State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

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O'Connor Asks for "Hard Look" at Increasing Size of Federal Judiciary

(The following is an excerpt from a speech given by Supreme Court Justice Sandra Day O'Connor at the U.S. Ninth Circuit Conference in August in Santa Barbara, Cal. It is reprinted with the permission of Justice O'Connor.)

I joined the Supreme Court in 1981. Since that time, the total filings in the United States Courts of Appeals have increased by roughly 60%. Drug-related cases have tripled. Criminal cases filed in the Federal District Courts have increased 50%. Bankruptcy filings have doubled. Over the same period, the number of filings in the Supreme Court also has risen dramatically. We have seen a 63% increase in the number of certiorari petitions filed in criminal cases. Filings of criminal *in forma pauperis* petitions have increased an astonishing 132%. The growth in the number of civil filings —by about one-third—has been more modest, but still substantial.

The consequences of the burgeoning federal docket, especially the federal criminal docket, are staggering—particularly when one stops to realize that the federal judiciary itself has grown much more slowly than the caseload.

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Supreme Court Justice O'Connor Encourages State–Federal Cooperation at Local Levels

by James G. Apple

U.S. Supreme Court Justice Sandra Day O'Connor, one of only two sitting justices on the Court with prior state court experience, told the *State–Federal Judicial Observer* in a recent interview that because the dual system of courts is a "difficult system to operate," judges in the lower federal and state courts have a special obligation to create opportunities for resolving tensions and engaging in training and education programs from which all could benefit.

Noting that "the extent of supervision of the Supreme Court over the system is necessarily small," Justice O'Connor said that federal and state courts at the local level must work and function together to make the system work.

She particularly noted the value of collaboration to reduce strain between state and federal courts. In recalling the serious tension that existed between the state and federal courts over habeas corpus issues when she was sitting on the Arizona Court of Appeals, she observed that "some method that would have gotten us together would have been very desirable. There was a wall between the state and federal judges."

"Having opportunities for the judges from the two systems to get together is clearly a productive way to approach this problem," she said.

She specified the need for some mechanism "which would allow members of the bar, state judges, and federal judges to know what the others are doing so each knows what can be expected of the others."

While "formalizing contacts between judges of the two systems may not be necessary," she commented, "such institutions as state–federal judicial councils are desirable if they can produce results."

Justice O'Connor also made the following points:

• In capital punishment cases, legislation in the states and in the Congress that would make possible a single round of habeas corpus review with adequate representation at all stages would be "productive and desirable."

• The decline in professionalism among lawyers is "a problem in which judges from both systems have a stake and which should be a matter of mutual concern." It furnishes a "perfect area for total cooperation among the judges in the setting of professional standards."

• Mandatory alternative dispute resolution (ADR) procedures should be promoted in both the state and federal courts. There is a "tremendous amount of litigation which could be moved and handled outside the court systems." ADR should be made mandatory in both state and federal courts "so that a litigant could not escape from one system into the other."

• State and federal courts need to cooperate in promoting mediation, which is "a more satisfactory way of resolving disputes because it is more satisfying to litigants." Participants are "more satisfied with results because the process is therapeutic." Parties can "speak their minds without interruption from lawyers."

• Use of CD-ROMs (computer-readable compact discs) for information storage by courts and lawyers should be expanded, particularly in the case of pleadings. Pleadings could be placed on discs for exchange by lawyers and filing in the clerk's office. ❑

U.S. Supreme Court Justice Sandra Day O'Connor

Breast Implant Cases Lead to Model for Nationwide State–Federal Cooperation

Nineteen thousand breast implant cases have led to the creation of an exemplary model for nationwide state–federal cooperation, mass tort coordination, and case management.

Chief U.S. Judge Sam Pointer (N.D. Ala.), supervising judge for the federal multidistrict litigation (MDL), is directing the national effort to control and manage pretrial matters and issues for the 3,500 federal cases and over 15,000 cases pending in the state courts.

These cases have generated over 1 million documents. To make document retrieval more manageable, Judge Pointer has implemented a unique filing system that places defendants' discovery documents on CD-ROMs, computer-readable compact discs that hold thousands of graphic images. The transfer of document contents to CD-ROM ensures that defendants will not be overwhelmed by repetitive document requests.

Distributing documents on CD-ROM has proved cheaper and more efficient than requiring attorneys from different geographical regions to copy documents at a central depository.

The CDs contain only defendants' discovery documents. A plaintiffs' steering committee created an index to allow for the search and retrieval of relevant documents from the discs. These documents include complaints, tests and studies, research and development, outlines, laboratory notebooks, insurance policies, letters and memos, contracts, patents, and inspection procedures and protocols. For $25 a CD containing 15,000 documents is available to litigants and attorneys in both federal and state court actions.

Judge Pointer also developed a protocol for the large number of depositions scheduled in breast implant cases. The deposition protocol ensures uniformity and is designed to assist attorneys in deposition scheduling. The protocol addresses, *inter alia*, locations for taking depositions, selection of attorneys to conduct examinations, the sequence of examinations, videotaped depositions, supplemental depositions, rulings concerning disputes at depositions, and marking of deposition exhibits.

Depositions of plaintiffs, defendant–physicians, and expert witnesses are conducted in a "home district," while those of non-health care defendants are scheduled for 1 of 16 cities. An MDL attorney conducts the principal examination of the deponent. In advance of the deposition date, the MDL attorney coordinates with plaintiffs' counsel to select an additional attorney who will examine the deponent on nonredundant matters after the principal examiner has concluded. Supplemental depositions are permitted only upon motion for good cause made within 60 days of the conclusion of the originally noticed deposition.

This past spring, at the invitation of Judge Pointer, a subcommittee of judges of the Mass Tort Litigation Committee, National Conference of Chief Justices, met with attorneys representing plaintiffs, defendant manufacturers, and health care provider–defendants to share information and discuss coordination in the litigation. The conference, held in Birmingham, Ala., was funded by an agreed assessment of plaintiffs and defendants in the federal MDL proceedings and organized by the National Center for State Courts.

The subcommittee was formed after Judge Pointer requested that each state chief justice identify a trial judge who was or possibly would be handling silicone gel implant cases in that state. Forty-two chief justices responded by naming the 52 judges who now constitute the subcommittee. ❑

Special Issue of Justice System Journal *Focuses on the Impact of Tort Litigation on Courts*

A series of empirically based articles contained in a special issue of the *Justice System Journal* (vol. 16, no. 2, 1993) clarifies the effects of tort litigation on courts. The special issue was recently published by the Institute of Court Management of the National Center for State Courts.

In some instances conventional attitudes and viewpoints about such effects are contradicted by the articles.

The publication of the issue was prompted by the lack of systematic evidence relating to allegations that an increase in tort litigation is hampering access to courts and that excessive insurance awards translate directly and steeply into increased insurance rates and higher business costs.

The following six themes emerge from seven articles under the general heading "Torts: Understanding the Pattern in the Courts":

1. Punitive damages awards are infrequent.

2. The expansion of potential liability does not necessarily lead to more litigation. As an example, medical malpractice claims are infrequent, seldom litigated, and result in plaintiff's victories in only a small proportion of cases.

3. The best predictor of the size of awards by jury and bench trials for all types of torts is the type of party involved. Institutional defendants are more likely than individuals to gain a favorable verdict at trial, but have larger judgments imposed against them when they lose.

4. The trial is not the "main event" in a case (as is commonly believed). Many cases settle after the trial, and in some cases appellate courts substantially change the results.

5. Litigation patterns vary among the different types of torts, but they do not all conform to conventional expectations. While policy makers, the media, the public, and others focus on product liability and medical malpractice cases, the largest increase in filings has been in automobile torts, and these cases are often the most complex and result in the largest damage awards. A pro-plaintiff surge in products liability cases has not occurred, and the number of plaintiff verdicts has remained stable for the past several decades.

6. Jurors do not substitute passion for scientific evidence in complex litigation. Such factors as manner of presentation of evidence, jury instructions, and defense lawyer decisions may affect jury decisions, cause questionable judgments, and call for procedural reforms, but they do not necessitate abandonment of the jury system or the elimination of conventional juries.

The NCSC reports that almost the entire stock of copies of the publication has been distributed to subscribers, libraries, and other institutions. ❑

Inside . . .

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The entire federal judiciary currently comprises some 846 judges. As one commentator recently noted, there are corporate law firms larger than that. The result is that civil cases in many federal courts are put at the end of the line. According to one report I recently read, last June over 28,000 cases across the nation were still awaiting trial in federal court more than three years after they were filed. In these circumstances, time for oral arguments may be reduced or eliminated altogether. Fewer courts of appeals opinions are written and, of those written, fewer still are published. Judges may be forced to rely more heavily on their staff while devoting less and less time to each individual case. The bottom line is that the nature and quality of federal judicial service appears to be changing dramatically.

One of the principal causes of this seachange is Congress's current enthusiasm for federalizing claims that traditionally have been heard in state courts. For much of our nation's history, of course, federal court jurisdiction was quite limited. The great majority of criminal cases were charged and tried in state courts. As they say, things have changed. More than one-third of the cases pending in the Ninth Circuit last year were criminal filings. And Congress is continuing to rapidly expand the range of cases triable in federal court. The federalization of drug-related offenses and certain crimes involving firearms are perhaps the best known examples. In this circuit, drug cases now account for more than one quarter of the criminal docket. But Congress's foray into local law enforcement has reached far beyond the war on drugs. Recently Congress made the willful failure to pay child support a federal offense. Carjacking is now a federal crime. It seems likely that stalking and crimes of domestic violence soon will be federalized. More and more, Congress is responding as a state legislature might in addressing matters formerly of state and local concern.

In short, federal courts traditionally have handled only about 2% of the nation's litigation. They have been staffed by judges who have been particularly well regarded and well qualified. They have dealt chiefly with a limited number of uniquely federal issues—constitutional and statutory matters of import to the nation. We are facing a watershed change in that system—a change that threatens irrevocably to enlarge the federal bench and to expand its jurisdiction to include a wide range of traditionally nonfederal issues.

Not surprisingly, a number of federal judges have recommended increasing the size of the federal bench. Judge [Stephen] Reinhardt [U.S. 9th Cir.] thinks it should be doubled. Not everyone endorses this solution. Judge Jon Newman of the [U.S.] Second Circuit has suggested that the federal judiciary cannot be effective if the number of authorized Article III judges exceeds 1,000. He would eliminate federal court diversity jurisdiction to achieve sustainable limits. A Federal Courts Study Committee noted with some sympathy, but did not specifically endorse, a 1,000 judge cap. Chief Justice Rehnquist, however, has warned that such a cap would be "undesirable" without other changes in the federal courts. Chief Judge Gerald Tjoflat of the [U.S.] Eleventh Circuit has argued that the size of the federal bench should not be increased at all, but rather that the productivity of the courts should be increased by enhancing automation and support staff and reducing the demands placed on the judiciary.

I do not have the answer to this problem. But the first step, in my view, is to encourage judges and lawyers to take a hard look at the issue and help develop some answers. Surely one of those answers must be to raise the consciousness of the Congress to the dangers of the ever-increasing burdens it is assigning to the federal courts. There must be ways to make the federal legislative and executive branches more sensitive to the very legitimate concerns of the federal court system and to the dangers of the present dramatic enlargement of federal court jurisdiction. The conference resolution proposing a national commission with representatives of all three branches of government to develop long-term solutions and a consensus about the mission of the federal courts is sensible and it may attract support. Writing and speaking about the problem, as we have been at this conference, are additional means of communicating with the political branches. We as judges must endeavor to make the other branches of government aware of the problems confronting our court system and contribute to solving those problems by proposing reasonable alternatives. ❑

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A note to our readers

The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. Edited versions of letters may be printed by the *Observer* with the permission of the author.

The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Decisions concerning publication of a submitted article will be made by the editorial staff.

Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

OBITER DICTUM

Erosion of Public Confidence in Criminal Justice System Is Source of Increased Federalization of Crime

by Judge Stanley Marcus
(U.S. S.D. Fla.)

(This column has been adapted from a speech given by Judge Marcus at the Western Regional Conference on State–Federal Judicial Relationships in Skamania, Wash., in June.)

The problems I would like to address concern not only the trend toward the federalization of state crime but also the critical backdrop against which this issue will play itself out, the increased erosion of public confidence in our criminal justice system, and the fundamental threat to freedom implicit in that withdrawal of public support.

Plainly, recent years have witnessed a trend toward the federalization of a wide variety of narcotics offenses, violent street crimes, firearms violations, and other crimes that have historically been prosecuted in the state courts across this country.

At the same time, the substantial growth of the civil docket is not simply a reflection of America's litigiousness. It is also the product of Congress's response to urgent social and economic problems—the creation of a host of new federal rights and remedies in the post-war period in such important areas as civil rights, labor relations, and employee benefits. Although the current trends toward federalization surely have been responsive to important contemporary social and political concerns, the long-term systemic costs to the federal and state courts are real and deserve serious attention and discussion.

Expanding Federal Jurisdiction May Have Adverse Consequences

It is surely the province and function of Congress to define the jurisdiction of the federal courts as Congress perceives a need for a federal response to changing conditions. I do believe, however, that the current trend of a rapidly expanding federal jurisdictional base, especially in the criminal area, may affect the judiciary's ability to manage the core responsibilities of the federal court (i.e., the adjudication of cases calling for the interpretation and application of the Constitution, laws, and treaties of the United States). The resulting cost to our tripartite federal system, the health of which depends upon the robust strength of each branch, may be quite real.

Civil filings in the federal courts have increased approximately 300% over the past 40 years. Even more dramatic are the changes in the bankruptcy courts and the federal courts of appeals, where filings have risen 2,800% and 1,500% respectively. Unlike the other areas of the courts' workload, criminal filings have fluctuated widely since 1950, with no consistent pattern. Criminal filings in 1992 were nearly 70% higher than in 1980, but only 21% higher than in 1970. However, because of the complexity of criminal cases and the enormous increase in the filing of drug cases, the numbers alone do not adequately explain the increased demand on the resources of the courts. For example, in 1992 criminal jury trials required 25,000 trial days, 56% more than in 1973, and accounted for more than 47% of all trials in the district courts. Between 1980 and 1990, fueled largely by the increase in drug cases, criminal cases filed in the federal district courts rose by some 60%, while at the same time the drug cases increased 290%.

Changes Impact Courts' Effectiveness

The impact of these changes on the ability of the federal judiciary to manage effectively both the criminal and civil docket has been substantial. To take the example of the Southern District of Florida (where I sit), criminal trials occupied 84% of the total trial hours spent in 1992. Ultimately an answer to the problems created by the expanding federal caseload may be found in striking the right jurisdictional balance between the federal and state courts.

Traditionally, the core functions of the federal courts have been thought to include the following:

- Enforcing the institutional arrangements and individual rights and liberties provided by the federal Constitution;
- Adjudicating disputes involving the interests of the federal government;
- Resolving controversies between states;
- Interpreting and applying federal statutes and treaties;
- Developing federal common law; and
- Deciding appeals from rulings by federal administrative agencies.

These functions are by and large the exclusive domain of the federal courts in our constitutional framework. To the extent that they are eclipsed by an ever-expanding universe of functions far removed from the core, there is the danger that they will not be addressed with the same quality and thoroughness. For that reason, the creation of evermore federal judgeships to keep pace with the explosion of litigation and the growing jurisdictional base may not be an adequate answer in maintaining the ability of the federal courts to attend to these core functions. At the same time, an ever-expanding federal jurisdictional base and the concomitant movement of jurisdiction from one equal sovereign judicial system to another will surely affect the vitality of our state courts and our federalism.

Five Basic Areas of Federal Prosecution

It seems to me that there are five basic areas in which a federal prosecution makes sense in the context of our system of federalism:

1. The first area includes those criminal offenses directed against the national sovereign itself, its officers, or its treasury. Obviously included in that category would be such crimes as counterfeiting, treason, or assaults on federal officers.

2. The second area embraces crimes involving a substantial multistate or international criminal enterprise, such as some organized crime enterprises or drug cartels.

3. The third area involves those activities that, even if isolated within a single state or locality, would involve criminal enterprises so large or so sophisticated or intractable in their nature or scope as to require the application of federal resources.

4. The fourth area incorporates activities clearly demonstrating systemic top-level or widespread corruption in a state or county.

5. The fifth and last area comprises crimes impinging on areas of civil rights traditionally protected by the federal government.

Effects of Expansion Are Significant

The effects that the expansion of federal jurisdiction beyond these specific areas may have on the nature of the federal judicial branch are real and significant. Should we ignore them in the effort to create a federal forum for otherwise valid and important controversies traditionally heard by the state bench, we may be endangering precious and delicate resources necessary for the continued vitality of our federalism.

To make these observations in the abstract would be perilous, however, if we did not return to what is an equally fundamental theme: the erosion of public confidence in the criminal justice system. After all is said and done, our people do not see a federal criminal justice system or a state criminal justice system, but rather simply a criminal justice system.

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State–Federal Committee Hears Reports on Condition, Trends of Federal Courts

The contrast of the growth, decline, and periods of stability of criminal filings in the federal courts with the dramatic growth of civil, bankruptcy, and appeals cases was a central point of discussion at the June meeting of the federal Judicial Conference Committee on State–Federal Jurisdiction in Washington, D.C.

"The Criminal Caseload: An Increasing Burden on the Federal Courts?" prepared by David L. Cook of the Administrative Office of the U.S. Courts, was one of two reports received by the committee to obtain a "snapshot" view of the business of the federal courts. The substance of the report was that "criminal filings [in the federal courts] have had long periods of consistent growth over the last 40 years, equally long periods of consistent decline, and long periods of relative stability."

The committee, chaired by U.S. District Judge Stanley Marcus (S.D. Fla.), received a second report by William T. Rule (also of the Administrative Office) on civil caseloads in federal court since 1950.

After analyzing such factors as the nature of the criminal caseload, the impact of the trial docket, and resource changes at the Department of Justice, Cook posed a rhetorical question: "Are these factors sufficient to create major concerns about the burdens (on the federal courts) of the criminal caseload?" His answer was "They are."

Cook concluded that "[federal] judges are spending a disproportionate amount of their time on criminal cases, with more trials, defendants, and sentencing. Even though the number of criminal cases has not changed significantly over a 20-year period, the nature of the cases has changed sufficiently to result in major concerns, especially over the large portion of available judicial resources consumed by the criminal dockets."

Rule told the committee that the number of U.S. civil cases commenced annually nationwide increased approximately 150% in the 40-year period since 1950. The number of private civil cases filed each year increased by more than 400% in the same period. However, the number of new criminal cases per year in that period increased only a modest 28%.

Such trends forecast annual civil case filings exceeding 830,000 by the year 2020. With new criminal case filings anticipated to be in the area of 430,000 per year, this new total caseload could result in a "district court bench of 2,800, and an appeals bench of nearly 2,300" (compared to 649 district judges and 179 appellate judges at present).

The committee also considered a draft of a paper on the impact of eliminating diversity jurisdiction in the federal courts, which has been a topic of attention at the most recent meetings.

Another major item on the agenda was pending legislation in the current session of Congress that would affect the federal courts. The committee heard brief reviews of the current versions of the Violence Against Women Act, The Crime Control Act of 1993, two versions of a "stalking bill," the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Religious Freedom Restoration Act, the Product Liability Fairness Act, several child support enforcement bills, the Freedom of Access to Clinic Entrance Act, the Multiparty, Multiforum Jurisdiction Act, and the Federal Solvency Act.

The committee is composed of 9 federal appellate and district judges and the chief justices of 4 state supreme courts. It meets twice a year—it will meet again in January 1994, in Washington, D.C. ❑

State and Federal Judges Explore Frontiers of Science at Fourth Annual Medina Seminar

Judge John Kern III (right) of the District of Columbia Court of Appeals introduces Dr. Harold T. Shapiro, president of Princeton University, and Mrs. Shapiro at the fourth annual Harold R. Medina Seminar for state and federal judges at Princeton University in June.

Frontiers of science—astrophysics, the environment, DNA, and molecular biology—were the popular subjects for state and federal judges participating in the fourth annual Harold R. Medina Seminar on Science and Humanities at Princeton University in June.

Professor David Wilkinson of the Princeton physics faculty led off the science day with a lecture on new developments in understanding the universe, from distant galaxies to black holes and questions about the "Big Bang" theory of the origin of the universe.

He was followed by Professor Rob Socolow, head of the Center for Energy and Environmental Studies at Princeton. Professor Socolow's lecture focused on the increase in carbon dioxide in the atmosphere and other issues related to global warming.

Professor Eric Lander of the biology department at the Massachusetts Institute of Technology concluded the day with a presentation on the basic elements of genetic science and DNA classifications and the policy issues posed by new developments in these fields.

An interlude to the strict science presentations was a slide presentation and lecture by Professor David Billington of the Princeton engineering faculty on the aesthetic and cultural considerations in designing and building bridges.

The five-and-a-half day seminar also included presentations on subjects within the disciplines of philosophy, politics, literature, history, art, drama, and music, all centered on a theme of cultural diversity.

Twenty-two federal judges, 17 state judges, and 2 administrative law judges attended.

The Judiciary Leadership Development Council of Washington, D.C., the Federal Judicial Center, and Princeton University sponsor the seminar in June of each year.

The 1994 seminar will be held from June 9–14. Interested judges can receive information on next year's seminar by writing the Judiciary Leadership Development Council, c/o Judge John Kern III, 2510 Virginia Avenue, N.W., Washington, DC 20037, or the Judicial Education Division, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002. ❑

Courts' Weak Relations with Media, Public, Legislatures Are Topics at S–F Meetings

Corrective Actions Recommended Include More Contacts with Lawmakers, Press, and Citizens

by James G. Apple

News Analysis

Poor relations between the courts and the media, the public, and legislative bodies are topics of frequent comment by judges at state–federal gatherings.

At one of the 1992 meetings of the State–Federal Judicial Council of Virginia, the relationship between the public and judges was a principal item of discussion. Council members concluded that "the public and the courts see each other differently" and "both seemed to lack a good understanding of the other."

The subject was raised at a meeting last year of the National Judicial Council of State and Federal Courts in Asheville, N.C. One member of that committee commented that "we simply must expend more time and effort in developing effective communications between judges and the public, including our state and national legislators."

Issue Discussed at National Conference

The issue arose at several different times during the proceedings of the National Conference on State–Federal Judicial Relations in Orlando, Fla., in April 1992. Two participants, reporting on the conclusions of their respective discussion groups at the conference, noted the need for more effective communications with the public, with legislators, and with members of the executive departments of government at the state and national level. Chief Justice Ellen Ash Peters (Sup. Ct. Conn.) summarized the comments of her discussion group: "One of the other points of agreement in our group was that we should endeavor to reach our legislators and our friends in the executive [departments]. But we really need to go beyond that. If judges are going to be effective communicators about the needs they have, they have to enlist allies. We have to find a way to enlist allies in the corporate world, among other consumers. And we probably have to learn to do something we as judges find very uncongenial, which is to enter into a dialogue with the press that can write the stories that help us or the stories that hurt us, in our pursuit of the resources that we urgently need."

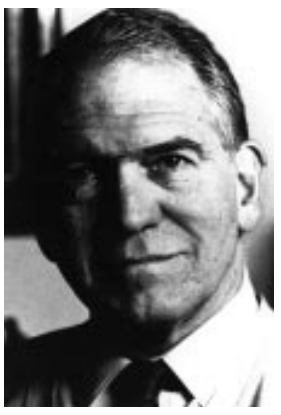
Chief Court of Appeals Judge Clifford Wallace (U.S. 9th Cir.), reporting on another discussion session at that conference, stated that a common topic was "communications, perhaps education, from the court systems themselves to political branches, the bar association, our court users, our major litigants, and the public as a whole."

Several at the conference made specific reference to judges' reluctance to communicate with legislators. Congressman Hamilton Fish of New York noted that during an average day many people contact him about legislative matters of interest to them. "But I hear from judges, however, a relatively few times in the course of an entire year," he said.

More recently, these relationships were topics of conversation and comment at the Western Regional Conference on State–Federal Judicial Relationships in Skamania, Wash., this past June.

Judges Thought To Be Remote

Doris A. Graber, political science professor at the University of Illinois and an expert on public opinion and the media, included a chapter in her book *Mass Media and American Politics* (3d ed. 1989) dealing specifically with the courts and the media. She commented that "judges infrequently grant interviews, almost never hold news conferences, and generally do not seek or welcome media attention, primarily because they fear their impartiality might be compromised." The situation, she said, imposes on the judiciary a "remoteness" that "enhances the impression that judges are a breed apart, doling out justice to lesser mortals." Judicial integrity, the isolation required to maintain it, and the resulting misperception of judges as haughty are thus major factors contributing to the problem.



U.S. Representative Hamilton Fish: Judges rarely contact members of Congress; should start communicating.

Media representatives also must share responsibility for the difficulties. Reporting about courts and court activities is, according to Graber, "imprecise and sometimes even wrong."

News Coverage Often Imprecise

As examples, she reported that an analysis of two Supreme Court cases on school prayer and electoral redistricting revealed that news coverage was "sketchy and imprecise." "Several stories contained serious errors." The author concluded that "reporting of court activities seems to be more superficial and flawed than its presidential and congressional counterparts."

The general ignorance or minimal understanding on the part of many media personnel about even basic court procedures, and about substantive law in general, often results in inaccurate news stories about cases, courts, and judicial actions. Media ignorance or carelessness when writing about or commenting on cases and judgments can in turn lead to misunderstandings and false impressions in the public mind about courts and judges.

In addition, many judges are reluctant to talk to legislators and executive branch representatives, fearing intrusion on the constitutional principle of separation of powers.

Poor public relations have adverse effects on the judiciary. Courts and judges are criticized for delays in the administration of justice. Faulty reporting of cases yields erroneous, usually negative impressions in the public mind about the entire system of justice. Imprecise or ill-advised legislation without judicial scrutiny can impose additional duties on busy judges and already overburdened court administrators. Financial support for court operations and judicial salaries can be left wanting in the halls of Congress, in state legislatures, in the White House, and in governors' offices.

Fortunately there are some activities that judges can endorse and participate in that do not do violence to the necessity of preserving judicial integrity. These activities can enhance the reputations of judges, foster good public perceptions of them, and encourage more thoughtful treatment of them by the other branches of government.

Congressman Fish provided one relatively simple solution in his address at the

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It doesn't require a trenchant observer of social trends to note that there is a rising tide of sentiment among our people that the criminal justice system has gone haywire—it does not protect ordinary people from criminals, it does not even nurture a serious ambition to protect ordinary people from criminals. Just about all it protects are criminals from the violation of their constitutional rights. That is, at the extreme, what appears to be a growing perception.

Movie Indicates Trend

Some time ago I saw a made-for-TV movie that I think is quite indicative of the trend I'm referring to. The movie was about an ordinary man, law-abiding his whole life, whose daughter was raped and murdered by someone who was out on bail and awaiting trial on a similar charge. The viewer is to understand by way of background that the physical evidence and confession of the alleged rapist/murderer were suppressed by the court because of what made-for-TV movies always refer to as "legal technicalities." While it's not clear what happened to the first set of charges, the alleged rapist/murderer is for some reason free and on the streets at the time the movie begins. The ordinary man, whose daughter was murdered, buys a gun, goes up to the putative murderer and shoots him dead. He then turns himself in, confesses all, and is indicted for murder.

What follows in the body of the movie is a courtroom drama with something of a twist. The drama is supposed to derive its tension from the audience's sense that it is difficult or nearly impossible for a defense lawyer to win the acquittal of someone who has blown away the murderer of his daughter bizarrely set loose by an infirm criminal justice system. While the dramatic presentation may have been flawed, the conduct of the trial depicted in this movie was very interesting, a very compelling indication of what people are feeling about our criminal justice system, or at least of what they are perceived as feeling by those in the business of sensing public feelings, tastes, and trends. The trial, needless to say, was going badly for the defense—until the defense attorney, after a rather impassioned exchange with his girlfriend, concluded that he had to "put the criminal justice system itself on trial."

This he did by calling as a witness the very judge who suppressed the evidence in the case against the rapist/murderer. When the judge explained that although he personally was absolutely certain that the physical evidence and confession which he suppressed established guilt beyond any doubt, he was compelled by a number of very subtle and, as presented in the courtroom, laughably technical interpretations of the 4th and 5th Amendments to suppress this evidence. The jury at the end comes back with a verdict that reads: "We find the criminal justice system guilty and the defendant innocent." The good guys hug in delighted surprise and the credits roll.

As someone who has been part of the criminal justice system for many years, first as a prosecutor and now as a judge, I'm obviously deeply troubled by the sentiments that this movie, or at least some of its characters, seem to embrace—sentiments suggesting an almost total lack of confidence in the criminal justice system.

Survival of Liberties Implicated

The very survival of our civil liberties is inevitably implicated in a widespread erosion of confidence in the system. Let me say that it would not be at all difficult to argue the opposite—that in a constitutional system such as ours, public support for the system and its emphasis on defendant's rights is irrelevant; that that's what you have a constitution for, to separate from popular will and passion the individual's basic rights. This view would argue with force that as long as constitutionalism prevails in the United States, and no one I think would suggest for a moment that we're about to toss in the towel on that basic tenet, the civil liberties guaranteed in the Constitution will remain inviolable regardless of public passion. There is much truth in this argument. But I think it is flawed or at least incomplete in that it fails to recognize the enormous role that the people themselves play in the functioning of the criminal justice system.

It is basic confidence in the system that prevents widespread resort to self-help. We are all too familiar with cases, particularly those involving physical abuse between family members, where ordinary people have apparently felt that their vital rights would not be protected by the state, and that they had no choice but to take the law into their own hands and kill. Just beyond self-help lies the dark threat of vigilantism, a specter so utterly poisonous to the rule of law that it has to be regarded by even the most stable democracies with real trepidation.

In the end, whether the rule of law is to be upheld or not is in the hands not of judges, not of prosecutors, not of defense lawyers, not of constitutional scholars, but of 12 ordinary people constituted as a jury. If it were ever to come to the point where those who were indicted for committing acts of self-help, or worse yet, vigilantism, were routinely acquitted by juries—if there could be no conviction against a vigilante because the public stopped believing that what he or she did was wrong and unnecessary—then the rule of law would be in danger of collapsing. More basic even than a *de facto* repeal of due process, which juries can accomplish case-by-case, is the loss of the political base on which all rights ultimately must rest. As Learned Hand observed long ago, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

I think we are far from that point, but I do not see how we can afford to be aloof from or indifferent to a widespread conviction that the government cannot protect the person and property of its citizens. This issue of the erosion of public confidence is basic to the entire debate about the federalization of crime. Indeed, it may not be too strong to suggest that the movement to federalization is driven by that erosion of confidence.

Conclusion

The evolutionary processes of our jurisprudence and our federalism find us actively engaged in a constant reevaluation and refinement of the system itself and its process. While I think that the made-for-TV movie that I mentioned does reflect a genuine frustration with the system, I also think that there's a vast reservoir of fundamental confidence in the brilliance of our constitutional system that can be tapped to begin the task of restoring confidence in our criminal justice system. ❑

RELATIONS, from page 3

Orlando conference: Judges should start communicating with the legislative branch by letters and telephone calls. He specifically urged judges to communicate with Congress.

"On matters to do with judicial administration," he said, "your input to members of Congress can be invaluable. We need to know more about the needs of the courts and the impact of legislation on your workload."

He admonished judges not to "wait until the bills become law. Let's hear from you early in the process and more often."

Judges can also communicate with legislators by inviting them to visit their courthouses and chambers. The Judicial Branch Committee of the Judicial Conference of the U.S. has recommended that federal judges invite representatives and senators from their areas to visit the federal courts to promote a general understanding of court operations and provide opportunities for discussion about court problems. State court judges could undertake a similar program for state legislators and members of the state executive branch.

Contacts between judges, legislators, and executive department representatives about judicial and court administration do not impinge on the separation of powers principle, because such contacts do not involve the exercise of judicial power, the true focus of that principle. As Chief Judge Wallace observed at a recent seminar on issues of federalism in the administration of justice, "the separation of powers doctrine does not prevent representatives from the three branches of government from getting together to discuss problems and solutions."

For improved relations with the media and the public, the Report of the Federal Courts Study Committee recommended in 1990 that (1) each judicial circuit designate a person as a media contact; (2) courts should hold "press days" to facilitate communication between the courts and the media; and (3) courts should continue and expand "publications programs to explain court operations to the public."

Judges can take other actions to improve public relations, including the following:

• Putting public relations for courts on the agenda of state–federal judicial council meetings to increase judicial awareness of the need for such and for the development of a state-wide plan for the promotion of judicial branch interests.

• Having a court public relations or media officer develop press kits and public information bulletins about the operations of courts and judicial duties, and prepare press releases and public announcements on appropriate occasions, such as immediately before the release of an important opinion or judgment.

• Developing ties to specific reporters in the local media, especially those who regularly cover court operations, and encouraging informal visits by them for discussions about court operations to promote greater understanding.

• Sponsoring, with the local bar association, conferences and seminars held at a local courthouse involving judges, court administrators, and media representatives, to promote better understanding of the operations of courts and the problems facing them.

• Establishing in state and local bar associations a Bench/Media Committee to operate like a Bench/Bar Committee.

• Establishing a speakers bureau of local, state, and federal judges, perhaps combining one judge from each system to form a team to lecture at civic clubs, other local organizations, local high schools, and colleges about court procedures, court problems, and judicial administration.

• Seeking funds from the state IOLTA commission or similar institution to develop a film or videotape about court operations and the judiciary for schools and the lay public.

• Turning an old courthouse or public building into a law museum and court education center for local schoolchildren and lay citizens.

• Serving as a resource for the design and implementation of a civics course for local high schools and political science courses for local universities, colleges, and community colleges that focus on the work of the judiciary and court operations.

• Developing, with the assistance of the state or local superintendent of public instruction or schools, a mock trial program to familiarize elementary and junior high school students with the operation of courts, as was done successfully in the state of Washington.

• Establishing an annual lecture series that focuses on the operation of court systems and judicial administration.

Such activities do no harm to judicial integrity and have the potential for assisting in the ongoing need for effective communication between judges and courts and the public they serve. ❑

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