper, as is a commitment to make misleading or unfair accusations against potential opponents.

Other assertions attracted mixed or limited support. Judges are viewed as political, but generally the public comes down on the side of respecting the unique responsibilities of the judicial branch. If judges are politicians, they are a very special kind of politician. The public wants judges to be subject to criticism but generally supports provisions that modify the election process to be appropriate for judicial office. The survey provides grounds for viewing with caution the desire expressed in this and other surveys to elect, not appoint judges. The public has an equivocal view of judges. The various pieces forming that view do not fit into a coherent whole.

Voters in judicial elections are poorly informed; voters acknowledge the limited information that they possess. Voters do not believe, however, that they are bereft of any information. About one-half of registered voters report knowing at least something about the judicial candidates in the last election.

The public is more supportive than the judiciary of reforms that will bring more information into judicial elections. The public is more persuaded than judges of the merits of efforts like voters' guides and campaign oversight committees. At the same time, the public is less convinced of the need for judicial candidates to condemn misleading advertising done on their behalf. It is notable, however, that a reform agenda for judicial elections attracts very substantial support among judges and the public.

Both of the surveys were professionally done and should meet accepted tests for acceptance by the courts. Under Rule 703 of the Federal Rule of Evidence, survey findings are allowed as a basis for expert opinion when they "are of a type reasonably relied upon by experts in the particular field in forming opinions." For survey results, the specific standard may be stated this way: "Was the poll or survey constructed in accordance with generally accepted principles, and were the results used in a statistically correct way."¹⁷

Here, both surveys meet that standard. The judges' survey is

unique in its authoritativeness. Nearly one of every ten serving American state judges participated. The high rate of participation by judges is strong testimony on the topicality of judicial selection.¹⁸

The public survey is unique in being devoted to the topic of judicial selection. The breadth and depth of its coverage gives it considerable value.

Perhaps the most striking finding from the public opinion survey is the equivocal view people hold of judges and the judiciary. In some ways, this is to be expected. Public thinking about the judiciary is inchoate. It is full of inconsistencies and not well grounded in knowledge or experience. That does not mean, however, that public opinion is without substance or importance. The American public is shaky on the details but gets the gist of our system. They acknowledge that judges are political, but consider them a unique sort of politician, ones who play within a different set of rules than legislative or executive branch elected officials when campaigning.



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17. See Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 233-34 (2d ed. 2000).
 18. The response rate is on the high end of what is typical in postal surveys administered to judges. The rate is notable in that the surveys were mailed in the immediate aftermath of September 11, 2001. Other surveys have produced response rates ranging from 14% (Randall D. Lloyd, et al., *An Exploration of State and Local Judge Mobility*, 22 JUST. SYS. J. 19, 26-27 (2001) (on contests to

judicial authority)), 33% (Rita James Simon, *Judges' Translations of Burdens of Proof into Statements of Probability*, 13 TRIAL LAW GUIDE 103 (1969) (on defining reasonable doubt)); and 41% (Gordon Bazemore & Leslie Leip, *Victim Participation in the New Juvenile Court: Tracking Judicial Attitudes Toward Restorative Justice Reforms*, 21 JUST. SYS. J. 199, 205 (2000) (on juvenile court judges)). The importance of the topic to the judges surveyed is an important factor in determining the response rate.

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Recent Criminal Decisions of the United States Supreme Court: The 2001-2002 Term

Charles H. Whitebread

The United States Supreme Court's 2001-2002 term at least gave the appearance of a more unified Supreme Court—at least when compared to the previous term, which was marked by an overwhelming number of 5-4 decisions—and featured several unanimous or near unanimous decisions. Specifically in the Fourth Amendment area, but also in other cases, the Court seemed at times to break free from the typical conservative-liberal divide that was so salient a year ago. This term, the Court confronted significant issues regarding the increased susceptibility to searches and seizures of bus passengers, students, and probationers; the death penalty and its limitations; the assistance of counsel in minor criminal cases; the constitutionally required roles of the judge and jury in criminal cases; and further interpretation of the Antiterrorism and Effective Death Penalty Act.¹

FOURTH AMENDMENT

In a 6-3 decision, Justice Kennedy wrote the opinion for the Court in *United States v. Drayton*,² holding that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse to consent to a search. Further, merely boarding a bus and questioning passengers does not result in a seizure nor is a passenger's consent to search made involuntary. The Court explained, "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." A person is not seized as long as "a reasonable person would feel free to terminate the encounter." The Court cited *Florida v. Bostick*,³ which "addressed the specific question of drug interdiction efforts on buses." In that case, the Court clarified here, "for the most part per se rules are inappropriate in the Fourth Amendment context," which requires instead "a consideration of 'all the circumstances surrounding the encounter.'" The confinement a bus passenger feels is "the natural result of choosing to take the bus," and is not related to police conduct. Regarding the encounter between police officers and bus passengers in the present case, the Court asserted, "It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure." Instead, the Court suggested,

"bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them." Ultimately, the Court explained that it "has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." Instead, it "has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning."

In *United States v. Arvizu*,⁴ Chief Justice Rehnquist, writing for a unanimous Court, held that an appropriate application of the totality of circumstances test considers facts collectively, rather than in isolation, and gives due weight to the factual inferences drawn by the law enforcement officer. In this case, facts including a minivan's travel on a primitive, unpaved road typically used to circumvent a border patrol checkpoint, at a time when the area is typically unpatrolled, the driver's stiff and rigid posture as he approached the border patrol agent, and the subsequent "abnormal" behavior of the child passengers "sufficed to form a particularized and objective basis for [the agent's] stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment." The Court explained that reasonable suspicion is determined on a case-by-case consideration of the totality of the circumstances, which consequently "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" The Court suggested that "it is quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona)." Accordingly, the officer's "assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight" and although "the facts suggested a family in a minivan on a holiday outing[, a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct."

Footnotes

1. For a more in-depth review of the decisions of the past term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2001-2002 (Amer. Acad. of Jud. Educ. 2002).
2. 122 S.Ct. 2105 (2002).
3. 501 U.S. 429 (1991).
4. 534 U.S. 266 (2002).

Chief Justice Rehnquist wrote the opinion for a unanimous Court in *United States v. Knights*,⁵ holding a warrantless search of a probationer's apartment, supported by reasonable suspicion and authorized by a condition of probation is reasonable within the meaning of the Fourth Amendment. The Fourth Amendment test of reasonableness balances "on the one hand, the degree to which [the search] intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests." The Court explained, "Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'" Therefore, "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." The Court also expressed its agreement with "the very assumption of the institution of probation'. . . that the probationer 'is more likely than the ordinary citizen to violate the law.'" Consequently, the Court concluded, "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable."

The Court addressed suspicionless drug testing of students who participate in extracurricular activities in *Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*.⁶ Justice Thomas, writing for the 5-4 majority, held that the Student Activities Drug Testing Policy adopted by the Tecumseh (Oklahoma) School District is a reasonable means of furthering the school district's interests and does not violate the Fourth Amendment. The Court reasoned that the Fourth Amendment "imposes no irreducible requirement of [individualized] suspicion," within the frame of safety and administrative regulations, so "a search unsupported by probable cause may be reasonable when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" The Court next discussed *Vernonia School Dist. 47J v. Acton*⁷ in order to determine what constitutes "special needs." The Court in *Vernonia* held that "suspicionless drug testing of athletes was constitutional." The Court not only determined that "special needs" is inherent in the public school context, but that "a finding of individualized suspicion may not be necessary when a school conducts drug testing." In order to conduct drug testing in schools, the Court balanced "the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests." The Court next uses the fact-specific balancing approach in order to determine whether the policy was constitutional. The Court explained that although the students in this situation are not athletes, as in *Vernonia*, "they voluntarily subject themselves to many of the same intrusions on their privacy as do athletes." Therefore, students have a limited expectation of privacy. The Court next suggested that

the procedure is more protective of the students' privacy than the procedure in *Vernonia*. The Court concluded that the "invasion of students' privacy is not significant." Finally, the Court considered "the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them." Noting the importance of preventing drug use by schoolchildren, and the presence of drug use at the Tecumseh schools, the Court asserted that the policy was reasonable and there was no need to create a threshold test to be met before a drug testing program would be allowed. The Court stated that "the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike." Ultimately, by enacting the policy, the school district has created a reasonably effective means of addressing its legitimate concerns in "preventing, deterring, and detecting drug use."

FIFTH AMENDMENT

In a 5-4 decision, the Court in *McKune v. Lile*⁸ held that the Sexual Abuse Treatment Program (SATP) provided to convicted sex offenders in Kansas serves a vital penological purpose, and offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the Fifth Amendment. The SATP lasts for 18 months and involves daily counseling. Inmates address "sexual addiction; understand the thoughts, feelings, and behavior dynamics that precede their offenses; and develop relapse prevention skills." In order to take part in this program, respondent was required to complete and sign a form, committing to discuss and accept responsibility for the crime for which he has been sentenced. A sexual history form that details prior sexual activities was also required, regardless of whether these activities constitute uncharged criminal offenses. Although the information obtained for the SATP is not privileged, it does advance the rehabilitative goals of the program. Kansas may use new evidence obtained from this process against sex offenders in future criminal proceedings, as Kansas law requires uncharged sexual offenses involving minors to be reported to law enforcement authority. Justice Kennedy, in a plurality opinion for four justices, began his analysis by discussing the impact of sex offenders on the nation. He noted that once convicted sex offenders reenter society, they are more likely than any other type of offender to be rearrested for a new sexual assault or rape. The state, therefore, has a "vital interest in rehabilitating convicted sex offenders." The clinical rehabilitative programs can be successful in reducing recidivism, and confronting one's past and accepting responsibility for one's actions is an important part of that rehabilitation. Justice Kennedy opined that the program does not create a compulsion for the inmates to incriminate themselves since the consequences are not severe enough to compel a prisoner to speak about past crimes despite a desire to remain silent. This is partly due to the fact that these consequences are imposed on prisoners instead of regular citizens. Justice Kennedy pointed out that respondent's decision not to participate in SATP did not result in either an

5. 534 U.S. 112 (2001).

6. 122 S.Ct. 2559 (2002).

7. 515 U.S. 646 (1995).

8. 122 S.Ct. 2017 (2002).

extension of his term of incarceration, or in his eligibility for good-time credits or parole. Citing prior decisions, Kennedy concluded that “the government need not make the exercise of the Fifth Amendment privilege cost free.” Justice O’Connor concurred in the judgment, concluding that “the alterations in respondent’s prison conditions as a result of his failure to participate in [SATP] were [not] so great as to constitute compulsion” under the Fifth Amendment.

DUE PROCESS

Justice Breyer delivered the opinion of the Court in *United States v. Ruiz*,⁹ holding that the Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. The Court evaluated the lawfulness of a “fast track” plea bargain process used by federal prosecutors in southern California. The fast-track plea bargain offer “asks a defendant to waive indictment, trial, and an appeal [and] in return, the government agrees to recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence.” The Court acknowledged that “a federal criminal defendant’s waiver of the right to receive from prosecutors exculpatory impeachment material [is] a right that the Constitution provides as part of its basic ‘fair trial’ guarantee.” However, “[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees,” such as the Fifth Amendment privilege against self-incrimination as well as the right to confront one’s accusers and right to a jury trial both provided by the Sixth Amendment.” Although it recognized that “the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision and the wiser that decision will likely be,” the Court held that “the Constitution does not require the prosecutor to share all useful information with the defendant.” Instead, “the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.” Often, the usefulness of impeachment information “will depend upon the defendant’s own independent knowledge of the prosecution’s potential case—a matter that the constitution does not require prosecutors to disclose.” A right to pre-guilty plea disclosure of impeachment information does not exist. Such an additional safeguard not only has limited value, but “could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.”

In *United States v. Vonn*,¹⁰ Justice Souter delivered the opinion of the Court, holding that a defendant who fails to make a timely objection to a trial judge’s variance from the procedures

required before accepting a guilty plea, as specified in Rule 11 of the Federal Rules of Criminal Procedure, has the burden to satisfy the plain-error rule on appeal. Further, “a reviewing court may consult the whole record when considering the effect of any error on substantial rights.” According to Rule 52(a) of the Federal Rules of Criminal Procedure, “[t]he Government avoids reversal of a criminal conviction by showing that trial error, albeit raised by a timely objection, affected no substantial right of the defendant and was thus harmless.” However, if a defendant fails to make a timely objection, Rule 52(b) allows that defendant to “nonetheless obtain reversal of a conviction by carrying the converse burden, showing among other things that plain error did affect his substantial rights.” Rule 11(h), which tracks Rule 52(a), “is a separate harmless-error rule applying only to errors committed under Rule 11, the rule meant to ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea.” There is no comparable plain error rule, like that in Rule 52(b) in Rule 11(h). The Court cited Congress’s Advisory Committee Notes, which explain that “by 1983 the practice of automatic reversal for error threatening little prejudice to a defendant or disgrace to the legal system prompted further revision of Rule 11.” Accordingly the harmless-error provision was added to Rule 11 because “[t]he committee said it was responding to the claim that the harmless-error rule [of 52(a)] did not apply . . . [and] having pinpointed that problem, it gave a pinpoint answer.” Consequently, it is likely that Congress’s omission from Rule 11 of a plain-error rule did not show its intention to exclude its applicability. The Court maintained that if silent defendants were free from the burden of plain-error review, “[a] defendant could simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government’s shoulders.” Justice Stevens, dissenting in part, suggested, “It is . . . perverse to place the burden on the uninformed defendant to object to deviations from Rule 11 or to establish prejudice arising out of the judge’s failure to mention a right that he does not know he has.”

SIXTH AMENDMENT

In *Alabama v. Shelton*,¹¹ the Court held in a 5-4 decision that the Sixth Amendment prevented imposition of a suspended sentence that may end up in the actual deprivation of a person’s liberty if the defendant was not accorded the “guiding hand of counsel” in the prosecution for the crime charged. Justice Ginsburg, writing for the majority, emphasized that the Court’s Sixth Amendment analysis follows the “actual imprisonment standard,” which forbids imprisonment for any offense of a person who was not represented by counsel at trial, absent a knowing and intelligent waiver. Because suspended sentences are prison terms imposed for the offense of conviction, when the prison term is triggered the defendant is incarcerated for the underlying offense rather than for a probation

9. 122 S.Ct. 2450 (2002).

10. 122 S.Ct. 1043 (2002).

11. 122 S.Ct. 1764 (2002).

violation. Such actual imprisonment for uncounseled convictions falls squarely within the Sixth Amendment's prohibition. The Court further indicated that the Constitution also bars imposition of a suspended sentence that can never be enforced. Justice Scalia, writing for the four dissenting justices, insisted that actual imprisonment is the "touchstone of entitlement to appointed counsel" and accused the majority of extending the misdemeanor right to counsel "to cases bearing the mere threat of imprisonment." Thus, the dissent contended that suspended sentences clearly do not invoke a defendant's Sixth Amendment right to counsel.

In *Mickens v. Taylor*,¹² the Court addressed the Sixth Amendment right to conflict-free representation in a murder trial. In a 5-4 decision written by Justice Scalia, the Court held that in order to demonstrate a Sixth Amendment violation of the right to counsel where a trial court failed to inquire into a potential conflict of interest about which it reasonably should have known, petitioner must "establish that the conflict of interest affected his counsel's performance" in order to void the conviction. Although the Sixth Amendment right to counsel mandates counsel that is effective in preserving the right to a fair trial, defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. The Court found that petitioner failed to demonstrate in this case that counsel's brief court-appointed representation the previous week of the murder victim whom petitioner was accused of killing affected his representation in the murder trial. The highly fractured dissenting opinions (Justices Stevens and Souter dissented separately and Justice Breyer wrote in dissent for himself and Justice Ginsburg) appear to agree that various categorical rules would be appropriate. They disagreed whether these rules should free petitioners from showing prejudice in cases of apparent unfairness or impose upon the court a duty to enquire into potential conflicts of interest about which it should know.

In an 8-1 decision, Chief Justice Rehnquist, writing for the Court in *Bell v. Cone*,¹³ held that a defense counsel's failure to present any mitigating evidence or make a closing argument at a capital sentencing proceeding was not ineffective assistance of counsel, but instead a tactical trial decision. Rehnquist relied upon *Strickland v. Washington*,¹⁴ which "announced a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed." To satisfy this test, the defendant must prove "both deficient performance and prejudice to the defense," which would then indicate that "counsel's assistance was defective enough to undermine confidence in a proceeding's result." As it did in *Strickland*, the Court emphasized that "[j]udicial scrutiny of a counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate

the distorting effects of hindsight." Consequently, "a defendant must overcome the 'presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" The Court recognized counsel's "formidable task of defending a client who had committed a horribly brutal and senseless crime against two elderly persons in their home." Although the Court suggests that there were alternatives to the attorney's decision not to reemphasize respondent's mental disease and drug addiction, his decision not to call or recall witnesses, and his waiver of a closing argument, the Court concluded that none of the alternatives "so clearly outweighs the other that it was objectively unreasonable to . . . deem counsel's choice . . . a tactical decision about which competent lawyers might disagree."

EIGHTH AMENDMENT – CRUEL AND UNUSUAL PUNISHMENT

In *Hope v. Pelzer*,¹⁵ the Court held 6-3 that handcuffing an inmate to a hitching post or similar stationary object for a length of time in excess of that necessary to quell a threat or restore order is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. Justice Stevens, writing for the Court, said that any safety concerns had abated by the time petitioner Hope was handcuffed to the hitching post since he had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. The Court also found the practice was punitive and created a substantial risk of harm of which the officers were aware. The officials acted with "deliberate indifference to the inmates' health or safety" since the "risk of harm [was] obvious." The officers involved were not entitled to qualified immunity at the summary judgment phase since Supreme Court precedent, a Justice Department report, and Eleventh Circuit precedent gave a reasonable officer "fair and clear warning" that handcuffing Hope to a hitching post in these circumstances was unlawful.

DEATH PENALTY AND APPRENDI

In a 6-3 decision, Justice Stevens, writing for the majority in *Atkins v. Virginia*,¹⁶ held that in light of the nation's "evolving standards of decency," the execution of the mentally retarded "is excessive and . . . the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Although "those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes," the Court said that due to their disabilities "they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Consequently, their "impairments can jeopardize the reliability and fairness of capital proceedings against" them. The Court clarified that "the Eighth Amendment succinctly prohibits 'excessive' sanctions" and that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." The Court

12. 122 S.Ct. 1237 (2002).
13. 122 S.Ct. 1843 (2002).
14. 466 U.S. 668 (1984).

15. 122 S.Ct. 2508 (2002).
16. 122 S.Ct. 2242 (2002).

began its analysis by explaining that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . [and therefore t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” In identifying these standards, the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” However, the Court concluded that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” As an indication of the national consensus, the Court identified 18 states, as well as the federal government, all having enacted legislation exempting mentally retarded offenders from execution: “It is not so much the number of these States that is significant, but the consistency of the direction of change.” Consequently, this “provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal.” In order to substantiate its support of this “legislative consensus,” the Court urged that since the death penalty has been reserved for “the most serious crimes . . . the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” Moreover, the same impairments that exculpate mentally retarded offenders “also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”

In Justice Scalia’s lengthy dissent, he criticized the lack of support for the Court’s decision and exclaimed, “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.” He argued that “the arrogance of [the Court’s] assumption of power takes one’s breath away.” Scalia suggested that “it will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.” Revealing that the oldest of the Court’s cited statutes is 14 years old, Scalia warned that “reliance upon ‘trends,’ even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication.” He concluded, “As long as a mentally retarded offender knows ‘the difference between right and wrong’ . . . only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.”

In *Kelly v. South Carolina*,¹⁷ Justice Souter delivered the opinion of the Court, which held 5-4 that when the only alternatives a jury is allowed to consider are death or life imprisonment without the possibility of parole, due process requires that a jury be clearly informed of the defendant’s parole ineligibility. The decision was in keeping with the Court’s decision in *Simmons v. South Carolina*,¹⁸ which held that the jury must be informed of life incarceration without possibility of parole

as an alternative to the death penalty. The state court had held *Simmons* inapplicable since the state’s statutes provide a possible sentence of 30 years instead of life without parole. The Court rejected that argument with a reference to *Shafer v. South Carolina*,¹⁹ which had explained that “under the South Carolina sentencing scheme a jury now makes a sentencing recommendation only if the jurors find the existence of an aggravating circumstance such as a finding of potential future dangerousness. When they do make a recommendation, their only alternatives are death or life without parole.” Responding to the state’s first point that the state supreme court found Kelly’s future dangerousness not at issue in the trial, the Court considered this finding “unsupportable on the record before us.” The Court’s final discussion was a reiteration of the need to inform the jury of South Carolina’s sentencing scheme due to reasonable assumption that jurors may not be sufficiently informed about the impossibility of parole. The Court concluded that although “[t]he State stresses that the judge told the jury that the terms ‘life imprisonment’ and ‘death sentence’ should be understood in their plain and ordinary meanings, . . . [w]e found these statements inadequate to convey a clear understanding of Shafer’s parole ineligibility and Kelly, no less than Shafer was entitled to his requested jury instruction.”

In *Ring v. Arizona*,²⁰ the Court revisited its decision upholding an Arizona sentencing statute in *Walton v. Arizona*.²¹ The Court set out to determine *Walton*’s validity in light of the reasoning in *Apprendi v. New Jersey*.²² In a 7-2 decision, Justice Ginsburg delivered the opinion of the Court, holding that *Walton* and *Apprendi* are irreconcilable. Overruling *Walton*, the Court concluded that a sentencing judge sitting without a jury is prohibited from finding an aggravating circumstance necessary for the imposition of the death penalty and since “Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense’ the Sixth Amendment requires that they be found by a jury.” The *Walton* Court accepted that the aggravating factors in Arizona’s sentencing scheme were not “elements of the offense,” but rather “ranked as ‘sentencing considerations’ guiding the choice between life and death.” It therefore could not “conclude that a State is required to denominate aggravating circumstances ‘elements’ of the offense or permit only a jury to determine the existence of such circumstances.” Ten years later, in *Apprendi*, the Court “held that the Sixth Amendment does not permit a defendant to be ‘expose[d] . . . to a penalty exceeding the maximum he would receive in the jury verdict alone.” Attempting to reconcile its decision with *Walton*, the *Apprendi* Court focused on “[t]he key distinction . . . that a conviction of first-degree murder in Arizona carried a maximum sentence of death.” For this reason, “[o]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser

17. 534 U.S. 246 (2002).
18. 512 U.S. 154 (1994).
19. 532 U.S. 36 (2001).

20. 122 S.Ct. 2428 (2002).
21. 497 U.S. 639 (1990).
22. 530 U.S. 466 (2000).

one, ought to be imposed.” However, the Court now recognizes that the *Apprendi* dissent more accurately described Arizona’s sentencing scheme when it explained that a “[d]efendant’s death sentence required the judge’s factual findings.” Following “*Apprendi*’s instruction that ‘the relevant inquiry is one not of form, but of effect,’” the Court acknowledged, “In effect, ‘the required finding [of an aggravated circumstance] exposed [Ring] to a greater punishment than that authorized by the jury’s guilty verdict.” As the Court said, “*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.” Finally, the Court concluded, “Although ‘the doctrine of *stare decisis* is of fundamental importance to the rule of law’ . . . our precedents are not sacrosanct.” Instead, the Court has “overruled prior decisions where the necessity and propriety of doing so has been established.”

OTHER APPRENDI ISSUES

In *United States v. Cotton*,²³ Chief Justice Rehnquist, writing for a unanimous Court, held that a federal indictment’s failure to include an alleged drug quantity involved in a conspiracy, which results in an enhanced statutory maximum sentence, make the enhanced sentence erroneous under *Apprendi v. New Jersey*,²⁴ but that the “error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings,” and therefore did not rise to the level of plain error to be corrected by the appellate court. According to the plain-error test of Federal Rule of Criminal Procedure 52(b), an appellate court can correct an error not raised at trial if only if there is an “error” that is “plain,” affects substantial rights, and “the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” Even though the parties agree that omitting the drug quantity from the indictment was an error that was plain, and the Court assumes the error did affect substantial rights, “the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.” The Court said that the “overwhelming” and “essentially uncontroverted” evidence included numerous state arrests and seizures, a federal search, and the trial testimony of two cooperating co-conspirators and the Court ultimately concluded, “Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base.” Ultimately, the Court stressed, “the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments.” Therefore, “The real threat . . . to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.”

23. 122 S.Ct. 1781 (2002).
24. 530 U.S. 466 (2000).
25. 122 S.Ct. 2406 (2002).

The Court in *Harris v. United States*,²⁵ set out to determine whether or not brandishing a firearm under 18 U.S.C. §924(c)(1)(A) is a sentencing factor or an element of a separate crime and to identify the validity of *McMillan v. Pennsylvania*,²⁶ after the Court’s decision in *Apprendi v. New Jersey*.²⁷ In *McMillan*, the Court had “sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm.” In *Apprendi*, the Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury, and proved beyond a reasonable doubt.” In the present case, Justice Kennedy writing for a 5-4 majority held, “as a matter of statutory interpretation, §924(c)(1)(A) defines a single offense . . . [and] regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury.” Then, writing for a four-member plurality (not joined by Justice Breyer, who helped to form the five-member majority), Justice Kennedy tried to reconcile *McMillan* and *Apprendi*: “Read together *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis,” and judicial discretion within the range authorized by the jury verdict may be narrowed “by requiring defendants to serve minimum terms after judges make certain factual findings.” Justice Breyer refused to join the plurality in reconciling *McMillan* and *Apprendi*, but nonetheless agreed that *Apprendi* did not apply to mandatory minimum sentences.

Justice Kennedy began his analysis in *Harris* by stating, “Federal laws usually list all offense elements ‘in a single sentence’ and separate the sentencing factors ‘into subsections.’” In §924(c)(1)(A), the initial paragraph lists the elements of a complete crime, but “toward the end of the paragraph is the word ‘shall,’ which often divides offense-defining provisions from those that specify sentences.” Separate subsections follow the word “shall” and incrementally increase the minimum penalty, yet do not repeat the elements stated in the principal paragraph. Based on this structure, Kennedy feels confident in “presum[ing] that its principal paragraph defines a single crime and its subsections identify sentencing factors.” Further, “[t]he incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge’s consideration.” Although sentencing factors “cannot swell the penalty above what the law has provided for the acts charged against the prisoner,” Kennedy observed, “[a]t issue in *Apprendi*, by contrast was a sentencing factor that did ‘swell the penalty above what the law has provided,’ . . . and thus functioned more like a ‘traditional element.’” The *Apprendi* Court “made clear that its holding did not affect *McMillan* at all: ‘We

26. 477 U.S. 79 (1986).
27. 530 U.S. 466 (2000).

do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself.” Kennedy emphasized, “The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi*.”

Justice Thomas, writing for the four dissenting justices in *Harris*, said that “*McMillan* . . . conflicts with the Court’s later decision in *Apprendi*,” and, he suggested, “[t]he Court’s holding today therefore rests on either a misunderstanding or a rejection of the very principles that animated *Apprendi* just two years ago.” He stressed, “As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.” Thomas contended that *Apprendi* stood for the principle that “when a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is ‘by definition [an] element of a separate legal offense.’” Thus, “there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.”

FEDERAL HABEAS CORPUS

In another 5-4 decision, Justice Breyer delivered the opinion of the Court in *Carey v. Saffold*,²⁸ holding that under §2244(d)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the term “pending” covers the time between a lower state court’s decision and the filing of a notice of appeal to a higher state court, an interval during which the time period for seeking federal habeas corpus relief is tolled. Relying on the dictionary definition of the word “pending” the Court determines that it means “through the period of continuance . . . of” or “until the . . . completion of.” The Court therefore concluded that “until the application has achieved final resolution through the State’s post-conviction procedures, by definition it remains ‘pending.’” In Justice Kennedy’s dissent, he criticized the Court’s assertion “that an application is pending as long as the ordinary state collateral review process is ‘in continuance,’” because “that is only true, of course, if ‘application’ means the ‘ordinary state collateral review process,’ a proposition that finds no support” in the dictionary. He argued that when the word “application” is used in the laws governing federal habeas corpus, “it is clear that the statute refers to a specific legal document.” However, he contended that the Court’s holding “gives ‘application’ a new meaning . . . that embraces the multiple petitions, appeals, and other filings that constitute the ‘ordinary state collateral review process.’”

In a 6-3 decision, Justice Ginsburg delivered the opinion of the Court in *Lee v. Kemna*,²⁹ holding that the failure to comply with state rules stipulating the requirements for continuance motions, in extraordinary cases, does not constitute state grounds adequate to bar federal habeas review. Generally, the Court “will not take up a question of federal law presented in a case ‘if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment . . . whether the state-law ground is substantive or procedural.” However, “there are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.” In this case, the Court found that noncompliance with Missouri Supreme Court Rules 24.09 and 24.10, which designate requirements for continuance motions, did not procedurally default petitioner’s claim. Focusing specifically on Rule 24.10, the Court acknowledged that it, “like other state and federal rules of its genre, serves a governmental interest of undoubted legitimacy . . . designed to arm trial judges with the information needed to rule reliably on a motion to delay a scheduled criminal trial.” But in this case “the Rule’s essential requirements . . . were substantially met.” In Justice Kennedy’s dissent, he argued that “[a]lmost every case presents unique circumstances that cannot be foreseen and articulated by prior decisions, and general rules like Rule 24.10 are designed to eliminate second-guessing about the rule’s applicability in special cases.” Moreover, “[a]ll requirements of a rule are, in the rulemaker’s view, essential to fulfill its purposes; imperfect compliance is thus, by definition, not compliance at all.”

In *Horn v. Banks*,³⁰ the Court addressed the necessity of undertaking the analysis identified in *Teague v. Lane*³¹ in a hearing for federal habeas corpus relief when the state properly raises the issue. In a per curiam decision, the Court held that the inquiries in the Antiterrorism and Effective Death Penalty Act (AEDPA) and *Teague* are distinct, and that the threshold question in every habeas case is whether the court is obligated to apply the *Teague* rule to the defendant’s claim. The *Teague* Court had explained that new constitutional rules of criminal procedure will not be applicable to those cases that have become final before the new rules are announced, unless they fall within an exception to the general rule. After respondent Banks’s first-degree murder conviction had been directly appealed, the Supreme Court decided a case that he claimed applied to his conviction. Because the government raised the question of retroactivity in the district and intermediate appellate court, the Court must apply the *Teague* analysis before considering the merits of the claim. The Court stressed that the *Teague* analysis is distinct from AEDPA standards of review and continues in force independent of, and subsequent to, the passage of the AEDPA. Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.

28. 122 S.Ct. 2134 (2002).

29. 534 U.S. 362 (2002).

30. 122 S.Ct. 2147 (2002).

Chief Justice Rehnquist, writing for an 8-1 majority in *Bell v. Cone*,³² held a federal habeas petition challenging specific aspects of an attorney's representation is governed by *Strickland v. Washington*³³ and survives only if the petitioner proves that the state court's decision is either "contrary to" or involves "an unreasonable application of clearly established Federal law" under 28 U.S.C. §2254(d)(1). The Court began by explaining that a federal writ may be issued "under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." Alternatively, a writ may be issued "under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." The Court stressed that "an unreasonable application is different from an incorrect one." Respondent in this case argued that his ineffective assistance claim was governed by *United States v. Cronin*,³⁴ which "identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" The three situations were: a "complete denial of counsel" at a "critical stage"; where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." Respondent only claims that by "fail[ing] to 'mount some case for life' after the prosecution introduced evidence in the sentencing hearing and gave a closing statement," his attorney failed to subject prosecution's case to meaningful adversarial testing at the sentencing phase and therefore prejudice should have been presumed. However, the Court explained that in *Cronin* it used the word "entirely" to indicate "that the attorney's failure must be complete." Respondent fails to make this showing since he does not argue "that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." The Court said that the attor-

ney's failure in this case to adduce mitigating evidence at sentencing and his waiver of a closing argument "are of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components." Ultimately, the Court also concluded that the state court's application of *Strickland* was not an "unreasonable" one when it determined that the defense counsel's "performance was within the permissible range of competency."

CONCLUSION

Although the Court's death penalty cases have received the most publicity, their significance for the future pails in comparison to the practical effect of the Court's decisions regarding assistance of counsel in minor criminal cases and the increased deference afforded law enforcement officers in making searches and seizures. Also, the Court's decisions clarifying and solidifying *Apprendi v. New Jersey* will undoubtedly have far-reaching influence on how routine criminal cases are conducted. While the 5-4 ideological split remains an ever-present feature of this Supreme Court, many more significant decisions than last term, specifically in the Fourth Amendment context, seem to be less susceptible of change as a result of any Court appointments that may take place in the near future. This is not only due to the more unified appearance of the Court at times, but also to the atypical divisions in numerous cases.



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31. 489 U.S. 288 (1989).

32. 122 S.Ct. 1843 (2002).

33. 466 U.S. 668 (1984).

34. 466 U.S. 648 (1984).

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Recent Civil Decisions of the United States Supreme Court: The 2001-2002 Term

Charles H. Whitebread

The United States Supreme Court's 2001-2002 term marked Chief Justice Rehnquist's 30th anniversary on the bench. Given the continuing prominence of 5-4 splits along typically ideological lines, the chief justice's leadership is as significant as it ever was. In the context of the Court's civil decisions, the chief justice's importance to the conservative bloc was demonstrated in the case immunizing states from private-party complaints adjudicated by administrative agencies and in the Court's acceptance of a policy permitting public vouchers to be used for religious school tuition. The Court also confronted significant issues regarding the First Amendment and limitations on protecting children from pornography; regulation of HMOs; student privacy; and, possibly most noteworthy, the applicability and limitations of the Americans with Disabilities Act.¹

FIRST AMENDMENT – SPEECH

In *Ashcroft v. Free Speech Coalition*,² Justice Kennedy delivered the opinion of the Court, holding sections 2256(8)(B) and 2256(8)(D) of the 1996 Child Pornography Prevention Act overbroad and beyond remedy in their infringement on lawful speech protected by the First Amendment. The Court found Section 2256(8)(B), which encompasses any Hollywood movies, filmed with adult actors if the jury believes an actor “appears to be” a minor engaging in “actual or simulated . . . sexual intercourse,” in violation of a fundamental First Amendment rule—simply, that “[t]he artistic merit of a work does not depend on the presence of a single explicit scene.” Section 2256(8)(D) altogether prohibits computer-generated images of fictitious children as well as any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct.” The Court examined this section in comparison to *New York v. Ferber*,³ and in this light the Court finds a crucial distinction: computer-generated images create no victims, which is in direct contrast to the content at issue in *Ferber*. *Ferber* specifically said that “[i]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized.” The Court reasoned, “*Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting

its holding.” To the secondary assertion of the government that virtual images “are indistinguishable from real ones [and] . . . are part of the same market” and so contribute to the exploitation of real children, the Court found this reasoning implausible due to the belief that few pornographers would risk such severe penalties if computerized alternatives would be sufficient to satisfy the market force. Finally, to the government assertion that technology could make it more difficult for the prosecution of real child pornographers, the Court responded, “This analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. The Constitution requires the reverse.”

In *Ashcroft v. American Civil Liberties Union*,⁴ Justice Thomas delivered the opinion of the Court, which held that “reliance on community standards to identify ‘material that is harmful to minors’ does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.” The Court deemed Congress’ effort to protect children from adult Internet content via the Child Online Protection Act (COPA) not to be overbroad in its definition of prohibited content or its evaluation of such content according to “community” standards. The Court’s ruling stood first on the distinctions between COPA and its unconstitutional forerunner the Communications Decency Act of 1996 (CDA). COPA represents a more limited ban compared to the CDA in three ways: COPA applies only to material displayed on the web, it covers only communications made for commercial purposes, and it prohibits “material that is harmful to minors” instead of the CDA’s prohibition of “indecent” and “patently offensive” communications. The Court fashioned its definition of “material that is harmful to minors” around its three-part test of obscene material in *Miller v. California*.⁵ The Court subsequently addressed the lower court’s concerns about the excessive burden of varying community standards by reasoning that a juror, regardless of instruction, will surely apply a personal knowledge of obscenity that will be, in part, a product of his geographic area. To buttress its position, the Court referred to its rulings in *Hamling v. United States*⁶ and *Sable Communications of California, Inc. v. FCC*⁷ and concluded that “this Court’s jurisprudence teaches that it is the publisher’s responsibility to

Footnotes

1. For a more in-depth review of the decisions of the past term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2001-2002 (Amer. Acad. of Jud. Educ. 2002).
2. 122 S. Ct. 1389 (2002).

3. 483 U.S. 747 (1982).
4. 122 S. Ct. 1700 (2002).
5. 413 U.S. 15 (1973).
6. 418 U.S. 87 (1974).
7. 492 U.S. 115 (1989).

abide by that community's standards. The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation."

In *City of Los Angeles v. Alameda Books, Inc.*,⁸ a 5-4 decision, Justice O'Connor wrote for a four-member plurality, upholding against facial challenge on a summary judgment motion a city ordinance prohibiting two adult-content operations traditionally existing in the same building and operated by the same enterprise. Her opinion concluded that the ordinance served a substantial government interest and did not constitute a content-based restriction of protected speech since the ordinance was supported by a study conducted by the municipality several years before the ordinance was enacted. Justice O'Connor specifically upheld the ordinance based on the three-part criteria set forth in *Renton v. Playtime Theatre, Inc.*⁹ The first of three criteria in *Renton*—that the ordinance be capable of construction as a proper time, place, and manner regulation—was considered to be satisfied because the ordinance did not ban, but only required relocation of establishments. The second criterion in *Renton*—whether the ordinance is content neutral or content based—was satisfied, for purposes of summary judgment, by the city's prior study demonstrating adverse secondary effects from concentrations of adult businesses. The third criterion in *Renton*—that the ordinance reflect a substantial government interest "and that reasonable alternative avenues of communication remain available"—also was satisfied for purposes of summary judgment by the city's prior study. In opposition to the Court of Appeals analysis of the third step in the *Renton* criteria, the plurality found that the 1977 study relied upon by the city successfully demonstrated that crime patterns were influenced by the number of adult entertainment establishments, and therefore satisfied the requirement in providing a substantial government interest in the city's attempts to reduce crime. The plurality specifically addressed the amount of evidence that the city must present to justify such an ordinance under *Renton*. If the Court accepted the arguments of respondents, the plurality opinion concluded, then "it would effectively require that the city provide evidence that not only supports the claim its ordinance serves an important government interest, but also does not provide support for any other approach. In *Renton*, we specifically refused to set such a high bar." Justice Kennedy provided a fifth vote in favor of upholding the city's ordinance at the summary judgment stage, but did not join the plurality opinion. He emphasized that the Court's decision in *Alameda Books* should not be read to expand the rules found in *Renton*, but agreed that there was sufficient evidence to uphold the ordinance at the summary judgment stage.

The Court considered the issue of judicial candidates announcing their views on legal or political issues in *Republican Party of Minnesota v. White*.¹⁰ In a 5-4 decision, Justice Scalia wrote for the majority and held that the

Minnesota Supreme Court's canon of judicial conduct that prohibits a judicial candidate from "announc[ing] his or her views on disputed legal or political issues" violates the First Amendment. Minnesota's process for the selection of state judges is a nonpartisan popular election. Since 1974, the "announce clause" has been in effect, creating a legal restriction that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." The Court began its analysis by noting that the prohibition on announcing applies to the candidate's statement of his current position, even if that is not maintained after election. The Court recognized there are limitations that the Minnesota Supreme Court placed upon the scope of the clause. The Court next determined whether a list of preapproved subjects that the judicial candidates may speak about adequately fulfills the First Amendment's guarantee of freedom of speech. Since the announce clause prohibits speech on the basis of its content, the Court used strict scrutiny to resolve its constitutionality. Strict scrutiny requires that the respondents prove that the announce clause is narrowly tailored and that it serves a compelling state interest. To demonstrate that the clause is narrowly tailored, the respondents must show that it does not "unnecessarily circumscribe protected expression." The Court noted that respondents claimed two interests as "sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." These interests do not meet strict scrutiny, according to the Court. The Court concluded its decision by identifying an "obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits." However, the Court said that the First Amendment does not allow elections to occur while at the same time "preventing candidates from discussing what the elections are about."

In *Thompson v. Western States Medical Center*,¹¹ the Court held in a 5-4 decision that the prohibitions in the Food and Drug Administration Modernization Act of 1997 (FDAMA) on soliciting prescriptions for, and advertising, compounded drugs amount to unconstitutional restrictions on commercial speech. The FDAMA exempts "compounded drugs" from the Food and Drug Administration's standard drug approval requirements as long as several restrictions, including a prohibition on advertising or promoting compound drugs, are met. Drug compounding is mixing or altering ingredients to create a medication tailored to the needs of a particular patient. The Court began its analysis by pointing out that although commercial speech receives First Amendment protection, not all regulation of commercial speech is unconstitutional. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*,¹² the Court created a test to determine permissible regu-

8. 122 S. Ct. 1728 (2002).

9. 475 U.S. 4 (1986).

10. 122 S. Ct. 2528 (2002).

11. 122 S. Ct. 1497 (2002).

12. 100 S. Ct. 2343 (1980).

lation of commercial speech. First, the test asks whether the commercial speech concerns unlawful activity or is misleading. If so, then it is not protected by the First Amendment. If it is lawful activity that is not misleading, however, the next step is to determine “whether the asserted governmental interest is substantial.” If it is, then the third step is to “determine whether the regulation directly advances the governmental interests asserted,” and last, “whether it is not more extensive than necessary to serve that interest.” All of the last three inquiries must be answered in the affirmative in order for the regulation to be found constitutional. The Court then applied this test and noted that the government did not argue the first prong of *Central Hudson*. The Court recognized that the next prong is met: “Preserving the effectiveness and integrity of the . . . drug approval process is clearly an important governmental interest.” For the third prong, the Court assumed *arguendo* that the prohibition on advertising “might” directly advance the governmental interest. The court held, however, that the government failed the last step of the test, to “demonstrate that the speech restrictions are ‘not more extensive than necessary to serve [those] interests.’” Accordingly, the regulation cannot be found constitutional. The Court said, “If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.” Finally, the Court concluded that the advertising prohibitions were overbroad as they would “affect pharmacists other than those interested in producing drugs on a large scale.”

In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*,¹³ the Court addressed an ordinance regulating the activities of solicitors and canvassers. The six-justice majority held that an ordinance that requires individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand violates the First Amendment. The ordinance at issue provided that any canvasser who intends to go on private property must obtain a “solicitation permit” from the office of the mayor if they intend to promote a cause. The ordinance itself lays out the grounds for denying or revoking a permit, although there was no evidence that any permit had been denied or revoked. Petitioner, a society that coordinates the preaching activities of Jehovah’s Witnesses, never applied for a permit on the grounds that their authority to preach stems from scripture and that seeking a permit would cause the petitioners to feel as though they were insulting God. The Court began its analysis by pointing out that restrictions on door-to-door canvassing and pamphleteering have been invalidated for over 50 years. Since door-to-door canvassing is mandated to Jehovah’s Witnesses through their religion, most of the cases dealing with First Amendment challenges to restrictions on door-to-door canvassing have involved this religious group. Through review of these past cases, the Court recognized that although the village’s interests are legitimate, precedent makes it “clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights.” The interests put forth by

the village were the prevention of fraud, the prevention of crime, and the protection of residents’ privacy. However, the Court said it must also look at the amount of speech covered by the ordinances and at the balance “between the affected speech and the governmental interests that the ordinance purports to serve.” Since the ordinance applies to more than commercial activities and solicitation of funds, the Court held it was not narrowly tailored to the village’s interests. The Court identified the permit as a burden on some speech of citizens holding religious or patriotic views, including those who will not apply for a license because of their religious scruples as well as those who would “prefer silence to speech licensed by a petty official.” The Court also noted that spontaneous speech would be banned by the ordinance. The Court concluded its analysis by pointing out that although the “breadth and unprecedented nature” of the regulation renders it invalid, the regulation also is not tailored to the village’s stated interests, which additionally renders the regulation invalid. Although the prevention of crime is a stated interest, the Court found it unlikely that “the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance.”

FIRST AMENDMENT – ESTABLISHMENT CLAUSE

In a 5-4 decision, the Court in *Zelman v. Simmons-Harris*¹⁴ held that Ohio’s pilot school voucher program does not offend the Establishment Clause as it is neutral with respect to religion and permits individuals to exercise genuine choice among public and private, secular and religious options. Ohio’s program provides tuition aid for students to attend a participating public or private school that their parents choose. “Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards,” the Court explained. Among the 56 private schools participating in the program, 46 (or 82%) are religiously affiliated. Most of the students participating in the program (96%) are enrolled in religiously affiliated schools. The Court began its analysis by recognizing that the Establishment Clause of the First Amendment, “prevents a State from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.” Though the program has a valid secular purpose, the Court must determine whether the effect of the program is to advance or inhibit religion. The Court said that in dealing with this issue, its decisions have “drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” The Court determined that the Ohio program is one of true private choice and is neutral toward religion in all respects. The Court argued that there are no financial incentives that “skew the program toward religious schools.” Instead, the program creates disincentives for religious schools since magnet schools and adjacent public schools receive significantly more money

13. 122 S. Ct. 2080 (2002).

14. 122 S. Ct. 2460 (2002).

than private religious schools. Finally, the Court refused to use *Committee for Public Ed. & Religious Liberty v. Nyquist*¹⁵ as a framework to decide the current case. The Court in *Nyquist* found that a New York program that gave benefits exclusively to private schools and the parents of private school enrollees was unconstitutional. Although its purpose was secular, the program's function was to provide financial support for non-public, sectarian institutions. The Court concluded that *Nyquist* does not apply to the Ohio case, in part because the program in *Nyquist* provided incentives for students to attend religious schools and prohibited the participation of public schools.

FEDERALISM

In a 5-4 decision, Justice Thomas delivered the opinion of the Court in *Federal Maritime Commission v. South Carolina State Ports Authority*,¹⁶ holding that state sovereign immunity bars the Federal Maritime Commission (FMC), an executive branch agency, from adjudicating complaints filed by a private party's complaint against a nonconsenting state. The Eleventh Amendment states, "The judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." However, the Amendment "is but one particular exemplification of that immunity . . . [and the] Court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." Since "the Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state," the Court relied on the presumption established in *Hans v. Louisiana*,¹⁷ where the Court explained "that the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" Upon evaluating the FMC adjudications, the Court observed that an administrative adjudication "walks, talks, and squawks very much like a lawsuit," and concluded that "the similarities between FMC proceedings and civil litigation are overwhelming." "The preeminent purpose of state sovereign immunity," the Court concluded, "is to accord States the dignity that is consistent with their status as sovereign entities." Accordingly, "if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC." Furthermore, "it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply." Justice Breyer began his dissent, joined by three other justices, by disputing the majority's characterization of the

agency: "[T]he Federal Maritime Commission, is an 'independent' federal agency . . . [and therefore] belongs neither to the Legislative Branch nor the Judicial Branch of Government." Moreover, "the Court [has] denied that [agency] activities as safeguarded, however much they might resemble the activities of a legislature or court, fell within the scope of Article I or Article III of the Constitution." Finally, Justice Breyer anticipated that the Court's decisions will lead to "less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement."

In *Lapides v. Board of Regents of the University System of Georgia*,¹⁸ Justice Breyer, writing for a unanimous Court, held that a state waives its Eleventh Amendment immunity when it removes a case from state court to federal court. While the Eleventh Amendment grants a state immunity from suit in federal court by citizens of other states as well as by its own citizens, states remain free to waive that immunity. The Court reasoned, "It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." Although a state, as in this case, may be brought involuntarily into the state court as a defendant, if it "then voluntarily agreed to remove the case to federal court . . . [then] it voluntarily invoked the federal court's jurisdiction." The Court concluded that the voluntariness of the state's participation in federal court is what matters; removal to federal court is a sufficiently "clear" indication of the state's intent to waive its immunity.

In *Rush Prudential HMO, Inc. v. Moran*,¹⁹ the Court examined the interplay between federal Employee Retirement Income Security Act of 1974 (ERISA) claims and a state HMO Act providing for independent medical review of a denial of benefits. The Court held 5-4 that an Illinois statute regulating HMOs by providing a "right to independent medical review of certain denials of benefits" is not preempted by ERISA. Justice Souter, writing for the majority, pointed out that ERISA has two sweeping "antiphonal clauses" creating conflict: one preempting any state laws "relating to" employee benefit plans and another with similarly broad scope that "saves" any state laws from preemption if they regulate "insurance, banking, or securities." Since the challenged statute relates to ERISA plans, it can be saved only if it regulates HMOs in their capacity as insurers. The majority began with a commonsense test of the state statute and found that it is aimed specifically at the insurance industry. The Court then compared this outcome to the McCarran-Ferguson Act's three-factor test. The Court then noted that a statute may pass both tests and still not survive preemption if congressional intent is clear. The Court held that this statute is not preempted because it passes both tests and "imposes no new obligation or remedy." Thus, it does not cre-

15. 413 U.S. 756 (1973).

16. 122 S. Ct. 1864 (2002).

17. 134 U.S. 1 (1890).

18. 122 S. Ct. 1640 (2002).

19. 122 S. Ct. 2151 (2002).

ate a conflict between the federal remedies and the states' power to regulate insurers. Justice Thomas, writing for the four dissenting justices, would have held that ERISA preempts the Illinois statute. He pointed out that the "Court has repeatedly recognized that ERISA's civil enforcement provision . . . provides the exclusive vehicle for actions asserting a claim for benefits under health plans governed by ERISA, and therefore that state laws that create additional remedies are pre-empted."

DUE PROCESS – STUDENT PRIVACY

In *Gonzaga University v. Doe*,²⁰ the Court discussed whether to infer enforceable rights from a spending statute. The Court held in a 5-4 decision that "we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA [the Federal Educational Rights and Privacy Act of 1974] can confer enforceable rights." The Court began its analysis by looking at FERPA, which Congress enacted "to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." Next, it looked to past decisions, and found that spending legislation has rarely given rise to enforceable rights. In those rare instances where enforceable rights have been found, the Court emphasized that those findings were based on unmistakable legislative intent: "The key to our inquiry was that Congress spoke in terms that 'could not be clearer,' and conferred entitlements 'sufficiently specific and definite to qualify as enforceable rights.'" The Court also noted that its "more recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes." The Court explained that in both implied right of action cases as well as cases under 42 U.S.C. section 1983, the first determination must be whether Congress intended to create a federal right. Not only must the statute be phrased in explicit rights-creating terms, but a plaintiff suing under an implied right of action must also show that the statute manifests an intent to create a private remedy as well as a private right. The Court recognized that its role in determining whether personal rights exist in section 1983 suits should not be different from determining whether personal rights exist in implied right of action suits. In both instances, the Court is required to discern whether Congress intended to confer individual rights upon a class of beneficiaries. If the text and structure of the statute provide no indication of congressional intent to create new individual rights, there is no basis for a private suit in both section 1983 and implied right of action contexts. FERPA's nondisclosure provisions fail to confer enforceable rights. Ultimately, the Court emphasized that if Congress decides to create new rights to be enforced by section 1983, "it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." The Court pointed out that the nondisclosure provisions in FERPA do not contain "rights-creating language," have an aggregate focus as opposed to an individual one, and primarily serve to direct the Secretary

of Education's distribution of public funds to educational institutions. Thus, the Court concluded that no individual rights have been created that are enforceable under section 1983.

In *Owasso Independent School District v. Falvo*,²¹ Justice Kennedy delivered the opinion of the court concluding that the instructional technique commonly referred to as peer grading is not an unconstitutional breach of privacy. The respondent brought a class action pursuant to 42 U.S.C. section 1983 against the school district, its superintendent, and a principal, alleging a violation of the Family Educational Rights and Privacy Act of 1974 (FERPA). The decision of the Court hinges on the determination of whether grades produced by peer grading are to be considered "educational records" as FERPA defines them. The Court of Appeals determined that grade books and the grades within are "maintained" by the teacher. As the Supreme Court summarized the Court of Appeals opinion, "It reasoned, however, that if Congress forbids teachers to disclose students' grades once written in a grade book, it makes no sense to permit the disclosure immediately beforehand." The Court concluded that the Court of Appeals' logic in determining that a teacher's grade book "maintains" student records in keeping with the definition of "educational records" is flawed. The Court cited two statutory indicators in support of this conclusion. "First, the student papers are not, at that stage, 'maintained' within the meaning of" the statute; "[e]ven assuming the teacher's grade book is an education record—a point the parties contest and one we do not decide here—the score on a student-graded assignment is not 'contained therein,' . . . until the teacher records it," the Court concluded. Second, the Court did not agree with the Court of Appeals in the finding that a student grader during an exercise of peer grading is "a person acting for an educational institution." The Court reasoned, "Just as it does not accord with our usual understanding to say students are 'acting for' an educational institution when they follow their teacher's direction to take a quiz, it is equally awkward to say students are 'acting for' an educational institution when they follow their teacher's direction to score it." Finally, in accordance with *Davis v. Michigan Dept. of Treasury*,²² the Court examined the sections of FERPA that include requirements for records of both requests for access and access to a student's records. The Court concluded, "It is doubtful Congress would have provided parents with this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes."

DUE PROCESS – SUING PRIVATE PRISONS

In *Correctional Services Corp. v. Malesko*,²³ the Court held in a 5-4 decision that the limited holding in *Bivens v. Six Unknown Named Fed. Narcotics Agents*²⁴ may not be extended to confer a right of action for damages against private entities acting under color of federal law. Respondent suffered a heart attack while imprisoned under the supervision of the Bureau of Prisons. He

20. 122 S. Ct. 2268 (2002).

21. 122 S. Ct. 934 (2002).

22. 489 U.S. 803 (1989).

23. 534 U.S. 61 (2001).

24. 403 U.S. 388 (1971).

filed an action against petitioner, Correctional Services Corporation, a private company that managed the halfway house at which he suffered his heart attack. The Court began its analysis by discussing its holding in *Bivens*, which was the first time the Court had recognized an implied private action for damages against federal officers who allegedly violated a citizen's constitutional rights. The Court in *Bivens* held that "a victim of a Fourth Amendment violation by federal officers may bring suit for money damages against the officers in federal court." Respondent's request that the *Bivens* holding be extended to grant a right of action for damages against private entities acting under color of federal law is a request to "imply new substantive liabilities," which the Court refused to do. The Court said that its holding in *Bivens* had only been extended twice in its history: once in *Davis v. Passman*,²⁵ where the Court recognized an implied damages remedy under the Due Process Clause of the Fifth Amendment, and once in *Carlson v. Green*,²⁶ where the *Bivens* holding was extended to the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Court noted that the circumstances in both of these cases applied the "core holding in *Bivens*." The circumstances in *Davis* dealt with a plaintiff who lacked any other remedy for constitutional deprivation, while the circumstances in *Carlson* dealt with an unsatisfactory alternative. The Court has refused to extend *Bivens* in any situation since its holding in *Carlson*. The Court concluded by recognizing the importance of the available alternative remedies open to the respondent.

DUE PROCESS – FORFEITURE

In *Dusenbery v. United States*,²⁷ petitioner sought to have his property returned after he was arrested by the Federal Bureau of Investigation. The FBI was allowed to dispose of the property seized pursuant to the Controlled Substances Act. The statute required the FBI to send written notice of the seizure with information on the applicable forfeiture proceedings to all parties who appeared to have an interest in the property. The FBI sent letters of intent to forfeit the cash to petitioner by certified mail in care of the federal prison where petitioner was incarcerated. As the FBI received no response to these notices within the time allotted, the items were declared administratively forfeited. Chief Justice Rehnquist, writing for the five-justice majority, held that the use of mail as a method of giving notice to federal prisoners about the right to contest the administrative forfeiture of property is constitutional. The Court noted that the government has carried its burden of showing that the procedures used to give notice were adequate. The FBI's use of the U.S. Postal Service to send certified mail to petitioner has been recognized as an adequate measure when notice by publication is insufficient and an address is known. The Court determined that the use of mail addressed to petitioner at the penitentiary was "clearly acceptable for much the same reason we have approved mailed notice in the past. Short of allowing the prisoner to go to the post office

25. 442 U.S. 228 (1979).
26. 446 U.S. 14 (1980).
27. 534 U.S. 161 (2002).

himself, the remaining portion of the delivery would necessarily depend on a system in effect within the prison relying on prison staff. We think the FBI's use of [this] system . . . was 'reasonably calculated, under the circumstances, to apprise [petitioner] of the action.' Due process requires no more."

STATUTORY INTERPRETATION – SEX OFFENDERS

The Court addressed the Kansas Sexually Violent Predator Act (SVPA) in *Kansas v. Crane*.²⁸ The Court held that the SVPA does not require the state to prove an offender's total or complete lack of control over dangerous behavior. However, the Constitution does require a minimum lack-of-control determination to be made in order for civil commitment to be allowed. Respondent, Crane, a previously convicted sexual offender who suffers from exhibitionism and an antisocial personality disorder, was convicted of lewd and lascivious behavior and pleaded guilty to aggravated sexual battery for two incidents that occurred on the same day. Kansas sought the civil commitment of respondent. The Court's analysis discussed the prior case of *Kansas v. Hendricks*,²⁹ where the Court held that the statute's criteria for confinement of "mental abnormality or personality disorder" satisfied the substantive due process requirements. The Court now finds, however, that "*Hendricks* sets forth no requirement of *total* or *complete* lack of control." The Court pointed out that the Constitution does not permit commitment of the type of dangerous sexual offender found in *Hendricks* "without *any* lack-of-control determination." The Court admitted that *Hendricks* provides a constitutional standard that is not precise. The Court explained, however, that "the constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." Although the Court does not propose a bright-line rule, it is still able to provide constitutional guidance by "proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require. *Hendricks* embodied that approach." The Court, therefore, was able to reconcile its decision with the decision in *Hendricks*.

STATUTORY INTERPRETATION – EVICTING TENANTS FOR DRUG-RELATED ACTIVITIES

In *Department of Housing and Urban Development v. Rucker*,³⁰ the Court held 8-0 that the Anti-Drug Abuse Act of 1988 lawfully requires lease terms that allow a local public housing authority to evict a tenant when members of the tenant's household or a guest engages in drug-related criminal activity. Chief Justice Rehnquist, writing for the Court, indicated that the broad, plain language of the statute precludes any knowledge requirement for evictions based on drug-related offenses. Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten the health or safety of other residents, is a threat to other residents and the project." The Court pointed

28. 534 U.S. 407 (2002).
29. 521 U.S. 346 (1997).
30. 122 S. Ct. 1230 (2002).

out that due process concerns are not triggered since the government is “acting as a landlord of property it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required,” rather than attempting to criminally punish or to civilly regulate respondents as members of the general populace.

AMERICANS WITH DISABILITIES ACT

In *Barnes v. Gorman*,³¹ Justice Scalia, writing for a six-member majority, held that punitive damages may not be awarded in a private cause of action brought under section 202 of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act. The Court explained that “the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally funded programs and activities.” The Court explained, “Title VI invokes Congress’s power under the Spending Clause . . . to place conditions on the grant of federal funds.” Moreover, the Court emphasized that it has “repeatedly characterized this statute and other Spending Clause legislation as ‘much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.’” Consequently, “the legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the ‘contract.’” Applying the contract analogy, the remedy may be considered “appropriate relief . . . only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.” The Court pointed out that “punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.” Further, an implied punitive damages provision cannot be reasonably found in Title VI, and therefore should not be implied in section 202 of the ADA or section 504 of the Rehabilitation Act, either.

Justice O’Connor writing for a unanimous Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,³² held that in order to be substantially limited in performing manual tasks under the ADA, an individual must have an impairment that prevents or severely restricts the performance of activities that are of central importance to most people’s daily lives. Further, “[t]he impairment’s impact must also be permanent or long term.” The ADA “requires covered entities . . . to provide ‘reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability’ . . . unless . . . the accommodation would impose an undue hardship.” A disability is defined in the statute as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” The Court began its analysis guided by the regulations interpreting the Rehabilitation Act of 1973, which lists examples of “major life activities,” including “walking,

seeing, hearing,” and “performing manual tasks.” However, they “do not define the term ‘substantially limits.’” The Court then turned to the Equal Employment Opportunity Commission (EEOC) regulations that indicate that “‘substantially limited’ means ‘unable to perform a major life activity that the average person in the general population can perform,’” and then lists a number of factors to consider. Ultimately, the Court relied on the dictionary definition of the ADA’s terms. Since “‘substantially’ in the phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree,’” it “clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.” Also, “‘major’ in the phrase ‘major life activities’ means important,” and “thus refers to those activities that are of central importance to daily life.” Consequently, “[i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment,” but instead, individuals must offer “evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial.” Focusing its attention on carpal tunnel syndrome, the Court explained that “[w]hile cases of severe carpal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits, mild cases generally do not have either of these effects and create only intermittent symptoms of numbness and tingling.” Consequently, “an individual’s carpal tunnel syndrome diagnosis, on its own, does not indicate whether the individual has a disability within the meaning of the ADA.” Finally, the Court instructed, “[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.”

In *Chevron U.S.A. v. Echazabal*,³³ a unanimous Court held that the ADA allows a company to refuse to hire an individual on the basis that his performance on the job would endanger his own health, owing to a disability. The Act prohibits “discrimination against a qualified individual with a disability . . . by an employer” but also creates an affirmative defense for refusal to hire because of a “qualification standard” demonstrated to be “job-related for the position in question.” This standard may include a requirement that the individual not pose a direct threat to the health or safety to oneself or others in the workplace. The direct-threat defense demands a “particularized inquiry into the harms the employee would probably face,” based on “reasonable medical judgment . . . and individualized assessment of the individual’s present ability to safely perform the essential functions of the job” after considering facts such as “the imminence of the risk and the severity of the harm portended.”

In *U.S. Airways, Inc. v. Barnett*,³⁴ the Court considered the interplay between seniority systems and the ADA. The Court held, in a 5-4 decision written by Justice Breyer, that ordinar-

31. 122 S. Ct. 2097 (2002).

32. 122 S. Ct. 681 (2002).

33. 122 S. Ct. 2045 (2002).

34. 122 S. Ct. 1516 (2002).

ily the ADA does not require an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under an established seniority system because such an accommodation is not “reasonable.” An employer who makes a showing that the assignment would violate the rules of a seniority system is entitled to summary judgment, unless a plaintiff can present evidence that “special circumstances” in the particular case demonstrate that the assignment is nonetheless reasonable. The Court acknowledged that reaching the ADA’s “equal opportunity goal” will sometimes require “preferential” treatment, so a difference in treatment that violates an employer’s disability neutral rule cannot by itself place the accommodation beyond the Act’s potential reach. The Court further indicated that giving the operative words in the Act their ordinary English meanings supports the Court’s decision.

EMPLOYMENT LAW

The Court considered the requirements for pleading an employment discrimination lawsuit in *Swierkiewicz v. Sorema N. A.*,³⁵ where it held that an employment discrimination complaint does not need to include specific facts establishing a prima facie case of discrimination. The Court determined that all that is needed is a short and plain statement of the claim showing that the pleader is entitled to relief. Petitioner filed a lawsuit contending he had been fired on account of his national origin in violation on the Civil Rights Act of 1964, and on account of his age in violation of the Age Discrimination in Employment Act of 1967. The Court noted that specific requirements of a prima facie case are flexible and were not intended to be rigid. Since discovery may reveal relevant facts and evidence, it may be difficult to define the required formulation of the prima facie case. The Court stressed that “given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.” The Court concluded by pointing out that petitioner’s complaint satisfied the requirements of Rule 8(a) of the Federal Rules of Civil Procedure and did not need to contain specific facts to do so.

In *National Railroad Passenger Corp. v. Morgan*,³⁶ a highly fractured Court held that while Title VII of the Civil Rights Act of 1964 “precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period,” courts may consider “the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time limit” so long as “any act contributing to that hostile environment takes place within the statutory time period.” Justice Thomas wrote the majority opinion, part of which was joined by only five justices and part of which was joined by all nine. Justice O’Connor wrote a concurring and dissenting opinion that was joined at least in part by four other justices. Writing for the Court, Justice Thomas said that hostile work environment claims are “different in kind from discrete acts”

since their “very nature involves repeated conduct.” Such claims focus on the “cumulative affect of the individual acts,” any one of which “may not be actionable on its own” but “collectively constitute one ‘unlawful employment practice.’”

The Court considered the interaction between the Federal Arbitration Act and the Equal Employment Opportunity Commission’s power to seek victim-specific relief in *Equal Employment Opportunity Commission v. Waffle House, Inc.*³⁷ There, the Court held 6-3 that an arbitration agreement between an employer and an employee does not bar the EEOC from “pursuing victim-specific judicial relief” in enforcement actions alleging employer violation of Title I of the Americans with Disabilities Act of 1990. Justice Stevens, writing for the Court, explains that while the Federal Arbitration Act manifests a “liberal federal policy favoring arbitration agreements,” a contract “cannot bind a nonparty” such as the EEOC. EEOC claims are not “merely derivative” and may be “seeking to vindicate a public interest” even when the relief sought appears to be “entirely victim-specific.” Thus, drawing a line “between injunctive and victim-specific relief” to determine what remedies the EEOC may use to vindicate public interests would be an ineffective way of “preserving the EEOC’s public function while favoring arbitration.”

In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*,³⁸ the Court held in a 5-4 decision that federal immigration policy embodied in the Immigration Reform and Control Act of 1986 (IRCA) foreclosed the power of the National Labor Relations Board to award backpay to an undocumented alien who had never been legally authorized to work in the United States. Petitioner impermissibly fired four employees in an effort to rid its business of known union supporters, one of whom was subsequently discovered to be an illegal alien. While generally broad, the NLRB’s discretion to select and fashion remedies for employment violations is not unlimited and may be curtailed by congressionally enacted federal immigration law policy. The Court said that the IRCA combats employment of illegal aliens via a verification system requiring employers to confirm the identity and eligibility of all new hires by examining specified documents before they begin work and corresponding criminal sanctions for unauthorized aliens who subvert the employer verification system by tendering fraudulent documents. The Court concluded that awarding backpay to illegal aliens is beyond the NLRB’s remedial discretion because it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Justice Breyer, writing for the four dissenting justices, found the order awarding backpay was lawful since the NLRB’s limited backpay order reasonably helped to deter unlawful activity that both labor laws and immigration laws seek to prevent.

35. 534 U.S. 506 (2002).
36. 122 S. Ct. 2061 (2002).

37. 534 U.S. 279 (2002).
38. 122 S. Ct. 1275 (2002).

OTHER SIGNIFICANT DECISIONS

In a 6-3 decision, Justice Stevens, writing for the Court in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,³⁹ held that two temporary moratoria on land development instituted by the Tahoe Regional Planning Agency (TRPA) were not per se takings of property requiring compensation under the Takings Clause. In its effort to develop standards to protect the Lake Tahoe area from further deterioration, the TRPA enacted Ordinance 81-5 and later Resolution 83-21, which together “effectively prohibited all construction” on particular California lands in the Lake Tahoe Basin for 32 months and certain lands in Nevada for eight months. The Court explained that its jurisprudence regarding “physical takings . . . involves the straightforward application of *per se* rules,” whereas its “regulatory takings jurisprudence . . . is characterized by ‘essentially ad hoc, factual inquiries’ designed to allow ‘careful examination of all the relevant circumstances.’” The Court emphasized that the “longstanding distinction between acquisitions of property for public use . . . and regulations prohibiting private uses . . . makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.” The Court noted “two reasons why a regulation temporarily denying an owner all use of her property might not constitute a taking.” First, it is within the state’s authority to enact safety regulations. Second, there are “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.” The Court has previously held that “compensation is required when a regulation deprives an owner of ‘all economically beneficial uses’ of land.” However, this “holding was limited to ‘the extraordinary circumstance when no productive or economically beneficial use of land is permitted.’” Consequently, “anything less than a ‘complete elimination of value,’ or a ‘total loss’ . . . would require” a fact-based analysis. The Court said that the temporary nature of the restriction was of great significance: “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use because the property

will recover value as soon as the prohibition is lifted.” In Justice Thomas’s brief dissenting opinion, joined by Justice Scalia, he responded forcefully to this assertion, saying the majority’s assurance that the loss in value will only be temporary serves “cold comfort to the property owners in this case or any other.” “After all,” he said by quoting John Maynard Keynes, “[i]n the long run we are all dead.”

CONCLUSION

Contrary to the Court’s criminal decisions this term, 5-4 splits were prevalent in the Court’s civil decisions. There were numerous concurring opinions this year, as justices were less inclined to join majority opinions in their entirety. Also, there were times when the justices departed from the typical conservative and liberal blocs, which seems to suggest that certain issues could create strange bedfellows. However, there remains a ubiquitous concern regarding the future validity of these numerous ideologically split decisions in the face of the possible retirement by a few justices. The alignment that would result from the potential future appointments would categorically impact the strengthening or weakening of the Supreme Court’s decisions during these recent terms. This may prove especially true in the federalism area.



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39. 122 S. Ct. 1465 (2002).

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A Crack at Federal Drafting

Joseph Kimble

This will not be the first or last article that criticizes the style of drafting in federal statutes. But it will, I believe, be different in at least one respect: it will scrutinize the style in just one small slice of federal drafting in a way that should edify drafters of any legal document. In fact, this inspection should open the eyes of all legal writers—for I'll identify some of the persistent, inexcusable failings that pervade all legal writing. I did this kind of thing once before in *Court Review*, using the final orders from the Clinton impeachment trial.¹ If you think those impeachment orders were revealing, wait until you see the USA Patriot Act.²

It's amazing, really, how much you can wring out of a few paragraphs. And I'm not talking about subtle or arguable points; I'm talking about the kinds of changes that good stylists or editors would make almost routinely. At the same time, none of the items that I list below are what you would call major. None of them go to the unfriendly format of federal statutes or their overdivided structure. Nor do I get into organization or degree of detail. Nor do I raise the standard complaint about serpentine sentences full of embedded clauses, or even mention the passive voice. Individually, my changes may seem small, but taken as a whole, their effect is considerable. And so it is with writing: clarity does not come in one or two strokes, but through the cumulative effect of many improvements, some of them larger and some smaller.

How did our profession ever arrive at this state of linguistic distress? Apparently, 400 years' worth of legalese has left us blind. We are so used to it that we can't see it for what it is, or can't muster the will to resist, or don't care. The great irony is that most lawyers seem to consider themselves quite proficient at writing and drafting.³ They are deluded. But as Reed Dickerson, the father of American drafting, observed, "It is hard to sell people new clothes if they consider themselves already well accoutered."⁴

Of course, we all realize that legislative drafters work under pressure, that very often or perhaps most often they do not have a free hand, that the process is messy and variable, and that some drafters are no doubt skilled and experienced. Yet they are still heirs to "a history of wretched writing."⁵ So it's not surprising that the habits I criticize have seemingly become ingrained.

At any rate, let me say a word about the paragraphs I'll use from the Patriot Act. I didn't scour the Act for the worst examples. I didn't scour the Act at all. These paragraphs came to my attention because they affect the Federal Rules of Criminal Procedure, which I have an interest in. For the last three years, the Advisory Committee on Criminal Rules has been restyling all the criminal rules—a huge undertaking—and I served as a consultant during the last part of the project. The restyled criminal rules were submitted to the Supreme Court last November.⁶ At about the same time, Congress passed the Patriot Act, and the advisory committee had to scramble to insert conforming language into the new version of the rules. The Act amended Rules 6(e)(3)(C) and 41(a) of the old rules; the committee inserted the changes into 6(e)(3)(D) and 41(b)(3) of the new rules. I'm going to deal only with the Rule 6 changes because the Rule 41 changes were much shorter.

Now, the committee decided that it had to use the statutory language in the court rules—an understandable decision but a serious setback for good drafting.⁷ It's disheartening, after the long effort to improve the rules' clarity and consistency, to see that statutory language imported almost verbatim.

And here it is, in all its glory.

THE PARAGRAPHS THAT AFFECT CRIMINAL RULE 6

This is from Title II, section 203(a)(1), of the Patriot Act:

Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:

“(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

...

“(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforce-

Footnotes

1. Joseph Kimble, *How to Write an Impeachment Order*, *COURT REV.*, Summer 1999, at 8.
2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).
3. See Bryan A. Garner, *President's Letter*, *THE SCRIVENER* (Scribes — Am. Soc'y of Writers on Legal Subjects), Winter 1998, at 1, 3 (noting that, according to the author's informal surveys, 95% of lawyers claim to be good drafters).
4. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 2 (2d ed.

1986).

5. BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 2 (2d ed. 2002).
6. FEDERAL RULES OF CRIMINAL PROCEDURE, COMPREHENSIVE STYLE REVISION, AMENDMENTS SUBMITTED TO THE SUPREME COURT, at <http://www.uscourts.gov/rules/newrules6.html> (Nov. 2001); after December 2002, available in print as the FEDERAL RULES OF CRIMINAL PROCEDURE.
7. See Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 *SCRIBES J. LEGAL WRITING* 39, 48-52 (2001-2002) (forthcoming) (objecting to the tendency of committees to follow the exact language of statutes and court opinions).

ment, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

....

“(iii) Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

“(iv) In clause (i)(V) of this subparagraph, the term ‘foreign intelligence information’ means—

“(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

“(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

“(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

“(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of [a] foreign power; or

“(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

“(aa) the national defense or the security of the United States; or

“(bb) the conduct of the foreign affairs of the United States.”

• “the national defense or the security of the United States; or the conduct of the foreign affairs of the United States”

. . . or the conduct of its foreign affairs

2. *An Aversion to Possessives*

• “clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power”

clandestine intelligence activities by a foreign power’s intelligence service, intelligence network, or agent

3. *An Aversion to -ing Forms (Participles and Gerunds)*

• “in the performance of his official duties”

in performing his official duties

• “in the conduct of that person’s official duties”

in conducting [or “to conduct”] that person’s official duties

4. *An Aversion to Hyphens*

• “foreign intelligence information”

foreign-intelligence information

• “Federal law enforcement, . . . national defense, or national security official”

Federal law-enforcement, . . . national-defense, or national-security official

5. *Overuse of “Such,” “That” (as a Demonstrative Adjective), and “Any”*

• “~~Any~~ [A] Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use ~~that~~ [the] information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of ~~such~~ [the] information. Within a reasonable time after ~~such~~ disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that ~~such~~ [the] information was disclosed”

6. *Cumbersome and Unnecessary Cross-References*

• “foreign intelligence information (as defined in clause (iv) of this subparagraph)”

foreign-intelligence information (as defined in (C)(iv))

• “In clause (i)(V) of this subparagraph, the term ‘foreign intelligence information’ means—”

“Foreign-intelligence information” means— [There’s no need for the cross-reference, since the earlier

SO WHAT’S THE TROUBLE?

Did those paragraphs seem pretty normal—about par for legal drafting? I suspect they did, so let me try to identify some deficiencies. After each item, I’ll include one or more examples, along with a revised version or a question.

1. *An Aversion to Pronouns*

• “acts of a foreign power or an agent of a foreign power”

acts by a foreign power or its agent

provision, where the term was used, already referred forward to this part.]

7. *A Tendency Toward Syntactic Ambiguity*

- “foreign intelligence or counterintelligence (as defined in . . . 50 U.S.C. 401a)” [Does the parenthetical element modify both items? Yes?]
- “any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official” [How many items does *Federal* modify? All of them?]
- “activities by an intelligence service or network of a foreign power” [Does *intelligence* also modify *network*?]

8. *General Wordiness*

- “in order to assist the official receiving that information in the performance of his official duties”

for use in performing the official’s duties

- “Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.”

A federal official who receives information under (C)(i)(V) [or “receives grand-jury information”] may use it only as necessary to perform official duties [and?] subject to any limitations on its unauthorized disclosure.

- “Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.” [But isn’t the disclosure to an official, not an agency?]

Within a reasonable time after disclosure, a government attorney must file, under seal, a notice with the court stating what information was disclosed and to whom [or “stating what information was disclosed, the federal official’s name, and the official’s agency”].

9. *General Fuzziness*

- “any Federal . . . protective . . . official” [?]
- “a United States person” [?]

10. *Needless Repetition*

After (C)(i)(V) requires that the disclosure be to assist the official in performing official duties, then (C)(iii) requires that the use be necessary in conducting official

duties. I kept both requirements in my redraft below, but I think the first one—concerning the purpose for disclosure—could probably go. Having to file a notice of the disclosure makes it unlikely that someone will disclose for inappropriate reasons.

(Incidentally, why the switch in these two provisions from *in the performance of* (official duties) to *in the conduct of*? What possible difference is there? Probably none, but the switch creates a hint of contextual ambiguity.)

A REDRAFT

I’ll leave it to you to decide whether the original or the following redraft is better. Just two comments: the only part I reorganized is (C)(iv); and if I inadvertently changed a meaning somewhere, it can easily be restored without reverting to the style of the original. All right, then:

Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:

(C)(i) Disclosure of a grand-jury matter may also be made:

. . . .

- (V) to a federal official who is engaged in law enforcement, intelligence, protection [?], immigration, national defense, or national security, if the matter involves foreign intelligence or counterintelligence (as they are defined in 50 U.S.C. 401a) or foreign-intelligence information (as defined in (C)(iv)) and if the information is for use in performing the official’s duties.

. . . .

- (iii) A federal official who receives grand-jury information may use it only as necessary to perform [his or her?] official duties and subject to any limitations on its unauthorized disclosure. Within a reasonable time after disclosure, a government attorney must file, under seal, a notice with the court stating what information was disclosed and to whom.

- (iv) “Foreign-intelligence information” means any information about a person, a foreign power, or a foreign territory that relates to the national defense or the security of the United States, or to the conduct of its foreign affairs. The term includes any information about:

- (I) the ability of the United States to protect against actual attack, potential attack, sabotage, international terrorism, or other grave hostile act by a foreign power or its agent; or

- (II) clandestine intelligence activities by a foreign power's intelligence service, intelligence network, or agent.

CONCLUSION

Lawyers draft poorly. And for that to change, several related things must happen.

First, their loyal critics must keep complaining, keep agitating; I'll do my best, as a public service.

Second, reformers must keep exposing the myths about writing clearly, in plain language—like the myth that plain language is not precise, or is just about simple words and short sentences, or is not supported by any hard evidence of its effectiveness.⁸

Third, to overcome resistance and doubt, reformers must keep pointing to major advancements—like the restyled Federal Rules of Appellate Procedure and Federal Rules of Criminal Procedure, new article 9 of the UCC, and some of the work done by the Securities and Exchange Commission in the late 1990s.⁹ The drafting in these projects may not be perfect, but compare it with what went before.

Fourth, lawyers must stop making excuses for traditional legal style and stop aping old models. This will require, to begin with, some humility and open-mindedness, and then a close encounter with some books on legal writing or a CLE

course or a good editor. Like any skill, writing well takes sustained effort; it's not innate.

Finally, law schools must end their shameful neglect of legal drafting. Although many schools have strengthened their writing programs in the last decade, those programs concentrate mainly on briefs and memos, not on drafting (contracts, wills, bylaws, statutes, rules). True, most schools do offer an elective in legal drafting, but only a very small number—maybe 10 or 15 schools—require it as a substantial part of their writing programs.¹⁰ It's no wonder, then, that most lawyers, steeped as they are in old forms and models, consider themselves good drafters. Nobody has ever showed them a better way.



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8. See Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 7–31 (1996–1997) (citing 25 studies showing that plain language saves time and money and is strongly preferred by readers); *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109 (1998–2000).
9. See DIV. OF CORP. FINANCE, U.S. SEC. & EXCH. COMM'N, BEFORE &

- AFTER PLAIN ENGLISH EXAMPLES AND SAMPLE ANALYSES (1998).
10. Jo Anne Durako et al., Association of Legal Writing Directors & Legal Writing Institute, 2001 Survey Results 6 (Question 20), 10 (Question 33), 11 (Question 35) (released Aug. 2001) (on file with author), available at http://www.alwd.org/resources/survey_results.htm.



The Resource Page



INFORMATION ON PROBLEM-SOLVING COURTS

A brief overview of problem-solving courts is found in the opening essay of this issue of *Court Review*. For those who would like to look further, here are some additional resources.

PAMELA CASEY & WILLIAM E. HEWITT, COURT RESPONSES TO INDIVIDUALS IN NEED OF SERVICES: PROMISING COMPONENTS OF A SERVICE COORDINATION STRATEGY FOR COURTS. National Center for State Courts, 2001 (\$5 shipping & handling). 66 pp.

Researchers Pamela Casey and William Hewitt review the increased use of problem-solving courts from several helpful perspectives. First, they describe the primary examples of problem-solving courts—community courts, domestic violence courts, drug courts, family courts, and mental health courts, including the types of service referrals (e.g., drug therapy, parent education, housing assistance, etc.) that may arise in each type of court. Second, they discuss how court supervision of the provision of such services may fit into the role of a judge and court. Casey and Hewitt review the standards of the Trial Court Performance Standards—access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence—from the perspective of a problem-solving court. Third, they present nine “promising components” of an effective strategy for coordinating services provided through a problem-solving court. Their suggestions are based on telephone interviews with court personnel in 50 jurisdictions and in-depth field research in eight jurisdictions. Suggestions include having case-level service coordinators, judicial and court leadership, and an active policy committee of those who have a stake in the

process. (Copies can be ordered for \$5 shipping and handling from Lynn Grimes, (757) 259-1812, lgrimes@ncsc.dni.us.)

GREG BERMAN & JOHN FEINBLATT, PROBLEM-SOLVING COURTS: A BRIEF PRIMER.

http://www.courtinnovation.org/pdf/prob_solv_courts.pdf

These authors from New York’s Center for Court Innovation provide a helpful overview of the concept of problem-solving courts and how that concept is playing out in practice. Their essay provides an overview of the development of problem-solving courts and the reasons for their recent rise, some definitions of how they have become unique in practice, the results of evaluations of their performance, and a summary of potential areas of tension between these courts and some traditional principles of the justice system. This online monograph was originally published as an article in *Law and Policy*.

National Center for State Courts Website
Materials on Problem-Solving Courts
<http://www.ncsconline.org/WCDS/index.htm>

From this page on the NCSC website (which you get to by clicking the “Court Information” icon on their home page), look at the folder marked, “Court System Structure and Governance.” There, you’ll find separate folders containing articles and resource materials on specialized and problem-solving courts.

U.S. Department of Justice Website
Materials on Problem-Solving Courts
http://www.ojp.usdoj.gov/courts/problem_solving.htm

From this page on the Justice Department’s website, you’ll find federal reports on drug courts, mental health courts, community courts, and teen courts.

Center for Court Innovation
<http://www.courtinnovation.org/>
<http://www.problem-solvingcourts.org/>

We’ve given you two web addresses here. The first is the home page for New York’s Center for Court Innovation. The second is the Center’s specific page containing resources related to problem-solving courts. Several publications are included here, including the Berman & Feinblatt article mentioned above and an online monograph describing the Midtown Community Court in Manhattan, New York.

Center for Problem-Solving Courts
<http://www.problemsolvingcourts.com/>

This group attempts to provide resources, including education and training, to help problem-solving courts to succeed. Its website includes background briefing papers from a variety of sources.



NEW BOOKS

ANN L. KEITH & CAROL R. FLANGO, EXPEDITING DEPENDENCY APPEALS: STRATEGIES TO REDUCE DELAY. National Center for State Courts, 2002 (\$5 shipping & handling). 70 pp.

Timeliness is a goal in the resolution of all court disputes, but it is especially important when the issues involve children. It becomes critical when the children may be forced to remain in unstable, violent, or otherwise harmful situations. Researchers Ann Keith and Carol Flango surveyed 43 states that have some procedure in place for expediting appeals in cases involving dependency findings (e.g., child in need of care, foster care, adoption, and abuse cases) and made an in-depth study of the practices of several courts. Their findings contain several major recommendations for strategies that can streamline the appeal process. (Copies can be ordered for \$5 shipping and handling from Toni Knorr, (757) 259-15912, tknorr@ncsc.dni.us.)