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THE ACCOUNTABLE JUDGE: GUARDIAN OF JUDICIAL INDEPENDENCE

by

Frances Kahn Zemans

Prepared for presentation at the Judicial Independence and Accountability Symposium, University of Southern California, November 20-21.

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INTRODUCTION

To listen to the roaring debate over judicial independence, one wonders whatever happened to Alexander Hamilton's oft-quoted description of the judiciary as the "least dangerous branch." With neither the power of the sword nor the power of the purse, the third branch has had an enduring vulnerability to attack. Yet if the courts were to pursue their assigned role in our system of government, it would seem that there should have been some mechanism by which they could offset this apparent imbalance. Remarkably, the judicial branch must rely on a voluntary grant of authority by the public. While this seems a fragile basis for power and despite contemporary concerns, over the course of our nation's history, the authority of the courts has actually expanded.

We have come a long way from John Marshall cleverly avoiding presidential disobedience by lecturing Thomas Jefferson, while not issuing any directive that would require him to act.[1] And we have progressed quite a distance from Andrew Jackson's direct snubbing of the Supreme Court.[2] Yes, there have been continued attacks on the Court (Roosevelt's court- packing plan and the Southern Manifesto issued by Southern Congressmen in response to Brown v Board of Education comes readily to mind), but over time the authority granted to the courts

1 Marbury v Madison (1803)

2 "John Marshall has made his decision now let him enforce it," was Jackson's, perhaps apocryphal, response to the Court's striking down the forced Cherokee march from Georgia to Oklahoma. Worcester v Georgia 6 Pet. 515 (US 1832).

has been sustained.

Throughout these years, this grant of authority has depended on the perceived legitimacy of the courts and their role in our system of government. The question of whether the courts continue to fulfill their appropriate function in our democracy has been the subject of considerable political debate. Attention has been directed to replacing current judicial personnel (and/or selecting a different kind of judge), and to imposing institutional constraints (e.g., limiting jurisdiction, establishing sentencing guidelines, putting caps on damages). These have garnered substantial attention in presidential, and more recently statewide elections.

The lightening rod for the current frenzy over judicial independence was United States District Court Judge Harold Baer's granting of a suppression motion[3] that generated a presidential suggestion that he consider resigning and a presidential candidate's call for his impeachment. The decibel level became so extreme that then Chief Judge of the 2nd Circuit Court of Appeals and three former chief judges issued a joint statement that such attacks threaten the structure of our constitutional system. While claiming no quarrel with judicial criticism, the statement asserted that:

> when a judge is threatened with a call for resignation or impeachment because of disagreement with a ruling, the entire process of orderly resolution of legal disputes is undermined.[4]

What followed was a flurry of statements in defense of judicial independence,[5] and the establishment of mechanisms to respond to criticism of judges.[6] The American Bar Association

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[3] U.S. v Bayless 913 F. Supp 232 (SDNY)

[4] Joint statement of 2nd Circuit chief judges, issued March 3, l996. Copy on file with author.

[5] For example, a group of New York bar associations and law school deans established "The Joint Committee to Preserve the Independence of the Judiciary" and issued a statement urging presidential and other candidates to refrain from personal criticism of judges. (Press Release, New York County Lawyers' Association, October 2, 1996). Another press release on March 7, l997 urged similar restraint on mayoral candidates. (Copies on file with author).

[6] In February l998 the American Bar Association adopted a model "Response to Criticism of Judges," which has been adopted by numerous state and local bar associations and is being considered by others.

established a Commission on Separation of Powers and Judicial Independence, which issued its final report (probably not coincidentally) on July 4th of 1997.

At the state level the lightening rod for the judicial independence debate was the defeat of Tennessee Supreme Court Justice Penny White in the 1996 retention election a few months after the Baer decision. The focus of the attacks on her was a decision of the Tennessee Supreme Court, in which she concurred, that upheld a criminal conviction, but overturned the imposition of the death penalty (remanding the case for a new sentencing hearing).[7] That election and the Baer controversy have been topics of discussion of judicial independence at numerous symposia (many of the academic variety and some more broadly based)[8], and special issues of court-related journals.[9] And a major foundation has committed significant funds to promoting judicial independence.[10]

In this same period and shortly before, there have been a number of books that indict the courts for a variety of ills.[11] And politicians have become very forthright in publicly proclaiming their views of judges.[12]

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7 State of Tennessee v Odom, 928 SW 2d 18 (Tenn. 1996)

8 Academic symposia include, among others, "Judicial Review and Judicial Independence: The Appropriate Role of the Judiciary," 14 Georgia State Law Review (July 1998), "A Symposium on Judicial Independence," 25 Hofstra Law Review (1997). Public events include, for example, "Judicial Independence - A Public Education Symposium" held at University of Tulsa (May 1998) and "A Symposium on Judicial Independence" at John Marshall Law School in Chicago (October 1998). It should be noted that not all of these events have been designed in defense of judicial independence. For example, a recent conference sponsored by the American Public Philosophy Institute was entitled "Reining in Judicial Imperialism: Effectively Limiting the Judiciary to its Constitutional Powers"(October 1998 at Marquette University).

9 For example, "Court Bashing and Reality, Judicial Independence Issues," Judges' Journal, Vol. 36, No. 1 (Winter 1997) and "Judicial Independence," Judicature Vol. 80, No. 4 (January-February 1997). The latter includes one article critical of federal judges for straying "beyond its proper functions."

10 The Open Society Institute is providing continuing funding to "Citizens for Independent Courts," a project of the Century Foundation/Twentieth Century Fund, and has made grants to other organizations to pursue programs related to the independence of the judiciary.

11 Rothwax, Guilty: The Collapse of Criminal Justice (1996); Boot, Max, Out of Order: Arrogance, Corruption and Incompetence on the Bench; Goulden, Joseph, The Benchwarmers; Stein, David, Judging the Judges; Bork, Robert, Slouching Towards Gomorrah, Modern Liberalism and American Decline, (New York: Regan Books, 1996) and Huber, Peter, Liability: The Legal Revolution and Its Consequences.

INSTITUTIONAL VERSUS DECISIONAL INDEPENDENCE

The bulk of the discussion about judicial independence since the Baer rulings (the initial granting of the motion to suppress the evidence and the subsequent vacating of the motion[13]) and the defeat of Penny White has focused on decisional independence, the ability of the individual judge to make decisions based on the facts and the law without undue influence or interference. While it has been argued that any diminution of institutional independence will by definition have a detrimental effect on decisional independence, the historical record is not so clear. As noted in a Federal Judicial Center study,

> The argument that administrative independence is a necessary condition for the exercise of decisional independence is a forceful one, but support for it comes from sources other than the text of the Constitution or the history of federal judicial administration.[14]

Indeed, it can be argued that the most significant mechanism of accountability of the federal judiciary is through institutional constraints.

The Constitution itself makes this quite clear by granting to Congress the very power to create all courts below the Supreme Court, a power that must necessarily include the power to abolish them. In comparison to other nations where the courts are typically beholden to the minister of justice, the self-administration of the federal courts is frequently cited as a mark of its independence. Yet until 1939, the administration of the federal courts was a function performed by the Department of Justice in the executive branch. And rather than an assertion of the courts' independence, it appears that the creation of the Administrative Office of the United States Courts

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12 Governor Sundquist of Tennessee asked "Should a judge look over his shoulder [in deciding cases] about whether they're going to be thrown out of office? I hope so." (Wade, "White's defeat poses a legal dilemma: How is a replacement justice picked?" Memphis Commercial Appeal, August 3, l996, p. A1. And Tom DeLay, House Majority Whip, asserted "We are going after judges!" (Washington Post)

13 US v Bayless 921 F Supp 211(SDNY 1996)

14 Bermant, Gordon and Wheeler, Russell R., "Federal Judges and the Judicial Branch: Their Independence and Accountability," 46 Mercer Law Review 835 (1995), p.836.

emerged out of the Progressive Era's emphasis on efficiency.[15] The budget of the courts, their jurisdiction (with limited constitutionally defined exceptions), and most importantly the laws that they interpret have always been and remain under Congressional control. A parallel situation exists in the states.

Institutional attacks at the federal level seem to have accelerated in recent years. Legislation restricting judicial review of habeas corpus petitions, sentencing guidelines that include mandatory minimums that severely limit judicial discretion, the Civil Justice Reform Act of 1990 that imposed oversight by district level committees and mandated alternative dispute resolution programs, and the Prison Litigation Reform Act of 1995 have all been adopted. Then Senator Grassley, chair of the Senate Judiciary Committee's subcommittee on administrative oversight and the courts began an inquiry into court expenditures by surveying all federal judges with an eye to increasing efficiency and decreasing costs, perhaps by not filling existing vacancies in the courts.[16] There have been continuing efforts to cap punitive damages through a federal products liability statute, and the current Congress was considering a number of restrictions such as requiring three-judge panels to review state law adopted by referendum.[17] At the same time, the judiciary had not received even a cost-of-living increase for several years, in their view a violation of the spirit of the constitutional requirement that judicial pay not be decreased.[18]

State judiciaries have also faced limits imposed by legislatures, including sentencing guidelines, three strikes laws, and a variety of tort reform measures. For example, in Arizona

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[15] Ibid, p.855.

[16] Among other issues, the inquiry covered how judges manage their time and use their law clerks. Senator Grassley had been a member of the Federal Courts Study Committee, a joint judicial-legislative-lawyer effort to address a number of concerns about the operation of the courts. With a few exceptions, the broad range of recommendations in their Report (1990) have not been implemented.

[17] HR 1252, the Judicial Reform Act of 1997. This particular provision was in direct response to U.S. District Judge Thelton Henderson's order blocking implementation of California Proposition 209, which eliminated state affirmative action programs. He was subsequently reversed by the 9th Circuit Court of Appeals

[18] See The Third Branch, May 1997, p. 2 for a reference to this from Justice Kennedy's remarks at the 11th Circuit Judicial Conference, May 1997.

voters amended the state constitution to revoke the state courts' exclusive jurisdiction over juvenile justice.

Against this background, it is perhaps not surprising that the judicial reaction (and that of their defenders) to direct attacks on judicial decisions has been robust. Yet it is important that we not confuse perceived attacks on institutional independence as themselves necessarily directly affecting the decisional independence that is the *sine qua non* of the judicial role in our system of government. Too often, judicial pronouncements fail to make this distinction. Indeed they typically argue that any incursion on institutional independence is by definition a potential threat to decisional independence.[19] Thus, the federal judiciary typically uses a defense of decisional independence as the argument against any institutional restraints. For example, the Long Range Plan for the Federal Courts (1995), discusses the core value of judicial independence. "Although the autonomy to make impartial decisions is at the heart of judicial independence, the concept extends further . . . The federal court system must continue to be in control of its own

[19] This is not to argue that there can be no relationship between institutional and decisional independence or that institutional constraints never affect decisional independence. Still it is worth noting that in a study conducted by the Federal Judicial Center (albeit before the Baer controversy), it was concluded that recent executive and legislative efforts to provide greater oversight to the judiciary have been viewed by the judges as attacks on branch independence rather than decisional independence. Op. Cit, fn 14, p.857.

governance."[20] While the statement goes on to acknowledge limitations set by the constitution, there is a sense expressed that full decisional independence requires institutional independence as well. The Report's chapter on governance continues to argue the critical relationship between decisional independence and institutional independence. In part this may be a response to what is viewed by the courts as a continuing trend toward greater and greater legislative encroachment on judicial prerogatives.

Yet in the case of the federal courts, accountability comes essentially in the form of institutional accountability. To the public whose support is required to maintain an independent judiciary, judicial cries of invasions of their independence that are directed largely at legitimate institutional mechanisms of accountability sound curiously like a power struggle rather than an aspirational statement about the role of the judiciary in our system of government. The notion that established mechanisms of institutional accountability to the political branches (and thereby to the people) constitutes infringement on appropriate judicial authority is potentially a very hazardous perspective for the judiciary. For if the public is to continue to grant authority to the courts, it will be on the basis of decisional independence **accompanied** by accountability. First and foremost is accountability to the law. Indeed it is that accountability that justifies judicial independence.

Remarkably, it is the rare discussion of judicial independence that acknowledges its accountability to the law. The Report of the Commission on Separation of Powers and Judicial Independence in fact begins by asserting that the Constitution established an independent judiciary for two reasons - decisional independence to insure "impartial decisions in individual cases" and institutional independence "to check overall concentrations of power in the political branches." It goes on to assert that the Constitution "creates a tension between judicial independence and accountability"[21] Nor does the 2nd Circuit response to attacks on Judge Baer make any reference to accountability to the law or for that matter to the Rule of Law. Rather it states that "they [the

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[20] Long Range Plan for the Federal Courts, Judicial Conference of the United States, December 1995, p.8.

[21] Report of the Commission on Separation of Powers and Judicial Independence, American Bar Association, p. 5.

attacks on Judge Baer] threaten to weaken the constitutional structure of this Nation." And it describes the attacks as doing "a grave disservice to the principle of an independent judiciary, and, more significantly, mislead the public as to the role of judges in a constitutional democracy."[22] While Judge Baer's accountability to the law (rather than to the President, the Congress or the people) is implied, this widely circulated statement could have done a great service by explicitly acknowledging that accountability and asserting the value, indeed the necessity, of an independent judiciary to the Rule of Law. Perhaps lawyers and judges have spent too much time talking to each other and thus assuming a common understanding that is not so common beyond their peer group.

Of particular concern is the almost exclusive focus on the federal judiciary in much of the literature on judicial independence. Even when states are included in the discussion, federal constitution's guarantees are most frequently cited. It is as if the judges of the 47 states that select judges for limited terms, whether by election or appointment, cannot have independent judges.[23] This would be quite a surprise to state judges who account for the overwhelming proportion of judicial decisions in this country and whose decisions most directly affect the lives of the people. This becomes particularly problematic when attacks on judicial decisions have no better response than that judges must be independent to fulfill their role in the constitutional order. While no one has argued this explicitly, that is the implication of relying exclusively on federal constitutional guarantees to assert the importance of independent judges. It is certainly not enough to simply assert that decisional independence requires institutional independence, particularly in an atmosphere where decisional independence itself is being scrutinized.

DECISIONAL INDEPENDENCE AND THE RULE OF LAW

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22 Op.Cit., fn 4.

23 Only Massachusetts, New Hampshire and Rhode Island select judges for life or until age 70. New Jersey provides for service until age 70 after one reappointment to the bench.

Much of the defense of decisional independence has carried two messages that do not resonate well with the public. First, judicial independence has been held up as valuable in and of itself. Second, it has been argued both explicitly and implicitly that mechanisms of accountability do damage to judicial independence. But judicial independence is only a means to an end; it is the mechanism chosen by the Founders to insure the Rule of Law. And it is to the Rule of Law that judges are ultimately accountable, even federal judges whose positions are protected by the Constitution. Thus, attacks on judicial activism are often stated in terms that appeal to public understanding of the importance of the Rule of Law that requires judges to base their decisions on the law. Senator Hatch, has been a particularly articulate spokesperson of this view. According to Hatch,

> a judicial activist is, simply put, a judge who exceeds the proper limits of his or her authority and usurps the authority delegated to another branch (or institution) of government. In its most basic sense, activism is when judges make the law instead of applying it.[24]

Yet even assuming agreement on the judge's obligation to follow the law, actual attacks on judicial decisions as "activist" typically turn on whose ox is being gored. Thus Franklin D. Roosevelt sought, through his ill-fated court-packing plan, to keep "nine old men" from using the Constitution to impose their own view of government regulation of the economy by invalidating a series of legislative initiatives. Recent attacks from a different ideological vantage point have focused on expansion of rights of the accused. Thus, for example, Senator Hatch attacked the bulk of President Clinton's appointments to the Courts of Appeals as having

> joined or written activist decisions that have either sympathized with criminal defendants at the expense of legitimate law enforcement interests or have sought to substitute the judges' policy preferences for those of the people and their elected representatives.[25]

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[24] Address of Senator Orrin G. Hatch before the University of Utah Federalist Society Chapter, Judiciary Committee News Release, February 18, 1997.
[25] Ibid.

Such "sympathies" are typically expressed by reliance on so-called legal "technicalities" found in the Constitution. Yet Senator Hatch would probably concur in Hamilton's view that:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . which contains certain specified exceptions to the legislative authority . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[26]

The expressed frustration, whether by Roosevelt or Hatch in the examples cited, rests in large measure on the grounding of the criticized decisions in the Constitution on which the courts have the final word (short of the difficult process of amending the Constitution). Thus the efforts to select judges who are expected to have the "correct sympathies."[27] Although still a decidedly minority view, today there are even suggestions that legislatures, both state and federal, should be able to override the decisions of their respective supreme courts.[28]

Yet the bulk of what courts do is interpret legislation, and here too the critics of "activism" are concerned with judges inserting their own policy preferences and/or political agendas for those of the legislature. Unfortunately, legislative preferences are not so easy to determine and even the

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[26] "Number LXXVIII, A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behavior," The Federalist, ed. Isaac Kramnick, London: Penguin Books, 1987.

[27] However unpredictable individual decisions, the importance of judges' backgrounds and policy preferences to their judicial decisions is discussed in a vast political science literature dating back at least to C. Herman. Pritichett's Roosevelt Court: A study in Judicial Politics and Values, New York: Macmillan, 1948. That legacy is still strong and current as reflected in Morton Horwitz's The Warren Court and the Pursuit of Justice, New York: Hill & Wang, (1998), which notes that the liberal majority over the years of the Warren Courts all came from relatively poor families, and argues that they and their decisions were shaped by race, class and religion. The public's understanding of this is reflected in their responses to a Louis Harris poll conducted for the American Bar Association. 85% of the respondents consider that beliefs and ideology should be important in the selection of federal judges ("USA Snapshots," USA Today, October 3, 1996.

[28] OpCit, Bork, fn 11 for a discussion of Congress and the U.S. Supreme Court. Alabama Governor Fob James has recently claimed the same privilege for the governor and legislature of his state ("Governor with a Mission," Time, September 4, 1995, p. 32). And Pat Buchanan, as a candidate for president in the Republican primaries suggested that federal judges be subject to recall and removal for the content of their decisions.

best legislators cannot foresee all the fact situations that may arise. And often legislation, whether intentionally or not, leaves many open questions that must be, indeed they are expected to be, resolved in the course of litigation.[29] Communication between judges and legislators about statutes has taken a variety of forms, but is itself a complicated matter that raises its own concerns about judicial independence.[30]

However prominent are the criticisms of judges for allowing their personal policy preferences to influence their decisions, there are a host of other factors that can inappropriately affect judicial decisions. Judges are not to be influenced by bias toward or against particular litigants or by a personal interest in the outcome of a case, financial or otherwise. Thus, every state and the federal judiciary has a code of conduct that prohibits a judge from deciding a case in which he or she has a personal interest. These are intended to insure the public that judges will be impartial in deciding their cases, that they will be based on the facts and the law, that judges decisions will sustain the Rule of Law. Decisions are not to be influenced by the other branches of government or politicians. In fact they are not to be decided in response to the will of the people if that will has not been expressed in the law. These are the issues that are much more important in most cases in most courts of law. They have been deemed so important to the public's grant of authority to the courts that judges are prohibited even from engaging in "appearances of impropriety." And every state and the federal judiciary has a disciplinary body that enforces the code of conduct. In the states, these disciplinary bodies even have the power to remove a judge from office (as well as impose less serious sanctions). While some judges have argued against

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[29] See, for example, the recommendation of the Federal Courts Study Committee that Congress consider a "legislative checklist" for review of proposed legislation for technical problems such as statute of limitations, relief available, retroactivity and the like. This would serve to remind them to include items that courts frequently must decide in the context of litigation. Report of the Federal Courts Study Committee, 1990, p.91. This suggestion is reaffirmed in the Long Range Plan for the Federal Courts, Op.Cit. fn20, p.126.

[30] See Shirley S. Abrahamson and Robert L. Hughes, "Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation," 75 Minnesota Law Review 1045 (April, 1991). For the federal level see Katzmann, Robert, A. Congress and the Courts, (1997) and Katzmann, Robert A. And Herseth, Stephanie M., "An Experiment in Statutory Communication Between Courts and Congress: A Progress Report," 85 Georgetown Law Review 2189 (July 1997).

judicial discipline as an inherent infringement on judicial independence,[31] it is intended to insure that judges behave in a manner that insures that they operate independently and impartially and that they appear to be so. A legitimate mechanism of judicial discipline actually enhances judicial independence because it contributes to the public's willingness to grant authority to the courts.[32]

There are also much more subtle factors that may unduly influence judicial decision-making and thereby accountability to the Rule of Law. One that has received particular attention in the literature is the concept of the workgroup in the courthouse. In work settings where the same actors work together on a regular basis, their need for continued cooperation may inappropriately influence decision-making toward enhancing that working relationship rather than what is required by law. This is a significant issue in urban criminal courts[33] and in rural courts more generally.[34]

> Near the end of its Report, the ABA Commission on Separation of Powers and Judicial Independence accurately concludes thatIf the public does not understand that judges are given independence to enable them to make impartial decisions based on the rule of law rather than on the passing popular will of the political branches or the people, they will not comprehend how a system that permits judges to invalidate popular laws, or "release criminals on

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[31] In arguing against the then pending legislation to establish a mechanism of federal judicial discipline, Judge Irving Kaufman argued that "weighing against the flimsy justification for this legislation is the extraordinary danger of erosion of the impartiality that is the essence of the judicial role." Kaufman, Irving R. "The Essence of Judicial Independence," 80 Columbia Law Review 67l (1980) It is particularly ironic that this oft-cited article on judicial independence was written by a judge whose imposition of the death penalty in the Rosenberg spy trial is now cited as and example of "embarrassing judicial capitulation" to public pressure. See "Law Matters, News and Information for the Adult Public, Vol. 16, No. 1, Fall 1997, American Bar Association Division of Public Education. It is worth noting that in an examination of the Judicial Conduct and Disability Act of 1980, a Federal Judicial Center "study revealed no matter that can be considered to have directly interfered with or seriously threatened independent judicial decision-making." Barr, Jeffrey N. And Willging, Thomas E., "Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980," 142 University of Pennsylvania Law Review, 25 (November 1993).

[32] The National Commission on Judicial Discipline and Removal acknowledged the compatibility of judicial independence and accountability. As noted by a member of the Commission, both judicial independence and accountability enhance "the respect and confidence necessary to the effectiveness of the federal judiciary" Burbank, Stephen B., "Is It Time For a National Commission on Judicial Independence and Accountability?", 73 Judicature 176 (1990)

[33] See Eisenstein, James and Jacob, Herbert. Felony Justice: An Organizational Analysis of the Courts, Boston: Little Brown, 1977

[34] See Geiger, Maurice D. And Fahnestock, Kathryn, "Local Judicial Independence: An Endangered Species," 36 Judges' Journal 24 (Winter 1997).

> technicalities," ultimately protects *their* rights, and they will not long tolerate judges who take such actions.[35]

The Report then goes on to assert the need for educational programs in schools and colleges, in communities, and through the electronic media. Such calls for public education have come from a myriad of sources over many years.[36] And many programs and materials have been developed.[37] But two important ingredients have been missing with regard to enhancing an understanding of the value of an independent judiciary.

First, judicial independence has only recently been included in much of the educational materials that have been developed about the legal system, and it relies on the intent of the Framers as expressed in Constitutional protections rather than explaining its importance to the Rule of Law and our democratic system of governance. Even those American government texts that refer to the Rule of Law as a basic principle on which our government rests only rarely associate it with an independent judiciary.[38] With greater clarification of the relationship between judicial independence and the Rule of Law, educational materials and programs should no doubt be continued. But they are not enough. It is the judges themselves who constitute the second ingredient essential to both public understanding of and support for an independent judiciary. It is the judges themselves that bear the greatest burden of sustaining judicial independence in an age of political and media scrutiny.

JUDICIAL INDEPENDENCE IN AN AGE OF POLITICAL AND MEDIA SCRUTINY[39]

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[35] Report of the Commission on Separation of Powers and Judicial Independence, American Bar Association, July 4, l997

[36] See for example Recommendation 86 of the Long Range Plan for the Federal Courts and Kaye, Judith, "Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts," 25 Hofstra Law Review 708 (1997).

[37] The ABA Division of Public Education has a vast array of materials that are widely distributed, particularly to social studies and government teachers.

[38] See for example, Gitelson, Alan R., Dudley, Robert L., Dubnick, Melvin J., American Government, Fifth Edition, Houghton Mifflin Co., Boston, 1998.

[39] This title is taken from a speech by U.S. District Judge Gerald E. Rosen at Kalamazoo College November 11, 1996 (copy on file with author).

Throughout our history the judiciary has been and remains our least visible branch of government.[40] By and large the judges have liked it that way. As David O'Brien notes, the judicial process is a mystery because few judges talk about it - they are disabled by "judicial lockjaw."[41] And institutional aloofness has been the order of the day. This "aloofness begets an appearance of elitism that only contributes further to the public perception of the judiciary as an inscrutable, dangerously distant institution."[42] While these words were describing the federal judiciary, the public makes little distinction between state and federal judges. Too often judges' appeals to the public to respect the importance of judicial independence appear as arrogance. And unwillingness to engage in debate because it is "unseemly" or not in keeping with the "dignity" of the court rings of elitism. This is compounded if "much of the citizenry may unselfconsciously accept the legal realist's views of judicial decision-making."[43] If, as in Jerome Frank's terms, "it ain't a ball and it ain't a strike until I call it,"[44] then the judge appears to be asserting personal power without limits. Under these conditions, if judges remain invisible, they allow others to define them. And define them they will.

A frequent complaint of judges and their defenders is that "public ignorance of the real workings of courts is due to ignorant and sensational reports in the press." While that may have a contemporary ring, it was actually written in 1906 as one of Pound's "Causes of Popular Dissatisfaction with the Administration of Justice."[45] Still, media coverage of the courts has changed since Pound's day. First, and foremost, the "press" is now expanded to include broadcast media and virtually instantaneous coverage. While not limited to the courts, the demand

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40 This is somewhat ironic since, unlike the other branches, the judiciary (at least at the trial level) is designed to do its work in public.

41 O'Brien, David, ed. Judges on Judging: Views from the Bench Chatham, N.J.: Chatham House Publishers, Inc. (1997).

42 Executive Summary, Report of the Commission on Separation of Powers and Judicial Independence, American Bar Association, 1997, p.18.

43 Zagel, James and Winkler, Adam, "The Independence of Judges," 46 Mercer Law Review 795 (1995).

44 Frank, Jerome, Courts on Trial: Myth and Reality in American Justice, Princeton, N.J.: Princeton University Press, 1949.

45 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," Handbook for Judges, American Judicature Society, 1989.

for immediate analysis puts a greater burden on the media to have sufficient background to effectively cover the courts (particularly in an era of shrinking news bureaus that are less likely to include judicial specialists). In addition, for a variety of reasons, including entertainment shows that revolve around the courts, and gavel-to-gavel coverage of some trials, the courts increasingly have become the object of pubic attention and a favorite journalistic target.

From Ann Landers' "strange and inexplicable Judicial Decisions Sweepstakes" to Readers' Digest's "Special Report: America's Worst Judges"[46] individual judges have become the focus of derisive commentary. Much to the chagrin of the judiciary, a common feature of such negative coverage is the focus on selected individual decisions described in such a way as to bring the judge into disrepute. Lest judges feel picked upon, there is actually some evidence that news coverage generally has evolved into what has been characterized as "attack journalism."[47] In the case of the courts, this technique would mean that when a decision is made, journalists turn to adversaries to attack it. While no public figure appreciates this tactic, it is particularly problematic for judges who are prohibited from speaking out about their decisions. And as has been made clear in any number of cases, an individual judge receives no protection from having been part of a collegial court, even if the decision in question is unanimous.

A stunning example outside of an election cycle, is the case of James Heiple, at the time chief justice of the Illinois Supreme Court. In the now infamous "Baby Richard" case, a unanimous Illinois Supreme Court reversed the finding of the trial and appellate court, which denied a biological father's contest of the adoption of his child.[48] The case became a cause celebre on the basis of what seemed like an endless series of highly critical columns by journalist Bob

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[46] August 1996 issue.

[47] Sabato, Larry, Feeding Frenzy: How Attack Journalism has Transformed American Politics, New York: Free Press (1991). Some have argued that the negative tendency in the media has actually increased Americans' disillusionment with their leaders. See Patterson, Thomas Out of Order, New York: Vintage (1994), 23 and Robinson, Michael, "Public Affairs, Television and the Growth of Political Malaise: The Case of 'The Selling of the Pentagon'," 70 American Political Science Review, 409-32.

[48] In re Petition of John DOE and Jane DOE, Husband and Wife, to Adopt Baby Boy Janikova (John Doe et al., Appellees; Otakar Kirchner, Appellant) 638 N.E. 2d 181(1994). Two of the justices later dissented in the denial of a petition for rehearing.

Greene. As the author of the Court's opinion, Justice Heiple became the singular focus of Greene's attack.[49] Public fury was so intense that the Governor sought to intervene in the case and the legislature passed a statute in an attempt to reverse the decision of the court. Greene went on a similar crusade attacking Justice Heiple for a decision rendered when he was an appellate judge. Again, it is only Justice Heiple who has been attacked; in the 31/2 years writing about the latter case, Greene has never mentioned the other two judges that concurred in the Heiple decision.[50] Nor was there acknowledgment of the constraints that the written law imposes on judicial decisions. Yet however individualized the attacks, without a broader basis of information about the judicial process, the public is left to extrapolate from the one to the many. For good or ill, the media remain the public's primary source of information about the third branch of government. Robert Dreschel warns that "failure to respond to criticism that has its roots in inaccuracy and misunderstanding can enhance neither public understanding of the judiciary as an institution nor of individual judges as public officials"[51] But responding to criticism of an individual decision is fraught with danger.

Foremost among the hazards there is the First Amendment, which not only protects against government restrictions on speech, but is arguably designed precisely to enable the people and the media to criticize their public officials. Thus free speech and freedom of the press are central characteristics of our democracy. Not surprisingly then, responses to criticism of judges often begin with the caveat that legitimate criticism of decisions is acceptable, but that attacks that threaten the judge's position present a hazard to judicial independence. That was the essential message of the 2d Circuit chief judges' public response to criticism of Harold Baer.[52] But that

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[49] The editor of the Chicago Tribune editorial page now acknowledges that the paper failed to provide serious news analysis of the case, leaving coverage by default to a columnist who, as the editor put it, is paid to write his opinion, not to report news. Comments of R. Bruce Bold, Symposium on Judicial Independence, John Marshall Law School, October 15, 1998.

[50] DiVito, Gino L., "Setting the Record Straight on the Tragedy of 'Baby Joe'," Chicago Tribune, July 30, 1998, 21.

[51] "Dealing with Bad News: How Trial Judges Respond to Inaccurate and Critical Publicity," 13 Justice System Journal 308-322.

[52] Op. Cit., fn 4

distinction is much more problematic regarding state judges who serve limited terms of office. As they reach the end of a term, criticism of any decision will help define, if not dominate, the debate over their retention in office.

An example that illustrates the difficulty in which state judges may find themselves recently occurred in a case that received a great deal of media coverage. While riding his bicycle in the "wrong" Chicago neighborhood, an African-American boy was brutally beaten and left brain damaged. Three offenders were apprehended, tried and convicted. After sentencing the primary perpetrator to eight years in prison, the judge accepted a plea from two accomplices in exchange for a sentence of probation and community service. The primary perpetrator then returned to court to seek a reduction in his sentence. The Cook County judge refused, finding that "he planned the attack, led the attack and finished the attack upon a defenseless 13 year-old boy."[53] Supporters of the convicted felon reacted strongly, including shouting "Down with 242," the judge's number on the ballot in the retention election just eleven days away, and circulating leaflets with the judge's name and 'Vote No' printed on them. "Think about the impact of this kind of campaign on the administration of justice," stated the presiding judge of the criminal courts; "every judge would potentially be held hostage by disgruntled litigants."[54] Such fears are not without some merit.

Some defenses have been forthcoming as in both the 2d Circuit and Cook County examples, defenses that focus on the nature of the judicial process and the need to distinguish that from the content of individual decisions, even wrongheaded ones. In addition, the bar has recently begun to develop policies to respond to criticism of judges,[55] though it is too soon to tell how often these policies will be invoked or what their effect will be. Responses to criticism are all good and well, but they are band-aids that miss the heart of the problem. And by definition they come after the fact, after the negative message has been broadcast. In addition, criticism may be appropriate and provide the impetus for much needed public discussion of law and policy.

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[53] "Angry crowd erupts as Clark sentence upheld," Chicago Tribune, October 23, 1998, p.l.
[54] Ibid, back page.
[55] See fn.6.

However narrowly focused are attacks on individual judges, their impact is generalized and magnified. It is generalized because the public makes little distinction among judges (or even among different jurisdictions). One could argue that this lack of distinction is desirable because it is not the individual judge, but the law that is the basis for judicial decisions. Beyond the fact that significant research on judicial behavior questions that assumption, when it comes to retention in office, it is the individual judge who must face evaluation. Reporting possible suspect behavior becomes magnified because typically it is the only information the public has received. There is not a base of knowledge about individual judges or the judiciary as a whole against which the public can evaluate reports of judicial misbehavior. Thus the invisibility of most judges, while providing the appearance of some protection against attack, may in fact have the opposite effect. That is, with no other information about a judge against which to evaluate a story, whatever is printed or broadcast becomes accepted "truth." (As will be discussed below, the same holds true in the course of efforts to oppose the retention of judges seeking additional terms in office).

What then, is there to do? Are judges destined to be victims, irrespective of their behavior? Can they play a role in assisting the media in distinguishing between acceptable and unacceptable judicial behavior? Can they provide a template of information against which a reporter can evaluate judicial behavior? Is any of this possible without appearing defensive, without violating the Judicial Code of Conduct, without pandering to the press, without spending so much time dealing with the press that judicial duties are neglected? These are legitimate questions, but they can all be answered in the affirmative.[56]

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[56] This focus on the role of the judge in no way discounts the value of continuing calls for more public education about the judicial process in general and judicial independence in particular. See pp. 15-16 supra for a discussion of some current efforts to educate the public about judicial independence. Broader civics instruction has also gained new attention. In 1994 the Center for Civic Education established voluntary "National Standards for Civics and Government;" their impact is being evaluated in the 1998 Civics Assessment Framework, "National Assessment of Educational Progress" U.S. Department of Education. And the American Political Science Association currently has a Task Force on Civic Education . For an update on their activities see "APSA Task Force on Civic Education in the 21st Century," PS, September 1998, p. 636.

As has been acknowledged by at least some members of the judiciary, it is "judges, by and large, who have impeded the development of a more responsible press by turning their backs on the media."[57] This is not to suggest that judges should violate codes of conduct that restrict their public comments about cases.[58] In fact, even refusals to comment on pending cases can be opportunities to explain what it is about the nature of the judicial process that demands such prohibitions. Unfortunately, too often judges use restrictions imposed by the Judicial Code of Conduct as a means of avoiding talking with the media, perhaps fearing both distortion of their comments and the possibility of sanction. The result is that the primary resource about the judicial process, including the value and importance of judicial independence, is unavailable to those who remain the public's primary source of information.

To achieve the intended benefits, communication with the media must be ongoing rather than focused on individual high profile cases. The Third Branch of government should be covered as the public institution that it is, but that can only be effective with the active cooperation of judges. It is through regular communication that the media can come to understand the judicial process so that they can fully and accurately report on newsworthy cases. Further, it is only with openness to ongoing communication that judges' refusal to comment on specific cases can come to be accepted as a legitimate part of the judicial role.[59]

The need for and benefit of appropriate communication with the media are not new topics and several national organizations have developed materials designed to enhance such

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[57] Selya, Bruce M. "The Confidence Game: Public Perceptions of the Judiciary," 30 New England Law Review, Summer 1996, p. 914

[58] Canon 3B(9) of the 1990 ABA Model Code of Judicial Conduct states that "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness. Some states have retained the somewhat broader language of the 1972 Code. Only Montana among all state and federal jurisdictions has a code that is not based on the ABA Model Code.

[59] Courts can actually be proactive in relation to the media as for example the Kansas Court of Appeals that provides synopses of appellate cases to the media in advance of oral argument: "Bringing the Appellate Courts to the People," 35 Judges Journal 10 (1994). See also "If You Don't Toot The Court's Horn, Who Will?' in Judicial Division Record, 1 American Bar Association (Fall 1998), p.9.

interaction.[60] To be sure, this is a complicated matter and not without significant hazards.[61] But the stakes are high. If the public is to maintain the grant of authority to the courts, they must be perceived as legitimate institutions playing their appropriate role in our system of government. As courts have become more visible and more exposed to attack, judges must respond. And communicating with the media on an on-going basis is an important and effective mechanism for doing so.[62]

Judges have another powerful mode of communication: judicial opinions. It is here that judges are supposed to justify their decisions on the basis of the law. As one judge put it,

> Candor is a necessary means of judicial accountability . . . Candor insures decisional quality, satisfies the right of litigants to a justification for the resolution of their case, and is necessary to put future litigants and lawyers on notice of the state of the law.[63]

Written orders and opinions provide the opportunity to put on the record, for all to see, an explanation for the decision that has been reached. On the record clarification of the legal basis and the facts relevant to the decision can go a long way to obviate the need for further questioning by the press, the public and the bar. To be effective, however, such explanations must be in language that is understandable.

In those instances where constitutional provisions are invoked to invalidate the action of other governmental actors from the police to the legislature, judicial opinions can be a means to explain the public policy value of the protection provided by the constitution. This is particularly

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60 See "Judges Checklist for News Media Interviews" and "News Media Checklist for Communication with Judges," National Conference on Media and the Courts, National Judicial College, 1996; "Dealing with the Media in a Notorious Case," in Managing Notorious Cases, National Center for State Courts; and "The Reporter's Key: Rights of Fair Trial and Free Press," National Conference of Lawyers and Representatives of the Media, American Bar Association, 1994.

61 See "Shall we Dance: Courts and the Media" 30 Judicature, July-August 1996, pp. 30- 42.

62 Opening courtrooms to cameras is another important means of making the judicial process accessible and accountable to the public. For a discussion of the value of cameras in courtrooms see Zemans, Frances Kahn, "Public access. The ultimate guardian of fairness in our justice system," 79 Judicature, January-February 1996, pp.173-175.

63 Op Cit, fn 57, p.915

important in cases in which evidence is excluded, criminal convictions are overturned or sentences are reduced. This is the judge's opportunity to offer a reasoned explanation that will be significantly more persuasive than the derisive "legal technicalities" so often reported. It is the opportunity to assert the value of judicial independence and its accountability to the law.[64] Some time after her defeat in the Tennessee judicial retention election, former Justice Penny White acknowledged that the court could and should have done more to explain the basis for their decision in the Odom case that was the focus of the campaign to defeat her. "Knowing what we know now, let's rewrite this opinion and not write it for the lawyers. The audience for our opinion is the public."[65]

Judge Harold Baer's opinion granting the motion for suppression in the Bayless case did cite the Fourth Amendment, but could have done much more to articulate its value not just to the defendant in the case at hand, but to our system of government. He could have explained why that constitutional protection may require exclusion of what seems to the public to be perfectly good evidence. While such explanations do take time (although the same explanation could be used repeatedly), the judge in this case spent an extraordinary amount of time delineating the facts of the search in question in excruciating detail. The judge's most serious error, however, was not one of omission. Rather, it was a case of "foot in mouth" syndrome. After coming under fire and reversing his decision on rehearing, in a much more straightforward tone than the original decision, Judge Baer himself acknowledged what he called "my hyperbole" in the initial decision, asserting that it

> not only obscured the focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the

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[64] When based on legislative interpretation, courts can and often do provide guidance to legislatures as to how they can amend the law so that the unpopular result reached in a particular case would not occur in the future. See Midgett v State of Arkansas 729 S.W. 2d 410 (1987) for an example of a court's recitation of how other states have written statutes to define killing by child abuse as a more serious offense than the second-degree murder allowed under Arkansas law. The Arkansas legislature subsequently changed their statute.

[65] The Commercial Appeal, August 1998.

> dedicated men and women in blue who patrol the streets of our great City.[66]

What is the public to think? Judge Baer dismisses his commentary as dicta that does not "constitute a legal or factual conclusion." But as U.S. Attorney Mary Jo White stated in her request for reconsideration, "The Court has erred by injecting its own opinion and experience into the issue."[67] Whatever the "correct" decision on the suppression motion, is it any wonder that the impression is given that judges decide cases not on the law, but on the basis of their own inclinations? In this world of greater media and political scrutiny judges need to remember that their opinions are public documents. That reality may constitute a challenge to judges as they frame their opinions, but it also offers an opportunity to explain their accountability to the Rule of Law that justifies the independence that we grant to them.

Communication with the public can also be more direct, though historically it too has suffered from the "judicial lockjaw" and institutional aloofness mentioned above. A negative view of such communication came in response to my testimony before the Federal Courts Long Range Planning Committee:

> Do you really think the taxpayers won't benefit more if I spend more of my time, all of my time, trying to delve into these humongous briefs and read all that's coming around so that I know the law, exercise my responsibility for coherence and consistency of circuit law, put my opinions through seventeen drafts. I mean just try to do the best job I can which is exhausting, and take away from that and go to speak to some high school or some Bar group or some civic group to make a banal address that anybody else could make just as well?[68]

Thankfully the trend has been away from such attitudes, especially at the state level. In fact, efforts to communicate and even work with the public have expanded considerably in recent

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[66] US v Bayless 921 F Supp 211 (SDNY 1996)

[67] "Time for this guy to bench himself," New York Post, Maggie Haberman, September 29, 1998, p. 18.

[68] Transcript, Long Range Planning Committee Public Hearing, Chicago, December 1994.

years. These range from endeavors to make courts more service-oriented institutions,[69] to collaborative reform efforts,[70] to continuing programs to reach out to the public.[71] Some jurisdictions have programs designed to inform citizens about the operation and accessibility of judicial discipline.[72] All of these programs offer means by which courts and judges are held accountable. Whether they result in enhanced legitimacy and thus justification for their independence depends on what the public learns.

In the current climate, a number of jurisdictions have designed public outreach programs that focus specifically on judicial independence.[73] It is important in developing such programs that the content of the message about judicial independence be formulated in a way that the public will find persuasive. As mentioned above, it is important that the message to the public about judicial independence cover all judges and therefore not rely too heavily on the protections provided in the United States Constitution that apply only to federal judges. The message must make clear that the country benefits from judicial independence at all levels, and whatever the means of selecting judges, citizens should want and expect them to be independent. In addition, defenses of judicial independence that rely exclusively on cases in which courts have overturned the work of elected legislatures may not be sufficient to convince the people that they benefit from

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69 Examples include the Arizona Courts' QuikCourt kiosks and Maricopa County Self-Service Center, and Portage County Municipal Court (Kent, Ohio) "Court Clips." For descriptions of a wide range of these efforts see User- Friendly Justice: Making Courts More Accessible, Easier to Understand and Simpler to Use, American Judicature Society (1996)

70 For example the Franklin County (Massachusetts) Futures Lab Project and the New Jersey Probation Advisory Groups. See Justice Initiatives, American Bar Association, March 1998 for a description of numerous programs around the country and evidence that they are increasing.

71 The Washington Judges in the Classroom Program and the Brooklyn Supreme Court Judicial Officer Speaker Program are examples. The State of Wisconsin has an extremely impressive array of outreach programs described in Chief Justice Shirley S. Abrahamson's "A True Partnership for Justice," 80 Judicature 6 (July-August 1996). For a description of a variety of outreach programs see "Judicial Outreach on a Shoestring: A Working Manual," American Bar Association (1998).

72 Pennsylvanians for Modern Courts has produced and distributed a "Citizen's Guide to Judicial Discipline," and the Alaska Courts post information about the established mechanisms for filing complaints against lawyers and judges.

73 For example in Rhode Island an Ad Hoc Committee on Judicial Independence, a joint effort of the Supreme Court and the Bar Association, is developing a curriculum for secondary schools and speaking to community organizations about judicial independence.

judicial independence. Also, while judicial impartiality may be easier to understand, it is related to, but not the same as, judicial independence. The message must include acknowledgment that in our system of government the people are in part protected by the fact that they can know the rules that they must follow and that decisions about their conduct will be based on those rules rather than what benefits the powerful, what seems "fair" at the moment, or even what the general public may want. The message must make clear that the Rule of Law, which depends on judicial independence, affects everyone, even those among us who do not hold minority views that are protected by the First Amendment, or are not members of racial minorities protected by the Fourteenth Amendment. The benefits of judicial independence to protect the constitutional rights of the accused are particularly difficult to convey to those who do not see themselves directly benefitting from these protections.[74] Examples to which most citizens can relate may be most persuasive.

It may also be necessary to avoid terms such as "fair" and "good" unless tempered by reference to restrictions imposed by the written law. The impression that the judge relies on fairness as the standard against which to measure decisions can have dangerous implications that the judge is free to follow his or her conscience despite the law. Sometimes the law itself is unfair or unwise, but lacking a constitutional infirmity the judge is bound by it. And unless there is a legal basis, the judge cannot right every wrong. In addition, judges do not set their own agendas. Thus, they are dependent on others to bring claims before them. While these are quite obvious to judges and lawyers, they may not be so obvious to those who you are seeking to convince that judicial independence is to be valued and protected.

In discussions of judicial independence, judges are frequently referred to as symbols of our justice system. "To most citizens, the judge is nothing less than a symbol of justice. He or she

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[74] Even the American Bar Association in their award-winning Bill of Rights posters were unable to express the downside of not having a right to counsel. Each of the posters that covered the right to assemble, guarantees of free speech, guarantees of religious freedom and guarantees of equal protection indicates the negative result were we without those protections. But, remarkably, when it came to the poster guaranteeing an accused's right to an attorney, no downside was presented.

not only administers the law, but also embodies the law."[75] That message, while intended to be laudatory, can be a double-edged sword. For many dissatisfactions with the justice system - including those relating to police, prosecutors, private attorneys and the law itself - are not the judge's responsibility or usually within the judge's power to correct. I am reminded of a conversation I overheard shortly after Manuel Noriega had been taken into custody and brought to this country for prosecution on drug charges. At one point a retired military officer then employed in U.S. intelligence expressed great concern that we are in grave trouble "when judges make foreign policy." Even this government employee did not understand that it was the executive branch that made the decision to bring Manuel Noriega to justice in America.

It should not to be assumed that the public has no understanding of the value the Rule of Law, even if that is not the term they would use. Though no doubt unfamiliar with the Magna Charta, the public broadly endorses the idea (quite revolutionary in England in 1215 and in many parts of the world still today) that the people are subject to the law and not the whim of the ruler, and that even the ruler is subject to the law. A mere glance at today's headlines will suffice to conclude that there is universal agreement that even the president is subject to the law. One need not, and perhaps should not, focus only on those with celebrity status. For examples of the law dictating outcomes despite the wishes of the ruler occur regularly. A recent instance occurred in Virginia where the wife of a television newscaster sought to remove his life support after three years in a coma and a diagnosis of his permanent vegetative state. Under the circumstances Virginia law apparently gave her this power, but after his family challenged her, a state legislator and the governor became actively involved. The courts consistently upheld her position and after a four month battle she prevailed. "If it were not for the judiciary," she said, "I would think Virginia is a dictatorship. The law is clear. Marshall [the legislator] and Gilmore [the governor] decided they didn't like the law."[76]

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75 Feerick, John D., "Judicial Independence and the Impartial Administration of Justice," 215 New York Law Journal 1996

76 Masters, Brooke A. "A Time for Peace," Washington Post, October 15, 1998, p. B5.

This incident illustrates the positive feelings that actual experience in court can generate. In fact there is some evidence that this is the case more often than not. A recent study of users of trial courts in Wisconsin concludes that those with court experience within the previous year were more positive than the general population.[77] This is consistent with the findings of an earlier Virginia study, in which those with court experience in the prior five years had more positive views than those with no court experience.[78] The same appears to be true for those who have served as jurors.[79] This is not to suggest that all courtroom experiences are positive, only that in the aggregate users of the courts have more positive views of them than nonusers. There is also some evidence that here again the judge (as well as other court employees) play a role in influencing those perceptions. Contrary to the assumptions of most judges and lawyers, one study concludes

> that the attitudes of citizens who have participated in the judicial process is not so much a matter of whether they have won or lost, but very much of how they perceive they have been treated. People seem to care most about having neutral, honest authorities who allow them to state their views and who treat them with dignity and respect ... And views of the legitimacy of legal authorities are linked to the perceived fairness of the procedures used by those legal authorities.[80]

Thus, here again it appears that the individual judge has the potential to enhance the perceived legitimacy of the courts.

In the current political climate judges may feel particularly vulnerable and be hesitant to speak out. Yet speaking out may be the most effective strategy for countering attacks based on the content of a single decision or even a series of decisions. Like communicating with the press,

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77 Kritzer, Herbert M. and Voelker, John, "Familiarity Breeds Respect: Evaluating the Wisconsin Trial Courts," 1998 manuscript (on file with author). Unfortunately, "this positive image tails off quickly as the general perception repeated in the media replaces that specific experience."

78 "The Public as Partners: Incorporating Consumer Research into Strategic Planning for the Courts," Judicial College of Virginia, March 1994, p. 25

79 For a review of these findings see Diamond, Shari, "What Jurors Think: Expectations and Reactions of Citizens who Serve as Jurors," in Litan, Robert E., ed., Verdict: the Civil Jury System, Washington, D.C.: The Brookings Institution, l993, pp. 282-305

80 Zemans, Frances Kahn, "In the Eye of the Beholder," 15 Justice System Journal citing Tyler, Tom R., Why People Obey the Law, Yale University Press, 1990.

however, it may be that ongoing communication with the pubic during one's term of office will set the stage for a successful retention effort. Such ongoing communication not only provides an information base beyond the single decision, but allows the judge to set the agenda for public debate.[81] The traditionally passive role of the judge has allowed others to set the agenda for the campaign, often catching the judge unawares and at a time too close to the election for an opportunity to respond. And even with response time, when others set the agenda the judge is forced into the defensive. An examination of several campaigns against sitting judges illustrates the importance of agenda-setting.

At the state level, where almost all judges serve terms of office and are subject to retention by competitive election, non-competitive retention election or reappointment, there appears to be an increase in campaigns to unseat judges based on the content of individual decisions or a perceived pattern of decisions. Perhaps not surprisingly, most of these campaigns have focused on supreme court justices (and in some cases intermediate appellate court judges) who, by virtue of their positions, play more of a policy-making role than the average trial judge. The rejection of Tennessee Justice Penny White that has been widely discussed in the recent flurry of articles about current threats to judicial independence is a prime, but not the only, example.

A number of years ago then Chief Justice Leander Shaw, Jr. of the Florida Supreme Court faced a systematic campaign against his retention that focused on an abortion decision by the court. Rosemary Barkett, then his colleague on the court faced a similar campaign when she came up for retention in the next election. At the time Justice Barkett expressed the view that it would be easier to run against someone in a competitive election than against a campaign focused on one decision. Still, she may well have been put on the defensive about the same court decision in a competitive race. While it is possible she meant that in a competitive race at least she would have had an opponent to attack, my sense is that was not her point. The real difference would have

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[81] See E.E. Schattschneider, Semi-Sovereign People: A Realist's View of Democracy, Hinsdale, Illinoois: Dryden Press, 1960 for a discussion of the importance of agenda-setting in political discourse.

been that in a competitive race she would have known in advance that she would have to mount a campaign. She would have known that it would not be enough just to do a good job as a judge. In an era of less criticism of judges that may have been possible, but no more.

Penny White made the same mistake. She was caught completely unawares and tried to recover after her opponents set the agenda for the election.[82] An examination of her previous retention election for the Court of Criminal Appeals shows that she spent no money campaigning and received an affirmative vote of 67.3%.[83] Apparently she did not have to. But judges can no longer sit back and wait for others to come to them. In fact it is reported that Penny White did not follow advice given to her to meet with bar associations and community groups. Two years after Justice White's defeat, Justice Adolpho A. Birch, the author of the infamous Odom decision stood for retention and survived, despite a campaign against him by Tennessee Justice (a group organized for the sole purpose of defeating Birch). A number of the variables that contributed to his success that are worth exploring.

Unlike Justice White, Justice Birch was prepared; he had learned a lesson from the 1996 campaign. Prominent Nashville attorney James Neal (of the Watergate investigation) was an eminent spokesperson who focused on the judicial role and the importance of judicial independence in responding to attacks on Justice Birch. The 1998 retention election was also the first time that Tennessee's statutorily created Judicial Performance Commission evaluated each of the judges up for retention and published and distributed their findings. The Tennessee Bar Association, which had been largely passive in the '96 campaign, was an active participant in '98. In addition to having adopted a "Response to Criticism of Judges" policy, the bar produced a series of radio ads in the Knoxville area that survey data had determined to be a fruitful market.

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[82] The first story about the Odom decision was apparently the result of a call from an assistant district attorney to a reporter. Memo to court Public Information Officers from Tennessee's PIO, Sue Allison, August 27, 1996 (on file with author). The Tennessee Conservative Union organized the campaign against White, with active support of the Republican Party.

[83] In fact the appellate retention elections in 1990, '92 and '94 were all "characterized by the total lack of campaign activity." See Reid, Traciel V., "An Analysis of Judicial Retention Elections in Tennessee (on file with author).

The ad focused on the need for voters to participate in judicial elections and to base their judgments on the report of the recently adopted Judicial Performance Commission. The Tennessee Bar Association offered copies of the evaluation by mail and via their website (from which a surprising number were downloaded). Finally, Justice Birch had a significantly more extensive public record than Justice White and was, therefore, better known to a broader public.[84] Also in the same 1994 retention election in which none of the appellate judges campaigned, Justice Birch mounted a campaign for retention to the Supreme Court even though there was no known opposition.[85] The lesson seems to be that judges who are subject to retention in office should be particularly pro-active in their communication with the media and the public.

The success of Justice Birch, however, is not to be taken as a harbinger of the future. For political campaigns against sitting state judges are becoming more widespread, in at least one case, as part of a nationally orchestrated enterprise. For example, the tort reform movement has been focusing on judges for some years. This is an area where courts have made important policy decisions that have generated strong responses. At least since the Texaco-Pennzoil case the issue of lawyer contributions to judicial campaigns has been a major topic of discussion.[86] The balance of power on the Texas Supreme Court changed some time ago and the battles between plaintiffs' and defense attorney's organizations continues. Instead of being attacked for its ties to personal injury lawyers, the Texas Court is now criticized for its fundraising from and support for the defense side. This year in Ohio the business lobby is supporting the election of allies to the three supreme court seats on the ballot. In Illinois, where the supreme court overturned a tort reform package, plans are apparently already underway for the 2000 election when three justices will face

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84 After engaging in private practice, Justice Birch had served as an Assistant Public Defender, an Assistant District Attorney General, a trial court and appellate court judge. He had been elected and reelected to those judgeships, and elected to a term on the Supreme Court after being initially appointed. He had also been active in a broad range of professional and community activities.

85 Op.Cit, fn.83

86 Concerns over lawyers' campaign contributions motivated the appointment of an ABA Task Force on Lawyers' Political Contributions. Part One of the Task Force's "Report and Recommendations," was adopted in August 1998. Part Two, which is devoted to judicial elections, proved to be sufficiently controversial that its consideration has been deferred.

the voters.[87] This is a major continuing policy debate that it could be argued is precisely the kind of issue that the people should be able influence on a policy-making court, at least as long as no constitutional protections are violated. However, campaigns against sitting judges have not been limited to appellate courts.

The most active national effort to evaluate judges for the content of their decisions appears to be the work of StateSource, an organization funded in part by the Koch family and with ties to Citizens for a Sound Economy, a conservative advocacy group. StateSource has been very active in Oklahoma, and to a lesser extent in Florida, Alabama, and Kansas. The Oklahoma effort appears to be the most comprehensive so far. The StateSource website describes a sophisticated political strategy much like that of any interest group seeking to promote a particular issue and/or candidate. It clearly delineates their time line for research, web page development, earned media, direct mail and presentations to chambers of commerce and selected business groups and media.[88] As part of this effort, StateSource surveyed members of the state bar and asked them to evaluate trial and appellate judges up for review. Quite reasonable questions about job performance, docket control, and impartiality requested scaled responses. Somewhat more loaded either-or questions asked about 1)the basis of the judge's rulings as "being judicial restraint and an emphasis on legal precedent" or "innovative interpretations of the law"; and 2)the effect of the judge's rulings "being the willingness to dispose of cases on motions when appropriate" or "being a desire to send all issues to a jury." The content of Appellate judges' decisions were also evaluated. Out of responses from approximately 11% of the bar, a score of 1-100 was constructed for each judge and their "grades" widely distributed well in advance of the election. (Trial judges' success on appeal was supposed to be folded in, but it is not clear whether those data were ever collected.)

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[87] Mahtesian, Charles, "Bench Press," Governing, August 1998.

[88] See www.statesource.com

Despite the low response rate, the survey firm expressed great confidence in the results.[89] More problematic, is the inability of a reader to determine exactly how the scores were calculated.[90] As might be imagined, these widely distributed results were greeted with a negative response from the judiciary and many members of the bar. However, rather than simply criticizing the results, under the direction of the chief justice, the Oklahoma Judicial Evaluation Commission was established to evaluate judges in a more systematic and balanced manner.[91] With the assistance of a political scientist member of the Commission and focusing only on appellate judges standing for retention in 1998, their survey instrument was sent only to lawyers whose names were drawn from court cases before those judges during the past year. Perhaps not surprisingly, the results were quite different and significantly more positive.[92] Here again it was a proactive effort initiated by a judge that provided the broadest response.

Business-oriented groups are not the only ones seeking to evaluate judicial performance based on the compatibility of judicial decisions with group interests. The Traditional Values Coalition surveyed the 40 California appellate judges standing for retention in 1998. Reverend Louis P. Sheldon, chairman of this conservative Christian group described the coalition as a "grassroots Christian church lobby group representing 36,000 churches nationwide ... [that] opposes abortion, pornography and obscenity and supports religious liberty and the rights of parents to educate their children at home."[93] Only 14 of the 40 judges responded to the questionnaire; the others declined on the basis that they should be evaluated on their record, not on their prior memberships in groups or judicial philosophy, which were the subjects of the eight

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[89] "Judicial Survey Brings Mixed Response," Tulsa Daily Commerce, June 24, 1998. The survey was conducted by Oklahoma Secretary of State Tom Cole's political consulting firm of Cole Hargrave Snodgrass & Associates, Inc.

[90] Numerous telephone conversations with StateSource personnel finally elicited a refusal to provide the information required to evaluate the survey. I was finally told that they are simply providing information for the voters.

[91] Judges were graded on Legal Ability, Integrity, Communication Skills and Deportment at Oral Argument, Judicial Temperament and Administrative Performance. Respondents were then asked whether or not each judge should be retained.

[92] "Final Report," Oklahoma Judicial Evaluation Commission Survey, September 11, 1998

[93] Guccione, Jean, "Traditional Values Survey Splits the State's Judiciary," Daily Journal, September 21, 1998, p.1

questions. Responses to only three questions were reported in the voters guide: 1) prior to becoming a judge were you a member of the ACLU?; 2) Do you subscribe to the jurisprudence of "original understanding" as articulated by Judge Robert Bork? (Interpret law based on understanding as it was originally written, also known as framers intent); and 3) Do you subscribe to the jurisprudence of the "constitution as a changing document" as articulated by Lawrence Tribe? (Judges can legislate law according to modern day standards).[94] Not surprisingly the judges who did return the questionnaire all responded to the questions the way the Traditional Values Coalition would find "correct."

As a national organization, the Coalition is poised to repeat this process elsewhere. Many of the appellate judges, including some respondents and some non-respondents, spoke to the question of whether and how judges should be accountable to voters and whether such inquiries threaten judicial independence. Coalition chairman Sheldon dismissed such concerns: "That independence of the judiciary is their invention ... they should be accountable to the public."[95] A more persuasive view was articulated by Voters Guide editor Beverly Sheldon: "If the justices don't like the coalition's questions, she said, they should be educating voters on how to evaluate judges. It is in the lap of the justices to figure out a way to communicate to the voters, she said. They need to find a way to do that." Indeed they do.

As has been suggested in a number of venues, there is surely a place for others, especially the bar, to play a role in placing a single decision in the broader context of a judicial career and in articulating the role of the judge in our constitutional order that dictates adherence to the law.[96] But

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94 California Voters Guide - Traditional Values Coalition. The actual questions submitted to the judges about Bork and Tribe did not contain the parenthetical explanations (Appeals Court Justices Candidate Questionnaire for Voter Guide) and it appears that 9 of the 14 judges, rather than responding positively to the Bork view, provided statements of their general philosophy from which the Voters Guide Editor extrapolated. The Voters Guide also reported the votes on three Supreme Court cases by the four justices standing for retention. Both documents on file with author.

95 Op. Cit, fn 93

96 See for example Bright, Stephen, "Political attacks on the judiciary," 80 Judicature January-February 1997, p.1-9 and "Independence of the Judiciary," Roadmaps, American Bar Association, forthcoming.

ultimately judges themselves must take on a public role if they are to insure the people that they are appropriately accountable and worthy of the independence necessary for the Rule of Law to flourish.

CONCLUSION

Sustaining support for judicial independence in this age of political and media scrutiny is a weighty challenge. It has been argued here that central to meeting that challenge is a judiciary that recognizes the importance of communicating with the public in ways that will enhance their legitimacy and justify their independence.

Yet this too is not uncomplicated. For mixed messages about judicial speech abound. As restrictions on judicial speech are invalidated in court decisions based on the First Amendment[97] judges are freer to assert their views on a wide range of substantive topics, including topics that might come before the courts. Left to their own devices, some judges will speak out in ways that do not send the message of accountability to the law. To the extent this occurs, it is all the more important that the public not be left to generalize from the remarks of an individual judge. At the same time, however, in some jurisdictions judges seem to be increasingly restricted in their efforts to inform the pubic.[98]

It is appropriate and to be expected that the media will continue to review the performance of judges. And a good deal of it will no doubt be critical. That is both their right and their role. In his position as chair of the Executive Committee of the Judicial Conference of the United States, 6th Circuit Judge Gilbert Merritt initiated widely praised communication with the media about the policy decisions of the Conference. Yet that did not protect him from later criticism about an individual decision that included personal attacks. It would be unrealistic to expect otherwise. But that does not in any way diminish the value of his efforts to make the courts more accessible to the

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[97] See, for example, Buckley v Illinois Judicial Inquiry Board 997 F2d 224 7th Circuit (1993)

[98] See, for example, In re Broadbelt 683 A.2d 543,548 (N.J. 1996) prohibiting judges from regular television appearances commenting on cases pending in other jurisdictions.

public that they serve. The goal is to promote an understanding of the judicial role so that criticism of judicial behavior and even of judicial decisions can be expressed in a way that is cognizant of the whole.

The media can and do get the message as illustrated in a recent series of New York Post articles with the headline "10 Worst Judges," which on its face seemed to be yet another ad hominem attack. Yet it began by noting that the vast majority of New York judges are hard working and competent. Sounding quite responsive to criticism of the media for attacks on judges for individual decisions, the article states that "every judge on the Post's list earned a spot for a pattern of questionable rulings or behavior, not just one blot on the record."[99] These articles were followed by one entitled "The Verdict is in: These are the city's best."[100] It is perhaps telling that none of the bar organizations established to respond to unjust criticism of judges chose to react.

Political scrutiny of judges will also continue, if not increase, at least in the immediate future. Interest group techniques are being used to target judges; denying that reality or hoping it will disappear is not likely to be effective. Judges have come to understand that they must respond to election season attacks by reaching out to the public. But as yet there does not seem to be a broad understanding of the importance of greater openness and accessibility on an ongoing basis if the public is to value the role of the judiciary in our constitutional democracy. Years ago U.S. District Judge Edward David promulgated "Ten Commandments for the New Judge."[101] Consistent with the times, his commandments relate only to behavior on the bench. In this age of political and media scrutiny, it may be time for some additional suggestions. Many have been implied in the discussion above. It is only with appropriate accountability that judges are in a position to enhance their own legitimacy and thereby help to safeguard judicial independence.

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[99] "10 Worst Judges, Part 2" New York Post, September 28, 1998, p.12.

[100] New York Post, September 29, 1998

[101] Originally published in 1961 (ABA Journal, December 1961), they were revised eighteen years later (65 ABA Journal, April, 1979).