Denver Law Review

Volume 80
Issue 4 *Symposium - History and Practice of Law and the Business of Judging*

Article 14

January 2003

Vol. 80, no. 4: Full Issue

Denver University Law Review

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation

80 Denv. U. L. Rev. (2003).

This Full Issue is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

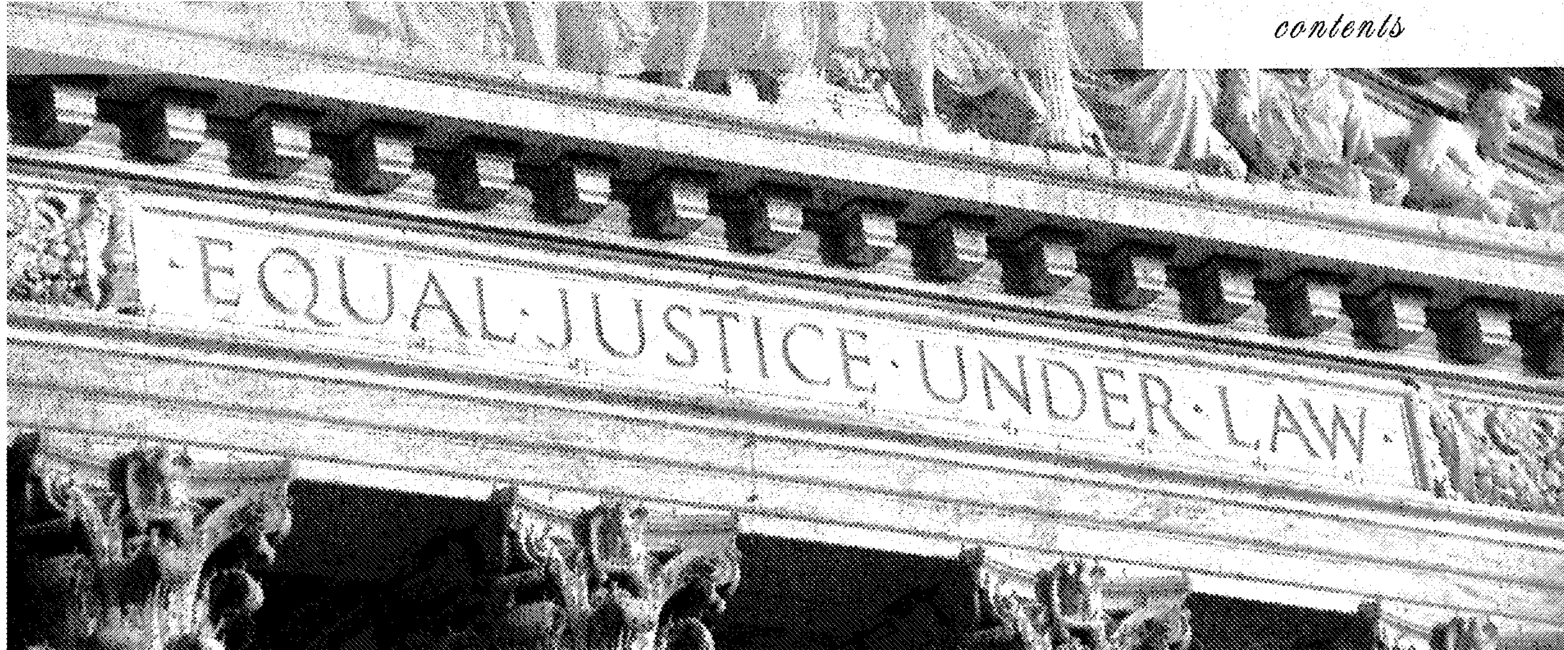
Vol. 80, no. 4: Full Issue

This full issue is available in Denver Law Review: https://digitalcommons.du.edu/dlr/vol80/iss4/14

DENVER UNIVERSITY LAW REVIEW

VOLUME 80

2002-2003



University of Denver College of Law

Law Review

2003 Edition www.law.du.edu/lawreview

i - v **Law Review Information**
Masthead
Administration and Faculty
Editor's Letter

738 **Giving Trials a Second Look**
John L. Kane
Senior District Judge, United States District Court for the District of Colorado

743 **The Making of a Good Judge**
Sherman G. Finesilver
Chief Judge (Retired), United States District Court for the District of Colorado

746 **Judicial Independence and Independent Judges**
Rebecca Love Kourlis
Associate Justice, Colorado Supreme Court

756 **The Practice of Poetry, History, and Judging**
Gregory J. Hobbs, Jr.
Associate Justice, Colorado Supreme Court

765 **Disrespect in the Court: A Judge's Perspective**
Christopher C. Cross
County Court Judge, 18th Judicial District, Arapahoe County, Colorado

770 **Perspective of an Immigration Judge**
James P. Vandello
Immigration Judge, Denver, Colorado

777 **An Egyptian Judicial Perspective**
Aly Mokhtar
Judge, Egyptian Ministry of Justice

783 **Debate Between Judge Lee R. West and Judge Robert H. Henry**
Remarks By Lee R. West
Senior District Judge, United States District Court for the Western District of Oklahoma

787 **Debate Between Judge Lee R. West and Judge Robert H. Henry**
Remarks By Robert H. Henry
Circuit Judge, United States Court of Appeals for the Tenth Circuit

791 **Book Review**
Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties
Ben Lieberman

Denver University Law Review (ISSN 0883-9409)
Summer 2003
The *Denver University Law Review* is published quarterly by the University of Denver College of Law through the Denver University Law Review Association.

Denver University Law Review
7039 East 18th Avenue
Denver, Colorado 80220
(303) 871-6172
www.law.du.edu/lawreview
Cite as: 80 DENV. U. L. REV. ___ (2003).

Subscriptions: Subscriptions to the *Law Review* are $35.00 per volume (add $5.00 for foreign mailing). All subscriptions will be renewed automatically unless the subscriber provides timely notice of cancellation.

Single and Back Issues: Single issues of the current volume are available from the Association at $15.00 per issue. All previous volumes and issues of the *Law Review* are available exclusively from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209 (800) 828-7571.

Copyright: All articles copyright © 2003 by the *Denver University Law Review*, University of Denver (Colorado Seminary) College of Law, unless otherwise expressly indicated. For all articles for which it holds the copyright, the *Law Review* permits copies to be made for classroom use, provided that (1) the user notifies the *Law Review* of the use, (2) the author and the *Denver University Law Review* are identified, and (3) the proper notice of copyright is affixed to each copy. For all other articles, contact the Law Review to request reprint permission.

Form: The *Law Review* generally conforms to *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) and to *The Chicago Manual of Style* (14th ed. 1993). It is the general policy of the *Law Review* not to keep unpublished sources used in articles, notes, or comments beyond their use for verification of citations. Inquiries as to the location of an unpublished source should be directed to the author of the article, note, or comment in which it is cited.

Manuscripts: Please address manuscripts to the Articles Editor, *Denver University Law Review*, 7039 East 18th Avenue, Denver, Colorado 80220. Manuscripts should be double-spaced and cannot be returned unless accompanied by a self-addressed, postage-paid envelope. Manuscripts may also be submitted electronically in Word format via e-mail to articleseditor@law.du.edu.

Previous nomenclature: Published as the *Denver Bar Association Record* from 1923 to 1928, *Dicta* from 1928 to 1965, and *Denver Law Journal* from 1966 to 1984.

Postmaster: Please send all address changes to *Denver University Law Review*, 7039 East 18th Avenue, Denver, Colorado 80220.

University of Denver Law Review
2003 Volume 80 Issue 4

Editor-in-Chief
CHARLES W. CHOTVACS

Managing Editor
CASIE D. COLLIGNON

Articles Editor
COREY A. FINN

Senior Editor
GRETCHEN FUSS

Solicitations Editor
CORY M. CURTIS

Business Editor
SCOTT W. LUNDHAGEN

General Issue Editor
CARRIE S. BERNSTEIN

General Issue Editor
THOMAS NEVILLE

Tenth Circuit Survey Editor
GILLIAN M. BIDGOOD

Magazine Issue Editor
DAVID B. GOTTLIEB

General Editors

EMILY AHNELL
CHASITY BARKER
JENNIFER GOKENBACH
JENIFFER G. HARGROVES
KATHRYN S. KANDA
CHRIS KOUPAL
KAREN MCDONALD
MATT PRING
LINDSEY WILLISON

Senior Staff Editors

BRITNEY BEALL-EDER
BEN LIEBERMAN
ROBERT RILEY

Staff Editors

REBECCA AMENT
PHILLIP ANGUS
DAMIAN ARGUELLO
CARLOS ARIAS
MICHAEL BALSTER
MARK BARR
HEATHER BERGERON
BARRY BROOKS
ENZIO CASSINIS
BRENT CHICKEN
TOM DEVINE, JR.
JENNIFERGOODENOUGH
CHARLES F. HART
KELLY JERKINS
STEVEN JOSEPHY
AMBER JU
MIRO KOVACEVIC
CINDY LAY
TIFFANI LENNON
KIMBERLY MARTIN
VANESSA MILLER
KRISTIN MCCANDLESS
MICHELLE MCDONALD
SUZANNE MEINTZER
LESLIE MILLER
SEAN MOYNIHAN
ALEX MYERS
ROBIN NOLAN
M. NOELLE PADILLA
SUZANNE RAUCH
GRACE HILLARY RILE
EMILY SCHEY
CHRISTA SCHULLER
LYNDALL SCHUSTER
REGINALD SHORT

Faculty Advisors

DEAN ROBERT B. YEGGE
PROFESSOR MICHAEL G. MASSEY

Administrative Assistant

SANDRA S. HOLDER

Production Editor

KIMBERLY KIRVEN

Production Advisor

LAURA RUEL

Administrative Officers

Daniel L. Ritchie, A.B., M.B.A., *Chancellor*
Robert Coombes, Ph.D., *Provost*
Craig Woody, B.A., *Vice Chancellor for Financial Affairs/ Treasurer*
Carol Farnsworth, M.A., *Vice Chancellor for Communications*
Mary Ricketson, B.A., J.D., *Dean of the College of Law*
J. Robert "Jay" Brown, B.A., M.A., Ph.D., J.D., *Associate Dean for Academic Affairs*
Gary L. Alexander, B.A., M.L.L., J.D., *Asst. Dean of Information Services and Library Director*
David Ricciardi, B.S., *Registrar*
Iain Davis, B.A., *Financial Aid Director*
Keryn Goldstein, B.A., *Chief Financial Officer*
Sheila Green, B.A., M.A.L.S., *Reference Librarian*
Martha Keister, A.B., M.A., M.L.S., *International Law Librarian*
Stephen Favreau, Masters, B.A., *Asst. Dean of Administration*
Lauri A. Mlinar, *Director of Events*
Nancy P. Nones, B.A., *Administrator, International Legal Studies*
Laura Dean, B.A., *Director of Alumni Relations*
Robin A. Ricker, B.S., *Program Coordinator, Graduate Tax Program*
Patty Powell, B.A., J.D., *Dean of Student Services*
Julie Field and Robert Yegge, *Co-Directors, Clinical Programs*
Forrest Stanford, B.A., J.D., *Director of Admissions*
Tim Henderson, B.A., M.S., J.D., *Director of Career Services*
Shane Seymour, B.A., M.A., *Executive Director of Development*

Faculty

Tanya Bartholomew, B.A., J.D., *Legal Writing Professor*
William M. Beaney, A.B., LL.B., Ph.D., *Emeritus Professor of Law*
Arthur Best, A.B., J.D., *Professor of Law*
Andrea Bloom, B.A., J.D., *Legal Writing Professor*
Jerome Borison, B.S., J.D., LL.M., *Associate Professor of Law and Director of Student Federal Tax Advocacy Clinic*
Burton F. Brody, B.S.C., J.D., LL.M., *Professor of Law*
J. Robert "Jay" Brown, Jr., B.A., M.A., J.D., Ph.D., *Associate Dean of Academic Affairs and Professor of Law*
Penelope Bryan, B.S., M.A., J.D., *Associate Professor of Law*
John A. Carver, Jr., A.B., LL.B., LL.D., *Emeritus Professor of Law*
Federico Cheever, B.A., M.A., J.D., *Assistant Professor of Law*
Alan K. Chen, B.A., J.D., *Associate Professor of Law*
Christine Cimini, B.A., J.D., *Assistant Professor of Clinical Programs*
Alfred J. Coco, B.A., J.D., M.L.L., *Emeritus Professor of Law*
Roberto L. Corrada, B.A., J.D., *Associate Professor of Law*
Tami D. Cowden, B.A., J.D., *Legal Writing Professor*
Edward A. Dauer, A.B., LL.B., *Dean Emeritus and Professor of Law*
Kate Duba, B.A., J.D., *Legal Writing Professor*
Wendy Duong, B.S., J.D., LL.M, *Assistant Professor of Law*
K.K. DuVivier, B.A., J.D., *Assistant Professor of Law and Director of Lawyering Process Program*
Nancy S. Ehrenreich, B.A., J.D., LL.M., *Professor of Law*
Christopher Gehring, B.A., J.D., *Legal Writing Professor*
J. Wadine Gehrke, B.A., J.D., *Assistant Professor of Law*
Rashmi Goel, B.A., LL.B., J.S.M., JS.D, *Assistant Professor of Law*
Robert M. Hardaway, B.A., J.D., *Professor of Law*
Jeffrey H. Hartje, B.A., J.D., *Associate Professor of Law*
Timothy M. Hurley, B.A., J.D., *Legal Writing Professor*
Sheila K. Hyatt, B.A., J.D., *Professor of Law*
Sam Kamin, B.A., J.D., Ph.D., *Assistant Professor of Law*
Martin Katz, A.B., J.D., *Assistant Professor of Law*
Francis W. Jamison, B.A., J.D., *Emeritus Professor of Law*
Jan G. Laitos, B.A., J.D., S.J.D., *John A. Carver, Jr. Professor of Law and Director of Natural Resources Program*
Harry O. Lawson, B.A., M.S., *Emeritus Professor of Law*
Neil O. Littlefield, B.S., LL.B., LL.M., S.J.D., *Emeritus Professor of Law*
Lucy A. Marsh, B.A., J.D., *Professor of Law*
Esteban Martinez, B.A., M.A., J.D., *Legal Writing Professor*
Michael G. Massey, B.A., J.D., *Legal Writing Professor*
G.Kristian Miccio, B.A., M.A., J.D., LL.M., J.S.D., *Assistant Professor of Law*
Ved P. Nanda, B.A., M.A., LL.B., LL.M, LL.M., LL.D. (Hon.), *Vice Provost for Internationalization, Evens University Professor, and Thompson G. Marsh Professor of Law*
Julie A. Nice, B.A., J.D., *Professor of Law*
Jim Otto, B.S., J.D., M.S., *Director of Advanced Degree Programs in Natural Resource and Environmental Law*
Stephen L. Pepper, A.B., J.D., *Professor of Law*
George W. "Rock" Pring, B.A., J.D., *Professor of Law*
John H. Reese, B.A., LL.B., LL.M., S.J.D., *Professor of Law*
Paula R. Rhodes, B.A., J.D., *Associate Professor of Law and Director of LL.M. in American and Comparative Law Program*
Edward J. Roche, Jr., B.B.A., J.D., *Professor of Law*
Howard I. Rosenberg, B.A., LL.B., *Professor of Law*
Thomas Russell, B.A., M.A., J.D., Ph.D., *Professor of Law*
John T. Soma, B.A., M.A., J.FD., Ph.D., *Professor of Law*
Mary A. Steefel, B.A., J.S., LL. M., *Legal Writing Professor*
Celia R. Taylor, B.A., J.D., *Associate Professor of Law*
Mark A. Vogel, B.B.A., J.D., LL.M., *Professor of Law and Director of Graduate Tax Program*
Eli Wald, B.A. LL.B., LL.M., S.J.D., *Assistant Professor of Law*
Timothy B. Walker, A.B., M.A., J.D., *Emeritus Professor of Law*
James E. Wallace, A.B., LL.B., B.D., Ph.D., *Emeritus Professor of Law*
James L. Winokur, B.A., LL.B., *Professor of Law*
Robert B. Yegge, A.B., M.A., J.D., *Dean Emeritus, Professor of Law, and Director of Legal Administration Program*
Edward H. Ziegler, Jr., B.A., J.D., LL.M., *Professor of Law*

Editor's Letter

The Denver University Law Review is proud to present the fourth and final issue for the 2002–2003 academic year. Distinguished members of the federal, state, and foreign judiciary have presented their thoughts on the history and practice of law and the business of judging. It is our hope that our readers will learn from the lessons contained herein.

This issue is the product of hard labor. We would like to take this opportunity to thank our contributing judges and their support staffs. Without their effort, this issue would not have materialized.

Additionally, we enlisted the aid of Kimberly Kirven and Professor Laura Ruel, both of the University of Denver School of Communications. They are responsible for the wholly unique layout, design, and organization of the following pages. Thank you and well done.

Enjoy,

David Bruce Gottlieb
Magazine Issue Editor

Giving Trials A Second Look

John L. Kane
Senior District Judge
United States District Court for the District of Colorado

I have been privileged to serve as a juror in two cases. The experiences changed my perception of the essential conduct of trials.[1] No matter which court is considered, the usual trial consists of a rambling *voir dire* of the jury, opening statements frequently confused with closing arguments, tumid questioning of witnesses interrupted by distracting objections and stuttering side-bar conferences, unexplained recesses for "gatekeeper" hearings, a seemingly interminable instruction conference in which template instructions are cobbled together, a monotone reading of those instructions to the jury, and closing arguments which offend every known rule of rhetoric. If indeed a sense of justice emerges with the verdict, it has more to do with the intuition of ordinary people on the jury than to all the contrivances inflicted upon them.

Of course not all trials are so woeful, but most of them contain some elements of mindless rituals that could easily be avoided. Proponents of the status quo frequently urge that juries are no longer competent to decide cases because the issues are too numerous and complicated and the proof required by the inexorable advance of technology too sophisticated for people of merely ordinary experience to comprehend. The fault lies not with juries, but with we who profess to know what we are doing. It is the responsibility of court and counsel to communicate with juries in clearly understandable terms; it is not the job of juries to translate or divine meaning from the entrails of legalistic monstrosities.

Counsel also burden juries with often needless information. Personal injury cases, for example, now require at least three and usually more expert witnesses per side. Photographs of wrecked cars no longer suffice.

A computerized reconstruction of the event complete with laser technology and an explanation by a Ph.D. are now considered *de rigueur*. Even drunk driving cases involve issues of metabolism rates, reaction times, and comparative physiology. Gone are the days when a policeman could testify, "I saw the car weaving down the highway and pulled it over. The driver was bleary eyed. I ordered him out of the car. His breath smelled of booze. He couldn't walk a straight line and he fumbled around to get his wallet out of his pocket." Bingo! Next case. The present scheme requires the arresting officer to call in a Driving Under The Influence Technician, a blood sample is taken or a Breathalyzer is administered, videotapes are recorded, laboratory results are scrutinized, and a plethora of charts, summaries, and reports are ceremoniously marked as exhibits and presented to jurors as burnt offerings. The result is usually the same; it just takes a lot more time, effort, and money to get there.

Of particular concern are the instructions provided to juries. Until quite recently, no one dared state the obvious—that jury instructions were incomprehensible. In the first half of the Nineteenth Century when jurors were not presumed or screened for the ability to read, judges instructed them orally in frank, natural language. As appellate courts came into prominence, an insistence developed that a written record of the charge to the jury be made. Cases were reversed for incorrect statements of the law, with the implied and characteristically unexamined assumption that the jury followed them in the first place. While special verdicts using specific questions leading to a coherent judgment could have helped solve the problem, they were not used. As trial judges were naturally averse to being reversed and appellate courts rigorously insistent upon compliance with their increasingly precise pronouncements of law, resort was made to instructions written in the language of the appellate opinions. It was another demonstration of the triumph of form over substance.

As Professor Lawrence Friedman observed in his monumental *A History of American Law,* instructions became "technical, legalistic, utterly opaque . . . [,and] almost useless as a way to communicate with juries; the medium contained no message. Each instruction had to be framed with great care, so as not to give the upper court a chance to find reversible error."[2] Further, as a very practical matter, jurors will pay no more heed to the instructions than demonstrated by the judge and counsel. One size fits all template instructions offer nothing more than jargon and leave jurors with no viable alternative but to resort to their own preconceptions.

In a truly ludicrous example, in a more than seven month long Robinson-Patman Act trial between Liggett & Myers and Brown and Williamson tobacco companies, the judge gave no instructions before or during trial. Without giving the jury copies of the instructions with which to follow along, he began reading in the morning session and did not finish until mid-afternoon with eighty-one pages of gobbledegook such as this: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and the substitutes for it."[3]

In 1993, the United States Supreme Court reversed the verdict in this case and said, *inter alia*, "[A] reasonable jury is presumed to know and

FAST FACT

The U.S. District Courts commenced 265,091 civil cases from April 1, 2001 to March 31, 2002—57,646 of which involved the United States as a party and 207,445 involving private parties. The eight federal districts comprising the Tenth Circuit handled 11,203 of these cases, with the District of Colorado accounting for 2,701 of those cases filed in the Tenth Circuit.

Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. District Courts - Civil Cases Commenced, Terminated, and Pending during the 12-Month Period Ending March 31, 2002, available at http://www.uscourts.gov/caseload2002/tables/c01mar02.pdf (Mar. 31, 2002).

understand the law, the facts of the case, and the realities of the market."[4] In the face of such mind numbing instructions delivered only once after more than seven months of technical economic testimony, that presumption evanesces into pure fantasy.

All is not lost, however. Constructive efforts to reform this theatre of the absurd are being made throughout the country. Numerous state and federal circuit and district courts have organized committees to revise and update jury instructions expressed in plain English. It remains a nascent art, but nevertheless modest optimism is justified. Some judges are now instructing juries in advance of testimony and as needed during the trial. Some are providing jurors with copies of the instructions to use throughout the trial. Permitting jurors to take notes and ask questions in some regulated manner is becoming a routine practice. Another promising innovation in trials lasting more than ten days is to have the lawyers make weekly "mini-summations" in which the jury is told what has been accomplished in the past week and what is expected to occur in the next. Some courts are cross-indexing the instructions with the special verdict forms so that easy reference can be made during deliberations.

Another innovation is needed. D. Graham Burnett is a professor of history at Princeton. He was summoned for jury service in New York City and served as foreman of the jury in a murder case. The experience was so wrenching, he wrote a book about it.[5] The book is well worth reading for many reasons. Among them, Professor Burnett points out that though he is an experienced teacher, well familiar with conducting discussions in seminars and classrooms, the court gave no instruction about how the jurors were to proceed once their deliberations began. In this Manhattan court, the judge appointed the foreman and left the jury to their own devices.[6]

In consequence of his observations, I crafted and have begun using a new advisory instruction to assist jurors in structuring their deliberations. Post verdict interviews with jurors reveal they found the instruction most useful. Moreover, in each case in which this advisory instruction was used, no notes or questions from the juries were received during their deliberations and no mistrials because of deadlock were declared. I crafted this instruction after corresponding with Professor Burnett and consulting a highly experienced mediator, Joseph Tita. Their suggestions were indeed essential to the task. Undoubtedly revisions will be made from time to time, but the basic ideas are contained in the following exemplar of the instruction.

INSTRUCTION NO. ___

Jury Deliberations

Once you have elected your Presiding Juror as directed by the previous instruction, you are free to proceed as you agree is appropriate. Therefore, I am not directing you how to proceed, but I offer the following suggestions that other juries have found helpful so that you can proceed in an orderly fashion, allowing full participation by each juror, and arrive at a verdict that is satisfactory to each of you.

First, it is the responsibility of the Presiding Juror to encourage good communication and participation by all jurors and to maintain fairness and order. Your Presiding Juror should be willing and able to facilitate productive discussions even when disagreements and controversy arise.

Second, the Presiding Juror should let each of you speak and be heard before expressing his or her own views.

Third, the Presiding Juror should

FAST FACT

In order for a case to be granted certiorari before the U.S. Supreme Court, four justices must decide to hear the case.

United States Supreme Court Website, Visitor's Guide to Oral Argument, at http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf (last visited Apr. 20, 2003).

never attempt to promote nor permit anyone else to promote his or her personal opinions by coercion or intimidation or bullying of others.

Fourth, the Presiding Juror should make certain that the deliberations are not rushed to reach a conclusion.

If the Presiding Juror you select does not meet these standards, he or she should voluntarily step down or be replaced by a majority vote.

After you select a Presiding Juror, you should consider electing a secretary who will tally the votes, help keep track of who has or hasn't spoken on the various issues, make certain that all of you are present whenever deliberations are under way, and otherwise assist the Presiding Juror.

Some juries are tempted at this point to hold a preliminary vote on the case before them to "see where we stand." It is most advisable, however, that no vote be taken before a full discussion is had on the issue to be voted on, otherwise you might lock yourself into a certain view before considering alternative and possibly more reasonable interpretations of the evidence. Experience has also shown that such early votes frequently lead to disruptive, unnecessarily lengthy, inefficient debate and ineffective decision-making.

Instead, I suggest the Presiding Juror begin your deliberations by directing the discussion to establishing informal ground rules for how you will proceed. These rules should assure that you will focus upon, analyze and evaluate the evidence fairly and efficiently and that the viewpoints of each of you is heard and considered before any decisions are made. No one should be ignored. You may agree to discuss the case in the order of the questions presented in the special verdict form or in chronological order or according to the testimony of each witness. Whatever order you select, however, it is advisable to be consistent and not jump from one topic to another.

To move the process of deliberation along in the event you reach a controversial issue, it is wise to pass it temporarily and move on to the less controversial ones and then come back to it. You should then continue through each issue in the order you have agreed upon unless a majority of you agrees to change the order.

It is very helpful, but certainly not required of you, that all votes be taken by secret ballot. This will help you focus on the issues and not be overly influenced by personalities. Each of you should also consider any disagreement you have with another juror or jurors as an opportunity for improving the quality of your decision and therefore should treat each other with respect. Any differences in your views should be discussed calmly and, if a break is needed for that purpose, it should be taken.

Each of you should listen attentively and openly to one another before making any judgment. This is sometimes called "active listening" and it means that you should not listen with only one ear while thinking about a response. Only after you have heard and understood what the other person is saying should you think about a response. Obviously, this means that, unlike TV talk shows, you should try very hard not to interrupt. If one of your number is going on and on, it is the Presiding Juror who should suggest that the point has been made and it is time to hear from someone else.

You each have a right to your individual opinion, but you should be open to persuasion When you focus your attention and best listening skills, others will feel respected and, even while they may disagree, they will respect you. It helps if you are open to the possibility that you might be wrong or at least that you might change your mind about some issues after listening to other views.

Misunderstanding can undermine your efforts. Seek clarification if you do not understand or if you think others are not talking about the same thing. From time to time the Presiding Juror should set out the items on which you agree and those on which you have not yet reached agreement.

In spite of all your efforts, it is indeed possible that serious disagreements may arise. In that event, recognize and accept that "getting stuck" is often part of the decision-making process. It is easy to fall into the trap of believing that there is something wrong with someone who is not ready to move toward what may be an emerging decision. Such a belief is not helpful. It can lead to focusing on personalities rather than the issues. It is best to be

patient with one another. At such times slower is usually faster. There is a tendency to set deadlines and seek to force decisions. Providing a break or more time and space, however, often helps to shorten the overall process.

You may wish from time to time to express your mutual respect and repeat your resolve to work through any differences. With such a commitment and mutual respect, you will most likely render a verdict that leaves each of you satisfied that you have indeed rendered justice.

And is not rendering justice the purpose of our entire enterprise?

Endnotes

[1] *See* John L. Kane, *Reasonable Doubt and Other Shibboleths*, 29 Litig. 22 (2002).

[2] Lawrence M. Friedman, A History of American Law 399 (2d ed. 1985) (1973).

[3] Stephen J. Adler, The Jury: Trial and Error in the American Courtroom 131 (1994).

[4] *Id.* at 141.

[5] D. Graham Burnett, A Trial By Jury (Alfred A. Knopf ed., 2001).

[6] *See also* Erin Emery, *The Jury that Couldn't: Scenes from a Mistrial in Teller County,* Denv. Post, July 3, 2003, at A1 (Noted one juror in a first-degree murder trial: "'It was really frustrating because we were not getting any help on how do you go about this, how do you approach the situation,' she said. 'You're supposed to decide the outcome of a man's life—blind—and that's not acceptable.'").

Judge John L. Kane is a Senior District Judge for the United States District Court for the District of Colorado and has served on the federal bench for over twenty-five years. Judge Kane received his Bachelor of Arts degree from the University of Colorado, 1958, and his Juris Doctor degree from the University of Denver College of Law, 1960. Prior to his appointment to the federal bench, Judge Kane's legal career included serving as a Deputy District Attorney for the Seventeenth Judicial District of Colorado; the first Public Defender in the State of Colorado in Adams County, Colorado; and as a private practitioner in Brighton and Denver, Colorado. Additionally, Judge Kane acted as Deputy Director for the Peace Corps in the Eastern Region of India, as well as Country Representative for Turkey. Judge Kane was nominated by President Jimmy Carter as a United States District Judge, and received his commission on December 16, 1977. Judge Kane assumed senior status on April 8, 1988. While on the bench, Judge Kane has also acted as an Adjunct Professor of Law for both the University of Denver College of Law and the University of Colorado School of Law.

The [illegible]ng of a Good Judge

Sherman G. Finesilver[†]

Chief Judge (Retired), United States District Court for the District of Colorado

Bristling with youthful exhilaration, I first appeared in court in 1952, representing the City and County of Denver as it sought eminent domain of property for Interstate 25, then known as the Valley Highway.

I had been sworn in as an assistant city attorney just the Friday before. Now I was amid hordes of attorneys seeking court dates and arguing motions. As I geared up to pursue immediate possession so Denver's highway project could proceed, I felt like a football player again, waiting for kick-off.

So when my case was called, I approached the lectern and proudly announced: "Sherman G. Finesilver for Petitioner, City and County of Denver, Your Honor." But as I began to argue, I stepped toward the clerk's desk to consult a statute book.

"Finesilver!" the judge loudly admonished me. "You are not in moot court now! You have forgotten your courtroom manners. You should ask for leave of court to approach the clerk's desk."

Stunned and humiliated, I just knew the other attorneys were snickering to see a neophyte disparaged by the judge. I apologized, stepped back to the lectern, and relied on my notes instead.

I prevailed. Denver won immediate possession. But I was mortified to think I had fumbled the ball on this, my first court outing.

Chagrined, I confided in the senior attorney, who simply grinned and extended his hand to congratulate me. Then I called my father, questioning whether I could be an attorney after such an unprofessional first effort. Dad bolstered my spirits, reminding me that this had been a valuable learning experience.

Indeed, during 39 years as a state and federal judge, two lessons have lingered from that day:

1. Mind your courtroom manners, and *always* ask permission to approach the bench.
2. As a judge, *never*

FAST FACT

Each Term the U.S. Supreme Court grants plenary review, with oral arguments, in about 100 cases—this from the more than 7,000 petitions filed with the Court. Oral argument is one hour—30 minutes per side.

United States Supreme Court Website, The Justices' Caseload, at http://www.supremecourtus.gov/about/justicescaseload.pdf (last visited Apr. 20, 2003).

embarrass anyone. Judges need speak only softly to make their voices heard.

Only three times during my decades on the bench did I hold an attorney in contempt, and each time was for egregious actions. A judge who must call attention to an important matter on argument, case citation, or presentation can do so humanely and gently. If one person must control their emotions and exude dignity, it is the judge.

When appointed a United States District Judge on October 22, 1971, I vowed to devote unstinting attention to running a fair and orderly court and pursuing the public interest. But I also wanted to always remember the vulnerability of those appearing before me:

> *[A] judge's words have a great potential for encouragement, but also potential to demoralize and shatter the human spirit. . . . [M]ay I always have the heart to know and the gentleness to understand human frailties.*

The full text was posted on the bench to ever remind me to conduct myself professionally, judiciously, and honorably, without self-importance.

When faced with the awesome responsibility of nominating or appointing a judge, officials often ask career judges what criteria to consider. I have suggested that any applicant should be:

1. Unbiased toward all facets of society, without regard to community status, economics, background, or ethnicity;
2. Distinguished and respected in the legal community;
3. Fully versed in and passionate about the law;
4. Known for unblemished integrity;
5. Creative;
6. Experienced with trial court and familiar with the rules of evidence, procedure, fair trial advocacy, and judicial responsibility; and
7. Recognized for judicial temperament, which is impartial, patient, courteous, decisive, fair, even-tempered, humble, well-prepared and conscious that any judge is merely a trustee, and appreciative of mediation, arbitration and other methods to resolve disputes without court trials.

But a federal judge, who is appointed for life, needs other qualities as well. Such a candidate must be an excellent case manager, as federal judges constantly juggle increased caseloads with limited support staff. Without clearly set procedures, backlogs develop. Antsy litigants begin to distrust the system and question the competency of counsel and judge alike. And while some cases merit priority status, the public has little patience when judges leave other cases languishing on the docket.

Yet few cases cannot be heard within 12 months after filing if a judge handles the workload expeditiously. Citizens are justifiably concerned when judges delay rulings and take cases under advisement for unreasonable periods of time. Thus any judicial applicant should demonstrate the ability to manage caseloads and control dockets.

By contrast, strict constructionists of the Constitution should *not* be favored for selection, despite the zealous insistence of some political leaders. All facets of American life are undergoing developments that cry out for sound legal reasoning. Many aspects of law have no legal precedent. Judges must be thoughtful and reflective, not ideologues with preconceived notions of judicial interpretation. In the law as in life, one size never fits all.

United States Circuit Judge Learned Hand (1872–1961), a master who served 57 years as a federal judge, deftly summarized the essence of a good judge:

> *[A] judge is in a contradictory position . . . . On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other,*

he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed. Nobody does this exactly right; great judges do it better than the rest of us.[1]

The incongruous, conflicting nature of judicial responsibilities requires a rare blend of knowledge, perspective, and personality. As our leaders seek prospects to serve on any court bench, may they, too, learn to spurn political considerations and other biases. In ferreting out the finest and most knowledgeable nominees, may they ever remember that good judges are critical for fair treatment in our democracy—and for upholding the integrity and credibility of our judicial system.

Endnotes

† Copyright © 2003 by Sherman G. Finesilver. This article, in expanded form, will be in the autobiography, *Out of Nowhere,* of Judge Sherman G. Finesilver. This article may not be reproduced in whole or in part in any form without written permission by the author.

[1] LEARNED HAND, THE SPIRIT OF LIBERTY 109 (3d ed. 1960).

Retired United States Chief District Judge Sherman G. Finesilver served 39 years, since age 28, as a state and federal judge. He was Chief Judge for the United States District Court for the District of Colorado from 1982 to 1994, as well as a member of the Judicial Conference, the policy-making branch of the federal judiciary. He is a graduate of the University of Colorado at Boulder (B.A., 1949) and the University of Denver (Westminster) College of Law (J.D., 1952). The judge has received numerous awards, including honorary doctorates of law from the University of Colorado, New York Law School, Gallaudet University in Washington, D.C., and Metropolitan State College. He retired from active judicial service in 1995, returning to private practice. His work now focuses on alternative dispute resolution, such as mediation, arbitration, and mock trials. He also has written many articles for professional journals, as well as The Day I Flunked Out of Law School, Reader's Digest, January 2001, and he frequently lectures on law, medicine, and societal problems.

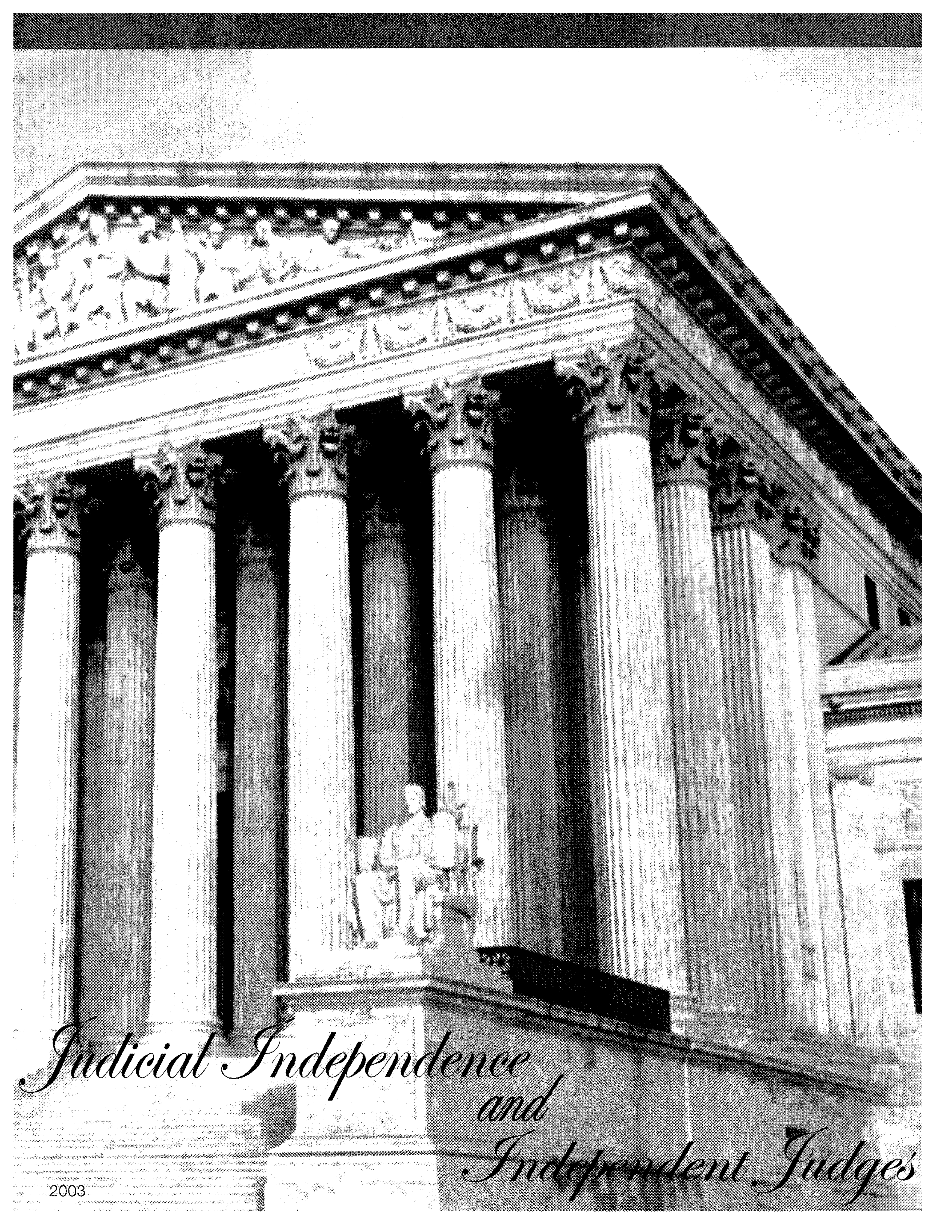
Rebecca Love Kourlis†
Associate Justice, Colorado Supreme Court

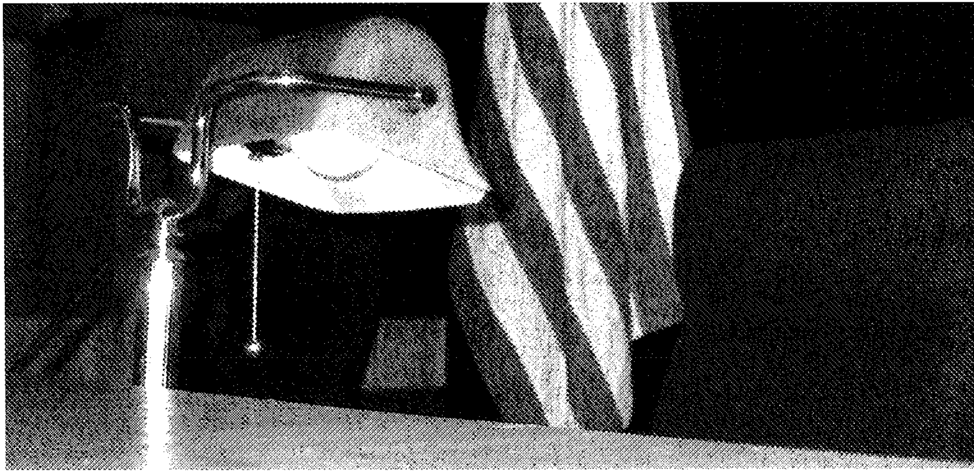
Judicial independence is one leg of the three-legged stool that comprises our system of government. Without it, the system topples. So far, so good; most people would agree with to that proposition. Now comes the rub: What is judicial independence; how should we identify those individuals whom we choose to uphold the duties of an independent judiciary; and what obligations do judges have once appointed?

Judicial independence is not political rhetoric; rather, it is a state of mind that is ever-present in the deliberative process of a good judge. Judges have a preeminent obligation to perform the duties of their offices impartially, and to address each case on its merits. In Colorado, Canon 3 of the state's Code of Judicial Conduct demands that a "judge should be faithful to the law and . . . be unswayed by partisan interest, public clamor, or fear of criticism."[1] In service of that impartiality, a judge "should abstain from public comment about a pending or impending proceeding in any court."[2] Indeed, the whole purpose of the judiciary in our tripartite system of government is independence from the other two branches: so as to maintain a nation ruled by laws, not by men; a nation in which minority interests and the rights of individual citizens find protection even in the face of societal pressures; and, a nation in which equality and justice for all is a reality.

I. Judicial Independence: Its History

The concept of a judiciary beholden to no one is fairly new, historically speaking. In medieval England, judges were anything but independent.


Judicial Independence
and
Independent Judges
2003



They were servants of the crown, who served at the pleasure of the crown. They enforced the will of the sovereign—whatever he or she might from time to time decree. In 1215, the Magna Carta announced the first substantial step toward a rule of law by declaring, "We [will not] proceed against or prosecute him [a free man], except by the lawful judgment of his peers and by the law of the land."[3] The notion of a rule of law was the first step, and a necessary one, toward judicial independence, and away from the expectation that the judge was the delegate of the crown or of some other body, enforcing the will of that authority—not the rule of law.

In 1608, one of the first crises of judicial independence occurred when James I sought to take cases away from the judges of England and decide them himself. In declining that request, Lord Coke wrote:

> *[C]auses which concern the life, or inheritance, or goods, or fortunes of his [Majesty's] subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which . . . requires long study and experience . . . that the law was the golden met-wand and measure to try the causes of the subjects.*[4]

The concept of judicial independence was brought to the colonies—and here amplified. In 1780, when John Adams put the phrase "a government of laws and not of men" into the Massachusetts Declaration of Rights,[5] he was anchoring that tradition. Nevertheless, the creation of a tripartite system of government, in which the courts and their judges were an equal and balanced part, was an evolution of the rule of law and an inspiration.

John Adams argued in 1776 that "judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both."[6] Adams did not want judges dependent upon any man or body of men for their salaries or their offices.

However, there was clearly an opposing view. Many of the early state constitutions made judges dependent on the legislature or electorate—by way of term limits, elections, or removal by the legislature. Jefferson said in 1776 that, in relation to legislatures, judges should be "mere machine[s]."[7] Between 1776 and 1787, Adams's viewpoint prevailed and by 1787, even Jefferson lobbied for independence in the face of a rising fear of "legislative despotism."[8]

The Ninth Resolution of the Virginia delegation to the Constitutional Convention stated an intention to establish a national judiciary who would hold their offices during good behavior—ultimately accompanied by a provision that salaries could be increased, but not decreased, during a judge's tenure.[9] Thus was born our flagship of judicial independence: the federal judiciary. The controversy surrounding that decision reflects the fact that judicial independence is, admittedly, contrary to the notion of majority rule and to accountability. An independent judiciary sometimes concludes that an act of Congress is unconstitutional, or that the tide of public opinion is—however strong—nonetheless wrong.

II. Does it matter?

Justice Aharon Barak, the President of the Israeli Supreme Court, spoke about the meaning of democracy and the role of an independent judiciary as follows: "[M]ajority rule [can infringe] upon the rule of law and the independence of the judiciary; majority rule [can infringe] upon human rights—majority rule of this kind violates the notion of democracy."[10] At one time, he noted, we might have believed that respect for basic principles "could be guaranteed by relying on self-restraint of the majority."[11] But history shows otherwise: "In

many regimes, the majority [has been] ready to abuse its full power in order to violate values, principles, and human rights which stood in its way."[12]

Judicial independence has been a vehicle for the curbing of excesses of other branches of government over the years—on a case-by-case, deliberate, and precedent-bound basis. The courts gave the protections of the First Amendment life; the courts gave voice and forum to the tension between federalism and states' rights; the courts enforced school integration, permitted slaves to own property, and curbed some of the excesses of the McCarthy era. Without a judiciary independent of the other two branches of government, those fundamental steps toward human liberty might never have taken place.

III. Colorado: Judicial Appointment and Retention

As distinct from the federal system, each state has a judicial system that represents its own answer to the tension between accountability and independence. In Colorado, since 1966, we have had a modified Missouri Plan for the selection and retention of judges. The constitutional amendment that took judges out of partisan elections was spearheaded by a group of citizens. Under our system, judicial nominating commissions accept applications for each judicial vacancy. They meet, review the applications, call references, interview the candidates, and nominate two to three (normally three) candidates. The nominating commissions consist of either thirteen or seven members (thirteen for the statewide commission and seven for district commissions). The commissions are comprised of a majority of non-lawyers, with not more than one-half being members of the same political party. The Governor, Attorney General, and Chief Justice, in a collaborative process, appoint the lawyer members. The Governor appoints the non-lawyer members. After receipt of the nominees from the commission, the Governor has fifteen days to decide which of the nominees he wishes to choose for the position. His staff consults various sources to obtain information on the candidates, and frequently the Governor interviews the nominees as well.

Once the Governor chooses a judge, that person serves a provisional term of two to three years depending upon when the next general election will occur. At that time, he or she will be on the ballot for a general "yes/no" vote from the electorate. If retained, Supreme Court justices serve ten-year terms; court of appeals judges serve eight-year terms; district court judges, six; and, county court judges, four.[13]

In 1988, Colorado implemented a statewide system of judicial performance evaluation in order to assist voters in making decisions about whether to retain a particular judge. Colorado was the second state in the nation to establish such a program. The judicial performance commissions consist of ten members—again, a majority of non-lawyers. The Chief Justice, the Governor, the Speaker of the House, and the President of the Senate appoint the members. Evaluation of a particular judge takes place through the use of survey questionnaires sent to lawyers, trial court judges, litigants, probation officers, social services, court personnel, and law enforcement agencies. The commissions review the information about the judges and then interview the judges individually. The commissions then issue a "retain" or "do not retain" recommendation, coupled

FAST FACT

Of the seven Colorado Supreme Court Justices, three are women. Significantly, a woman is the presiding Chief Justice. The Justices are as follows: Chief Justice Mary J. Mullarkey, Justice Rebecca Love Kourlis, and Justice Nancy E. Rice.

Colorado Judicial Branch Website, Judges of the Court of Appeals, http://www.courts.state.co.us/coa/coajudges.htm (last visited Sept. 1, 2003).

with a biographical statement about the judge and a brief compilation of comments about the judge.

The judicial performance commissions have two real benefits: first, they provide the voters with information about the judges on the ballot; and second, they give the judges themselves feedback about how they are viewed by the people whose lives they impact. Beginning in 1998, information about judges from the judicial performance commissions is included in the "blue book" distributed to all electors. For the first time in 2001, the General Assembly approved significant funding for judicial performance commissions—for an objective, professional survey and the accumulation of important input on judges.[14]

Other states have a variety of systems, which range from straight elective systems to appointive systems more akin to Colorado. Some states differentiate between appellate judges and trial court judges, with the trial court judges subject to election and the appellate judges subject to appointment. Other states have term limits for judges, capping the period of time that a judge may serve on a particular bench, or even in the judiciary.

With that brief overview of the federal system and the Colorado system, I return to the "hot topic" of judicial independence—a source of controversy, both systemically and ideologically.

IV. The Risks to an Independent Judiciary

Systemically, the discussion about judicial independence centers on political attempts to erode judicial independence—such as Congress's consideration of a bill that would allow it to overrule the Supreme Court, or talk of putting state judges back into an electoral system in states that have retention systems. Those changes would be dramatic, and I certainly would not state that they could not occur. They could, and it behooves all of us to be vigilant and vocal.

However, the more pervasive challenges to judicial independence are ideological. The clearest example of corrosion of judicial independence can be seen in partisan elections.[15] Elections of judicial officers necessarily impugn ideological independence—sometimes quite pointedly. Candidates for judicial office are asked to express their views on issues that will necessarily come before them if they are chosen to fill the position—issues such as domestic abuse, drunk driving, victim's rights, and criminal defendant's rights. It is a delicate matter for those candidates or applicants to express those views in generalities while still preserving the ability to hear individual cases without being rightfully accused of having prejudged the outcome.

Similarly, in an Alabama Supreme Court election, the state democratic party ran an ad calling for a vote against "Alabama's Republican Supreme Court" because the court had ruled for binding arbitration in the Firestone tire cases, rather than allow trial by jury.[16] The Michigan Republican State Committee recently ran an ad not authorized by any candidate, but which accused a judge of being "[w]eak on gun crime [and] wrong for the court," as the party contended that the judge had wrongly reversed over fifty criminal convictions.[17] A Georgia Supreme Court justice's opponent was cited by the Judicial Qualifications Commission for using false, deceptive, and misleading tactics by distributing a flier that called the justice a "judicial extremist" and accused her of "referr[ing] [sic] to traditional moral standards as pathetic and disgraceful."[18]

The United States Supreme Court opinion in *Republican Party v. White*[19] complicates the matter even further for candidates seeking a judgeship in a state that holds elections. The Court recently decided that the "announce clause" in the Minnesota Code of Judicial Conduct, which prevents a candidate seeking judicial office from "announcing their views on disputed legal or political issues," is unconstitutional.[20] Clearly, public pressure in those states will now be exerted to force judges to announce their positions on a variety of issues.[21] How can a judge exercise the necessary impartiality after having declared in the election process that he or she holds a particular ideology toward certain issues or types of cases?

Of course, there are also all of the problems associated with fund-raising in judicial elections. Overall, in 2000, state supreme court candidates raised $45.6 million—a 61% increase over 1998.[22] Not surprisingly, but certainly of concern, is the fact that

analyses have shown that at least half of those political donations come from lawyers and business interests.[23] These problems have become blatantly evident in Texas. On that point, a recent study indicated that individuals or entities who contributed to the justices' campaigns had an almost 400% better chance of having their petitions for certiorari granted.[24] Of the 442 petitions the court accepted, 70% involved at least one petitioning party who was a contributor.[25]

However, the corrosion of judicial independence is not limited to states with elective systems. Threats of recall and impeachment have also made it increasingly difficult for judges to act independently in the face of opposition. Over the last few years, numerous judges have been subject to great criticism by elected officials, the press, and the public for their decisions in particular cases.

For example, in 1996, a federal district court judge in New York ordered the suppression of evidence that he found to have been seized in an "unreasonable" search, within the meaning of the Fourth Amendment.[26] While the prosecution's motion for reconsideration was pending, congressional leaders threatened to initiate impeachment proceedings if the judge did not reverse his ruling.[27] The President also suggested that he might request the judge's resignation if the ruling was not changed.[28] The judge granted the motion to reconsider, allowing the evidence to be admitted.[29] Similarly, a superior court judge from California faced a recall effort based on the decision to award child custody to O.J. Simpson after he was acquitted of murder charges.[30] The group also criticized the judge for awarding partial custody to a woman who later killed her children and herself.[31] The judge defended her decisions as based on the law, but the group countered, accusing her of having "blood on her hands."[32] And, in Tennessee, state Supreme Court Justice Penny White was removed from the bench after she concurred with a majority decision to vacate a death sentence.[33]

In a time when we are increasingly dismayed by the impact of fund-raising upon our political candidates; when we worry about the leverage exerted by special interest groups or by lobbying efforts; and when we bemoan the balkanization of the political parties, why now are we infecting the judiciary with those very same ills?

V. Judicial Selection

If we accept the premise that an independent judiciary is a good thing, then how should we go about identifying those individuals who could serve as independent judges? Also, how realistic is it to argue that elected officials should be non-partisan in this effort?

Perhaps the place to begin is by creating a list of factors that most people would agree good judges should share. Those factors might consist of impartiality, industry, integrity, professional skills, community contacts, and social awareness. For appellate judges, one might add collegiality and writing ability; and for trial judges, one might add decisiveness, judicial temperament, and speaking ability.[34]

A good judge is not necessarily one who shares the political views of the appointing authority; and most definitely, a good judge is not someone who is willing to prejudge an issue and express an opinion about how he or she might vote on a case that might come before that court.

Why not? Why are we not, as a society, entitled to have a judiciary

FAST FACT

Four women currently sit on the Colorado Court of Appeals: Chief Judge Janice B. Davidson, Judge Sandra I. Rothenberg, Judge JoAnn L. Vogt, and Judge Marsha M. Piccone. Coincidentally, Judge Vogt attended the University of Denver College of Law (J.D. '86). The total number of judges on the Court of Appeals is 16.

Colorado Judicial Branch Website, Judges of the Court of Appeals, http://www.courts.state.co.us/coa/coajudges.htm (last visited Sept. 1, 2003).

that reflects the general morays of the public? The mere posing of the question suggests the answer. Judges should not be swayed by public opinion, and certainly should not conform their views to the majority or to the appointing authority's expectations once sworn into the office. Indeed, once the judge takes the bench, he or she is sworn to uphold the Constitution and the laws—not to conform decisions to the will of the majority. *Any* generalized attempt to force or induce a judge to express an opinion about a topic or case that will come before the court risks that judge's ultimate impartiality.

Furthermore, efforts to appoint partisan judges or judges who come to the bench with a particular bent of mind are shortsighted. First of all, those individuals may not, indeed, vote as predicted. Second, if one party succeeds in securing a series of appointees supportive of one ideology, the next time the other party comes into power, it will do the same. The battle is unending and counter-productive. Better by far to focus on choosing individuals who will serve with intelligence and integrity—individuals who can uphold the honor of an independent judiciary.

Accordingly, in my view, every individual in the business of choosing judges should be concerned with whether that person can apply the law in a fair and impartial manner on a case-by-case basis. As for trial court judge positions, the inquiry should center on whether the individual can truly be impartial, whether he or she can manage a courtroom, handle the work load, treat everyone in the courtroom with respect, and whether he or she has the industry and intelligence to become fully acquainted with the legal issues. Trial judges seldom rule on the constitutionality of a statute or decide issues that have policy implications.

Appellate judges sometimes deal with broader issues and, therefore, the inquiry of those applicants is necessarily broader. Toward that end, maybe the questions appellate judicial applicants should answer are questions such as:

1) Under what circumstances, if any, do you believe precedent should be over-turned?
2) What do you think the role of the courts is in interpreting legislation?
3) Do you think that the language of a statute or legislative intent is more important if the two conflict? Where would you look to find legislative intent?
4) Do you know what your biases are, and can you overcome them?
5) Do you have a particular ideological bent that would prevent you from judging each case before you fairly and impartially, based upon the facts of that case?
6) Absent a statute, what is the role of the courts in determining the law?

I certainly do not mean to imply that determining whether someone can be a good and fair judge is an easy task. I do think that frank and wide-ranging interviews, an analysis of that individual's writing and opinions (if any), and input from those with whom the individual has had professional contact are all very valuable. What I advocate here is that the decision-maker, be it the Governor in Colorado, the President, or a United States Senator, should be concerned with finding wise, smart, careful, thoughtful, and fair people who can uphold the independence of the judiciary with honor and integrity.

Lastly, I caution that we are "playing with fire" in this area. The judiciary is a very vulnerable branch of government that depends entirely upon public trust and confidence for its authority. If

FAST FACT

The Colorado Judicial Branch is comprised of 256 Judges and Justices: 7 Supreme Court Justices, 16 Court of Appeals Judges, 132 District Court Judges, and 101 County Court Judges. This excludes Denver County Court Judges, of which there are 17, who are appointed independently by the Mayor of Denver.

Colorado Judicial Branch Website, Court Facts, http://www.courts.state.co.us/exec/pubed/courtfactspage.htm (last visited Apr. 20, 2003).

judges are perceived as being unfair, political, or biased, the system begins to erode. We must remember how important both fairness *and* the appearance of fairness are to confidence in the courts. People only trust courts and our system of justice to the extent that they genuinely believe that they will be treated fairly. We cannot afford to undermine that perception in the process by which judges are selected. The independence of the judiciary is a hallowed and pivotal part of our system of government. It is critical to the system of checks and balances that we enjoy as a nation—and as a state. If we, as a society, can encourage respect for our rule of law and for our courts, we promote respect for authority and for society in general. We do so in part by supporting selection processes that designate the most impartial, independent, and thoughtful individuals as our judges. Those judges, in turn, bear the heavy responsibility of deserving that independence.

VI. After the Appointment: Then What?

The Colorado Code of Judicial Conduct begins with the admonition:

> *An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.*[35]

The canons demand that a judge should avoid impropriety and the appearance of impropriety in all activities (Canon 2), that a judge should perform the duties of his or her office impartially and diligently (Canon 3), that a judge is encouraged to participate in extra-judicial activities that do not detract from the dignity of the office or interfere with the performance of judicial duties (Canon 5), but that a judge should refrain from political activity (Canon 7).[36] The canons include detailed proscriptions and prescriptions for judicial behavior in service of the general goals. For example, a judge may not engage in ex parte communications about a case, or comment publicly about a pending or impending case.[37]

On the other hand, Colorado has recently amended its Code of Conduct to clarify that a judge is encouraged to engage in activities designed to improve the administration of justice; and is also encouraged to participate in civic and charitable activities, provided that they do not endanger the judge's impartiality.[38] In short, at least in Colorado, judges are expected to engage in overt efforts to improve our system of justice. That responsibility could take the form of attempting to develop better communications in a certain locale among schools, social services, probation, and religious entities about at-risk children; or, it could take the form of attempting to change the way that the entire system handles certain types of cases or treats jurors. Judges sometimes testify before legislative committees and often teach, speak to service groups, or host groups of children in their courthouses. Judges are, and should be, educators and innovators about our system of justice.

Additionally, judges should be a part of their communities, donating their time and efforts to those communities. Not only does that effort put the judge more in touch with community needs and problems, but it also puts a human face on the judiciary so that people are not as overwhelmed or mystified by it.[39]

Perhaps most importantly, judges have a duty to undertake the job of judging with wisdom, fairness, efficiency, and clarity. Trial judges must walk the daily tightrope of treating individuals in their courtroom with fairness and giving them their "day in court," while still being mindful of the hundreds of other cases awaiting court time. Those judges must remember that each individual case is about justice for those parties, and demeanor of a trial judge in a courtroom is of critical importance in upholding the integrity of the system. Additionally, judges must be case managers, who make the best use of in-court time as possible, and who move cases toward resolution appropriately. When judges rule, their decisions should be clear and understandable, so that all parties believe that, win or lose, they were heard and the decision makes sense.

Similarly, appellate judges have a duty to write opinions that are comprehensible for litigants, lawyers, law students, law professors, the media, and

trial judges. That is a diverse audience—but a realistic one for an important opinion.

Hence, all of those obligations accompany judicial independence from the perspective of a sitting judge. To continue to earn and deserve the independence that the Constitution envisions, those traits are optimal. Certainly none of us have them all, but, in general, Colorado's judiciary is held in high esteem nationally.[40]

The last set of obligations that come into play once a judge is appointed fall to other parts of society. Practicing attorneys and the organized bar bear some responsibility to defend and uphold the judiciary—particularly when the judiciary cannot speak for itself, such as on the heels of issuance of a particularly controversial opinion that is mandated by the wording of a statute or the application of precedent. In that circumstance, the judge or the court cannot offer a defense—but rather risk being pilloried in the media unless the bar steps in to defend the decision. In Colorado, the Colorado Bar Association has frequently taken on that role of supporting a decision or a judge.

The last step in this progression of interlocking responsibility falls upon the holder of the purse strings. To function, the judiciary must be adequately funded. The judiciary has no power to levy taxes, and must rely upon allocation of general fund monies. As a constitutional matter, the legislature bears the onus of funding the judicial branch of government.[41] Additionally, the courts have an affirmative obligation to perform their constitutional duties and to protect their independent status. Consequently, the courts possess the "inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities.[42] However, "a court may exercise its inherent powers only when established methods for procuring necessary funds have failed and the court has determined that the assistance necessary for the effective performance of judicial functions cannot be obtained by any other means."[43]

Indeed, in order to assure that funding entities—state or federal—do not attempt to punish the judiciary for unpopular decisions, no sitting judge's salary can be reduced while he or she is in office. But, of course, judges' salaries are just a small portion of what it takes to run a court system. Colorado's system currently consists of approximately 3,000 full-time employees, including judges. The non-judicial officers are the ones who file the cases, carry the probation caseload, compile the budgets, set up the technology systems, and manage to keep the system functioning. To make the court system one that deserves the trust and confidence of the public, we must constantly be innovative, responsive to new problems (such as the increasing need for translators or for assistance for litigants who choose not to hire attorneys), and ever mindful of our responsibility to provide equal justice for all. But we cannot do it without reasonable funding. If courts are not funded, what do they stop doing? Perhaps they stop accepting small claims cases, or civil cases in general, or perhaps misdemeanor crimes? Perhaps probation officers do not supervise probationers, and, instead, those individuals are committed to prison? All of us can envision a cascade of unacceptable problems stemming from any of those alternatives. The courts are not a luxury or a government program that could stand a little belt-tightening. The courts are a branch of government, charged with meeting constitutional responsibilities. Adequate funding is not optional; it is mandatory.

Conclusion

An independent and coequal judicial branch of government is as critical to our national well-being as water to drink, air to breathe, and food to eat. The courts safeguard not only our individual liberties, but also public safety, employment issues, personal injury recompense, enforcement of contracts, and a myriad of other social agreements. As judges, we are charged with upholding the dignity and sanctity of our offices. As a nation, we cannot afford to undermine the strength of that branch of government or the judges who people it.

Endnotes

† In preparation of this article, I am grateful for the assistance of Bragg Hemme, one of my 2002-03 law clerks, and Rosemary Motisi, my judicial assistant.

1 COLO. CODE OF JUD. CONDUCT Canon 3(A)(1) (2002).

[2] *Id.* at Canon 3(A)(6).

[3] Magna Carta, c. 39 (1215) (Eng.), *reprinted in* A.E. Dick Howard, Magna Carta, Text and Commentary 43 (1964).

[4] Prohibitions Del Roy, 77 Eng. Rep. 1342, 1343 (K.B. 1608), *quoted in* Catherine Drinker Bowen, The Lion and the Throne 305 (1956).

[5] Mass. Const. art. XXX.

[6] John Adams, *Thoughts on Government*, *in* The Political Writings of John Adams 482, 488 (George W. Carey ed., 2000), *quoted in* Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, 1997 Rep. of the A.B.A. Commission on Separation of Powers and Jud. Independence app. A, *available at* http://www.abanet.org/govaffairs/judiciary/rab.html.

[7] Gordon S. Wood, The Creation of the American Republic, 1776-1787 161 (1969) (quoting Letter from Thomas Jefferson to E. Pendleton (Aug. 26, 1776), Jefferson Papers I, 505 (Boyd ed.)).

[8] Geyh, *supra* note 6.

[9] *Id.*

[10] Aharon Barak, Remarks at the Opening Session of the Eleventh International Congress of Jewish Lawyers and Jurists (Dec. 28, 1998), *in Democracy in Our Times*, 20 Just. 8 (1999), *available at* http://www.intjewishlawyers.org/pdf/Justice%20-%2020.pdf.

[11] Anthony Lewis, *Why the Courts*, 22 Cardozo L. Rev. 133, 137 (2000) (quoting Aharon Barak, Remarks at the Hebrew University Honorary Doctorate Award Ceremony 1 (June 7, 1998) (transcript on file with author)).

[12] *Id.*

[13] For general information regarding the judicial nomination process in Colorado, see Mary J. Mullarky & Gerald Marroney, *Media Guide to Judicial Nominating and Performance Commissions*, June 10, 2002, *at* http://www.courts.state.co.us/exec/media/notices/perfnom.

[14] *See id.* (providing general information on judicial performance commissions in Colorado).

[15] For an example of the perils of judicial elective systems in a water context, see Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. Denv. Water L. Rev. 122 (2001).

[16] *See* Deborah Goldberg et al., *How 2000 Was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns*, The New Pol. of Jud. Elections, Feb. 2002, at 24, *available at* http://www.justiceatstake.org/files/JASMoneyReport.pdf.

[17] *Id.* at 23.

[18] *See* American Judicature Society, *Judges Under Fire*, *at* http://www.ajs.org/cji/cji_fire.asp (last visited Apr. 9, 2003).

[19] 536 U.S. 765 (2002).

[20] *Republican Party*, 536 U.S. at 787-88; *see also* Minn. Code of Jud. Conduct Canon 5(A)(3)(d)(i) (1998).

[21] One author suggests that the pressure will not be confined to states with elective processes. *See* Robert E. Hirshon, *A Few Thoughts on the Importance of an Independent Judiciary*, 4 J. App. Prac. & Process 331, 334 (2002).

[22] *See* Goldberg et al., *supra* note 16, at 4.

[23] *Id.* at 9.

[24] Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, at 8 (Apr. 2001), *available at* http://www.tpj.org/reports/paytoplay/index.htm.

[25] *Id.*

[26] *Federal Judicial Independence: A Review of Recent Issues and Arguments, Decisional Independence Issues*, Rep. of the A.B.A. Commission on Separation of Powers and Jud. Independence, *at* http://www.abanet.org/govaffairs/judiciary/rdecind.html (last visited Apr. 10, 2003).

[27] *See id.*

[28] *Id.*

[29] *Id.*

[30] American Judicature Society, *supra* note 18.

[31] *See id.*

[32] *Id.*

[33] *Id.*

[34] *See* Marla N. Greenstein, American Judicature Society, Handbook for Judicial Nominating Commissioners 65-66 (1984).

[35] Colo. Code of Jud. Conduct Canon 1 (2002).

[36] *Id.* at Canons 2-3, 5, 7.

[37] *Id.* at Canons 3(A)(4), 3(A)(6).

[38] *Id.* at Canon 5(B).

[39] *See* Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 Denv. U. L. Rev. 549, 558 (1988) (explaining that judges are "the best source available to the public for thoughtful insights into the legal process").

[40] Colorado is ranked among the top five states in the area of judges' impartiality. *See* U.S. Chamber of Commerce, State Liability Systems Ranking Study, Final Rep., at 9 (2002), *available at* http://www.litigationfairness.org/pdf/liabilities_survey.pdf.

[41] Colo. Const. art. X, § 2.

[42] Pena v. Dist. Ct., 681 P.2d 953, 956 (Colo. 1984) (citing Smith v. Miller, 384 P.2d 738 (Colo. 1963)).

[43] *Id.* at 957.

Justice Rebecca Love Kourlis is an Associate Justice for the Colorado Supreme Court. Justice Kourlis received her Bachelor of Arts degree, with distinction, from Stanford University, 1973, and her Juris Doctor degree from Stanford University School of Law, 1976. Prior to her appointment to the bench, Justice Kourlis was in private practice. Justice Kourlis was appointed as a District Court Judge for the Fourteenth Judicial District of Colorado in 1987, and served as Chief Judge from 1991 to 1994. In May 1995, Justice Kourlis was appointed by the Governor to the Colorado Supreme Court. Justice Kourlis serves on various judicial committees, including as Chair of the Supreme Court's Committee on Family Issues and the Committee on Jury Reform. Justice Kourlis has received numerous awards during her distinguished career, among which include the Rocky Mountain Children's Law Center's Champion for Children Award; the Academy of Matrimonial Lawyers' Judicial Excellence Award; and the Colorado Women's Bar Association's Mary Lathrop Award, as well as an Honorary LL.D. from the University of Denver College of Law.

The Practice of Poetry, History, and Judging

Gregory J. Hobbs, Jr.
Associate Justice, Colorado Supreme Court

I am delighted to accept the *Denver University Law Review*'s invitation to share a perspective on a law topic of personal importance. Judges are not often asked for their personal viewpoint. There is good reason for this: Judges cannot allow their personal views to stand in the way of their sworn judicial role.

The mystery is this: We get to become judges because the perspective we have gained as individuals in the community led to our nomination and appointment to the bench. Having called us to service, the Judicial Nominating Commissions and Governors who select us—and the citizens who retain us in office—certainly expect that we will bring our personal resources to bear in performing the public's work. These personal resources include our personality, education, experience, skills, expertise, and what we like to do.

Born to an Air Force family, I had the great fortune of living all over the West, including Alaska, California, and Texas. I grew up along the shores and rivers where a fisherman father and a mother who believed in blessings cared to take their four sons and daughter. My wife appeared to me at Philmont, the National Boy Scout Camp in northern New Mexico's Sangre de Cristo Range. We were both on summer staff there in the Sixties. Her home was Colorado. We served in the Peace Corps together. She is a teacher. I constantly learn from her. She is the inspiration of inspirations who keeps me going.

Blessings are of water and the spirit. History was my college major at Notre Dame. I've been writing poetry longer than I've been a lawyer; I am glad to include in this essay poems I have written of living and working in Colorado. My first law job after graduation from Boalt Hall, Berkeley, was Law Clerk to U.S. Circuit Judge William E. Doyle. He served on the Colorado Supreme Court before joining the federal judiciary. I pass his picture every day in the hall outside the door of my chambers.

When I left Colorado, after the clerkship, to practice in San Francisco, Judge Doyle's parting reproach/challenge to me was, "Why don't you make your stand here?" I'm still standing on the

strength of that question.

Judge Doyle began to teach me the practice of judging. Judging is the practice of translating the experience of the community into a just decision grounded firmly on scholarship and common sense responsive to the facts and the law of the case.[1]

JUDGES MUST BE STUDENTS

Law is the written experience
Of the People

Wise for being slow to change,
Courage for the changing

In the strength of individual experience,
One Nation

Joined to the community
Of individuals,

Judges must be students
Of the experience of the community.

Becoming a Coloradan

We are blessed to live in the land of the Great Divide. Surely, it's a place of poetry,[2] nature, men and women, words, passion, spirituality, delight, tragedy, insight, wit, brevity, discipline, melody, a profound sense of passing, and so a profound sense of gratitude for the opportunity to be here, at this time, in this place, with this person, this bird, this tree, this flower, this river, that hill, the one behind it, so on up to altitudes and attitudes, where oceans gurgle from snow seeps, in multiple directions, drawn by gravity to destinies far and near.

COLORADANS

To each of us
The land, the air, the water,
Mountain, canyon, mesa, plain,
Lightning bolts, clear days with no rain,

At the source of all thirst,
At the source of all thirst-quenching hope,
At the root and core of time and no-time,
The Great Divide community

Stands astride the backbone of the continent,
Gathering, draining, reflecting, sending forth
A flow so powerful it seeps rhythmically
From within,

Alive to each of us,
To drink, to swim, to grow corn ears,
To listen to our children float the streams
Of their own magnificence,

Out of their seeping dreams,
Out of their useful silliness,
Out of their source-mouths
High and pure,

The Great Divide,
You and I, all that lives
And floats and flies and passes through
All we know of why.

Thomas Hornsby Ferril worked for the Great Western Sugar Company. He was also a poet. He knew how water and well-prepared soil can siphon sugar to a poem and sugar beets. He loved Colorado history—plains history, stream history, mountain history—the history of rocks and rivers and how they came before and will outlast us. He wrote *Two Rivers*[3] about the confluence of the South Platte and Cherry Creek, from which Denver sprang as a result of an 1858 gold find. His poem sings of the wagon people and the invitation of the waters: "If you will stay we will not go away."[4]

Living through the Dust Bowl, Ferril knew enough of water scarcity to also write a poem he titled *Drouth--1824*: "Hear how the wagons crack/ In the copper drouth of the prairie."[5]

Another great western writer, Wallace Stegner, said: "Adaptation is the covenant that all successful organisms sign with the dry country . . . . [W]ater is safety, home, life, place. All around those precious watered places, forbidding and unlivable, is only open space, what one must travel through between

FAST FACT

Justices on the Colorado Supreme Court are appointed for ten-year terms. The Chief Justice is selected from among the presiding Justices on the Court and serves at the pleasure of a majority of the Justices

Colorado Judicial Branch Website, Colorado Supreme Court, http://www.courts.state.co.us/supct/supctindex.htm (last visited Apr. 20, 2003).

places of safety."[6]

Stegner's calling was to write about the joy and scarcity of the watering holes. He showed us how to relate our kinship to each other and to every other living thing that depends on water for a living. He softened no blows about our wasteful habits and busted hopes. "The town dump" is "our poetry and our history"[7] he said in *Wolf Willow*,[8] his reminisce about growing up as the child of homesteaders on the plains of southern Saskatchewan very near Montana's border.

What a concept, by our garbage are we known! What Stegner found in the dump as a kid was every sort of trace of what Westerners prize and discard in trying to perch a toehold. What he meant to say—as always—he said tartly and wisely: "The lesson they preached [from all these throwaways] was how much is lost, how much thrown aside, how much carelessly or of necessity given up, in the making of a new country."[9]

Stegner match paired his critical eye with his hopeful eye. Optimism and community he thought to be the West's future legacy:

> *Angry as one sometimes gets at what heedless men do to a noble human habitat, one cannot be pessimistic about the West. This is where optimism was born. And when the West learns more surely that co-operation, not rugged individualism, is the quality that most characterizes and most preserves it, I will seize the harp and join the boosters, for this will be one of the world's great lands.*[10]

Waste, necessity, opportunity, community—these are characteristic Western experiences. Despite our go-it-alone pretensions, enduring amidst this magnificent and capricious landscape has always meant pulling together. Those who get greedy and cannot cooperate will be exposed by the land and their neighbors for what they are, destructive of community and of themselves.

We are still a wagon people. We are immigrants, homesteaders. We are yet settling into this great land. We are marked by what we take—and what we give back—to the land and to each other. We are contemporaries passing through what has been, what is, and what shall be. We are tenured to this place of boom and bust hopefulness. We must see and hold on to what we value most.

CODE OF THE PASSING THROUGH PEOPLE

Pack our wagons, so the axles ride a little
Higher than the wagon-tearing stones, not so high
A capsize-wind will blow over the edge all we
Carefully stowed, or in mire-hole sink beyond

Resurrection. Pack only what we're needing and
Hope chest bear for when we homestead arrive, and there's
Cause for remembering what of our ancestors
At table before us spread, to remember theirs.

And do not expect what we do not earn, and thank
Always for what is given us. And do not waste
What tomorrow we may need, or blind to another's
Need, in grace and privilege, we may choose to freely

Give. Sharpen our axes, oil our guns, for they are
Tools, like the hammer, nail, stool, hand, and milking pail,
Lamp, wick, candle, planed-off plank and any good book,
Needle, thread, spindle, spool, crank, flume and headgate wheel,

Self-defense a right, but never to pick a fight
Or intimidate or disregard innocents
Or refuse to forgive or ask for forgiveness.
Insist that conscience begins in living it, string

String, every string, so every string plays of future
Well-being. How the red wing blackbird morning sings
And barn owl hunts the fluttering evening, cherish
Every creature for that creature's form of speaking

And every intonation and form of being.
And when we borrow another person's strength or
Natural feature, honor and repay, in how we
Transforming live and love and better pass on through.

We are part of developing a new country, a country of law, justice, love, individual rights, and community rights. This is a work of duty

and the public interest forged of humility, hard work, and the friction of conflicting voices and ideas which ignite the spark—induced by the oxygen of inspiration—that lights the way.

To help this light shine more clearly, we must understand the dark of our history as well as the bright.

Carved Out of the Public Domain

Congress carved the Western Territories and States out of the public domain, acquired by purchase, exploration, conquest, and negotiation, forged into highly consequential legal instruments, the 1803 Louisiana Purchase, the 1846 Oregon Compromise, and the 1848 Treaty of Guadalupe Hidalgo.[11] This vast expanse—from the Mississippi River to its headwaters on the Continental Divide, from the Snake and the Columbia Rivers to the Pacific Ocean, from the San Luis Valley of the Rio Grande and the Colorado River from its source on the western side of the Great Divide to the California delta, across the Great Basin to the Sierra, from its foothills to the long western shore—this vast and incomparable expanse gave birth to the Public Land States, 30 in all, creatures of the federal determination to follow the lead of those who were already going there.[12]

The job of the mapmakers was to reduce the scale of the West to features and contours, to show the lay of the land, where the rivers fall from peak to forest through the livestock grazing zones, then to the agricultural bottom land capable of cultivation by irrigation from the streams, exposing geological formations where might lie the valuable minerals.

Those explorers who mapped the west, Hayden, Powell, Wheeler, and King,[13] brought with them sketchers, photographers, and landscape artists—among them, Holmes, Jackson, Bierstadt, Moran, and Egloffstein—to portray the book of the western wilderness—magnificent, savage, alarming, and alluring.[14]

The job of the artists was to fire the mind with the sublime. Here the Creator had done the most glorious work, the Falls of the Yellowstone, the Chasm of the Grand Canyon, the sliced-off magnificence of Yosemite's Half Dome, and the sheer precipice of El Capitan. Out here, in the language and concepts of Manifest Destiny, Providence wrote Independence, Freedom, Challenge, Promise, and Fulfillment on the face of every feature of Nature's blessing. Here, Salvation and all the tools needed for Sustenance and Deliverance had come together.

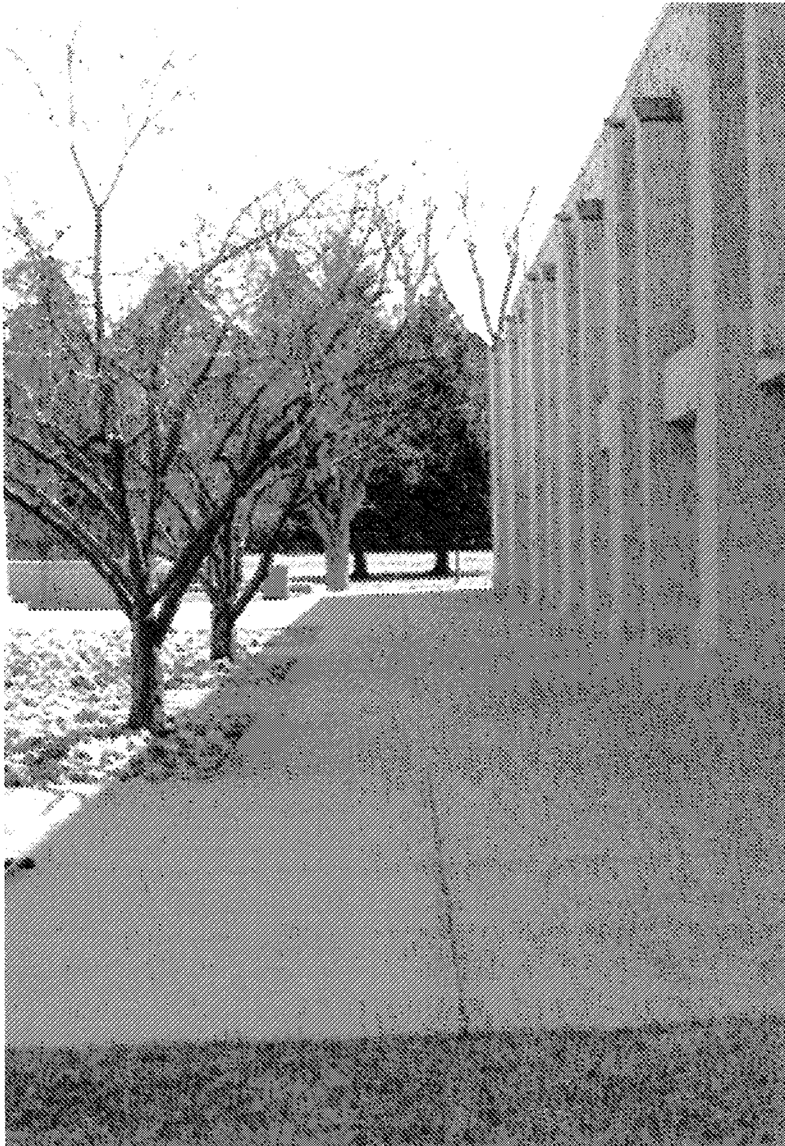
All in the interest of settlement. From their outset, the Territories and States preoccupied themselves with reducing the land, the waters, the timber, and the minerals to possession. For example, the very first session of Colorado's territorial legislature in 1861 adopted a statute that defined "real estate" as "any right to occupy, possess, and enjoy any portion of the public domain."[15] It also passed a water law that allowed any person to cross the lands of another to access, and remove from the streams, water necessary to work mining claims, irrigate farm land, and supply the factories, however far removed those uses might be from the stream.[16]

From the mines, from the farms, grew the towns and cities. Agriculture, mining, manufacturing, every form of commerce, recreation, tourism, transportation, education, and that most adaptable and necessary resource—people moving here to build and shape community—these are the sticks in the bundle of Colorado's heritage, past, present, and future. This legacy always takes shape from the land, the water, the sky, the vistas, and the limits we impose on our use of them.

Don't Go There! (But We Must and We Shall)

John C. Fremont was called the great pathfinder. But his risk-taking in the face of due warning about the elements led others to disaster. He persuaded Bill Williams to guide him up into the teeth of the Big Winter of 1848.[17] The warnings came from other mountain men at Bent's Fort and Pueblo.[18] Senator Thomas Hart Benton, Fremont's father-in-law, conjured up Fremont's fourth expedition to resurrect his son-in-law's reputation after Fremont had been court-martialed.[19] Various groups were vying for the glory and reward of having the transcontinental railroad route.[20] Senator Benton convinced St. Louis investors to finance Fremont. Bill Williams just barely escaped the disaster; the persistent rumor is that he and other survivors resorted to cannibalism after Fremont got out to Taos and went on to California.[21]

Fremont declared the expedition a success, despite the ten who died.[22] He became a California Senator and, in 1856, the first Republican candidate



for President after getting rich on a Sierra foothills land grant. His wife Jessie, a fine writer, is credited for ghost writing his adventurous accounts of exploration.

Abraham Lincoln ran in 1860 on a platform supporting passage of the Homestead Act and the Railroad Act.[23] Colorado Territory came into being in 1861. The Colorado militia under Chivington exterminated a peaceful band of Native Americans at Sand Creek in 1864, a year of escalating scalpings and killings by Indians and Whites.[24] The coming of the railroad cleaved through the two cultures of the Squaw Men, a single generation of a few white men who lived in community with Native Americans.[25]

THEY CALL ME SQUAW MAN

They call me squaw man. On account
Of the Cheyenne woman I live with.
There weren't no other women here
When I came out. Her people took me
In. We'd skinned along the cottonwood
Bottoms, at Big Timbers on the Arkansas,
Set our poles and wrapped our hide tight
To the raw smoke opening at the top,
Strangle berries was already freezin'.

That's when the Pathfinder come through,
Says he discovered South Pass, crossed
The Sierra in a big snow, liberated California.
Says he knows where the Railroad's got to go,
From St. Louis out the Arkansas, up and over
The 38th Parallel.

I says to him, Don't go up there. We been
Chunkin' ice out of river edges since
September just to get a drink. Up in the hills
Deer and bear been growin' more than usual
Hair, and it ain't strange ten feet or more
Of snow up there with early signs like this.

"Old Fool," he says. "I've done it all before.
Follow me, Men, don't listen. Just up
And over the other side to California!"

He tries the San Juans in December,
Gets hisself and the men stuck in a notch
Between the Rio Grande and whatever.
Bogs down at Christmas. The mules was
Freezin' in their tracks and there wasn't
Any eatin' left a civilized man can mention
Once they was down and the flesh stripped.
The Pathfinder skedaddles out of there
To Taos and Californi.

There's ten men didn't. Left their marks
On the bark where a Griz can't reach
And claw when the snow melts.

We almost didn't make it neither. There was
Nothin' for us to cut but rabbit, coyote.
Grandfathers stirred their story sticks into the
Coals, said of the ice that never melts up in the
Yellowstone country. We drew buffalo on the
Inside of tipi walls with cold smoke the fires
Made when the old men fell quiet, and let
The children gnaw the bottom thongs. River
Finally loosed and we scraped into the Sand Hills.

My woman died of the pox. Chivington gutted
Her family a year later. The railroad's chasing
The old Smoky Hill trail into Denver. They've
Carved through Cheyenne for the trans-continental.

I spend my days hacking around Fort Lyon,
The white people tell their children

Don't go near that squaw man!

Our state has had great moments of progress and great moments of shame. Entrepreneurial enterprise has been present from the start. After the Civil War, General William Tecumseh Sherman was assigned military jurisdiction over the West. He decided he needed to see what was there. He traveled up the Platte Trail and then came down the Front Range from Fort Laramie.[26] He most looked forward to seeing and being in the Rocky Mountains. He was a private person; he hated receptions and having to make speeches.[27] Wouldn't you know! The civic leaders of Denver came out to see him and invite him to a reception and give a speech.[28] Their motivation, to get the Army to build forts in Colorado so Denver merchants could sell them supplies.[29]

Our state has had its moments of great shame: the Sand Creek Massacre, riots against the Chinese in downtown Denver in the 1880s, the Ludlow Massacre of 1914, Ku Klux Klan marches in the 1920s, de jure discrimination against African-Americans in the Denver public schools as recent as the 1960s.[30]

The hospitality that Governor Carr showed to the Japanese people interred here during World War II;[31] the federal court orders against segregation in the schools; our efforts at opening up trade routes to Africa, Central and South America, and Asia; our election of Hispanic, African-American, and Japanese-American leaders—these demonstrate a Colorado compassion and commitment to a community that, despite difficulty and temptation, points to achieving what is fair and just.

We have a choice, the choice that every generation of Coloradans gets to make.

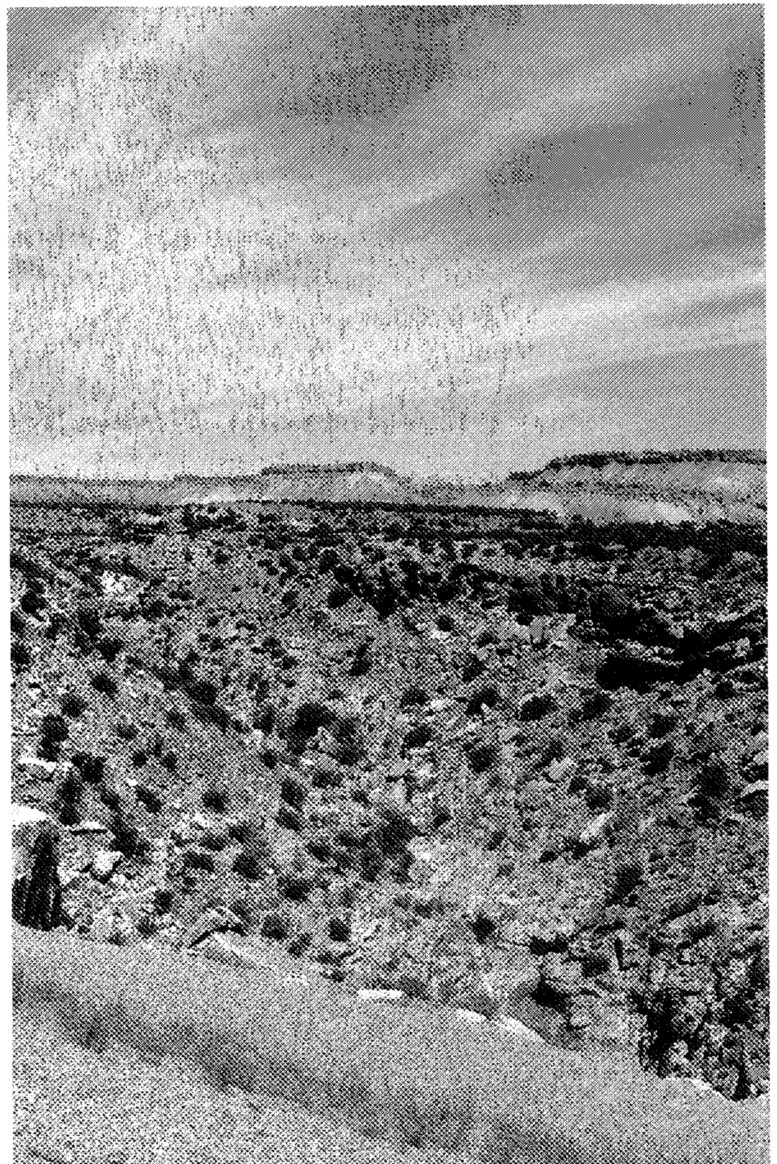
WHICH COLORADO SHALL WE BE?

I wander through a state that's grown
From out of prairie grass, a state of roots
In confluence of creek and river path.
I loathe this state, I love this state, for what
It's been and is, mean and dusty, lovely, green,
Which Colorado shall we be?

I'm the state of Chivington, of hounding out Chinese,
Of walking through the streets in sheets and
Fixing school boundaries to keep them Afros out.
I'm the state of parks and trees, of getting exercise,
Of welcome you, I'd like to help, what interests you?
Which Colorado shall we be?

Thirst at the Watering Hole

Justice is not a vaporous ideal. It's the thirst for searching out the watering hole. To smell the oasis and then, unerringly, to humble on the path that leads some other there—and they to others. Consider humor, honesty, humility, the three uh huhs! When we look to those we truly admire, isn't it their grace, their judgment, their kindness, their practicality, their intellect, their skill and craft, their unique madness and magic, their counsel and wisdom, their art, their



passion, their generosity that fills us with gratitude and profits us to the core?

Judging well in community benefits from having worthy mentors and colleagues, and focusing on the heart of the job. State and federal appellate judges must exercise scholarship and common sense. All judges have this responsibility of course. But appellate judges, in particular, have a duty to articulate justice and the law, in writing, for public guidance.

The third branch of government, the judiciary, governs primarily through the written judicial opinion. Authoring a written opinion for an appellate court can be very humbling—because of the work it takes and the impact court decisions can have on citizens and the community.

The work is hard and important.

First, the appellate judge needs to thoroughly research, read, and write the proposed opinion to be as correct as one can based on the law and the facts of the case. A judge is making a judgment on what others have done or left undone in their lives. The judge always owes the parties to the appeal the courtesy of fair and diligent consideration.

Second, the appellate judge needs the vote of a majority of the judges or justices who must decide the case. Otherwise, the judge's opinion will never see the light of day. One of a judge's colleagues may end up authoring the court's decision, simply by proposing a concurrence or dissent that gains enough votes to become the court's judgment.

For example, the Colorado Court of Appeals sits in three judge panels to decide a case; a judge needs the vote of at least one other judge besides his or her own. Our Colorado Supreme Court—which chooses which of the decisions of the Colorado Court of Appeals we will undertake to review—has seven justices; a justice needs the vote of at least three other justices.

The appellate judge must never give in to anger or pettiness. The law's not about the judge anyway. It has to do with people in community. Next time around, when the judge gets the next assignment to write the proposed majority opinion, he or she will have the privilege of convincing colleagues yet again.

Third, and most important, the appellate judge must learn never to give up listening and learning about people and the law, and how the work of justice is the crucial work of any civilized society, in all ages. Growing into the job—every day a judge gets to do the job—is the mark of settling into his role and responsibility of being an appellate judge.

JUST DESSERTS

Judges enjoy the last word
By keeping their mouths shut
After their judgments are in.

Whether it's a good judgment
Does not depend on who says
What about them, but whether

They speak experience accurately.
Peoples and principles are Wilderness-
Shaped. Holding court's a session

In dutch-oven cooking, citizens stir
Ingredients, what they do, what they say.
Just desserts merit savoring.

Judges look through the windows of their cases onto the landscape of what actually happens in the lives of citizens. They are reporters, educators, guides, scholars, idealists, pragmatists, and decision makers. They are bound by principle to articulate principles the

FAST FACT

Among the duties delegated to the Chief Justice of the Colorado Supreme Court, the Chief Justice is responsible for appointing the Chief Judge of the Court of Appeals and the Chief Judge of each of Colorado's 22 judicial districts.

Colorado Judicial Branch Website, Colorado Supreme Court, http://www.courts.state.co.us/supct/supctindex.htm (last visited Apr. 20, 2003).

best they can discern and apply them, window-by-window, case-by-case, upholding the rights and the responsibilities of individuals and the community. They must be sign readers of the facts and mapmakers of justice and the law.

OUT ON THE ROAD TODAY

A.
Can't make it on the cleaning stints,
Gotta' get good tips tonight
Just can't get kicked out
Of another apartment,

Damn bus is late again
Momma's got the baby,
Hope she's not too sick,
What if I get sick, no benefits?

Two guys snigger, leer at her,
She huddles in her slicker.

B.
I'm just hanging with the brothers
At the Points outside the bar,
I see them coming, I start walking,
They pull a patrol car onto the sidewalk,

Hey you, they say! I just keep on stepping,
Hey you they say, stop right there!
Get on over here! My fist is clenched,
That's proof enough for them.

He doesn't hang at the bar with
The guys who buy at Cherry Creek.

C.
I get to the King Soopers, wait in line
At the pharmacy counter, sorry we can't
Do that, they say, hasn't been approved,
Call your insurance company,

Car smokes, emission test is due,
Another $500.00 to the mechanic
Maybe gets it through, what if I forget
And drive with the registration out?

A grandfather on oxygen tries to steer into traffic,
Park it or walk it! screams the driver behind.

D.
Will the young mother raped
Outlast her cross-examination?

Is the constitution in place for a
Black stop in a "bad" neighborhood?

Will the jury see those teen-aged epithets
Caused one of the elders to crash into a pole?

What if they, what if we, what if I
Just don't care?

E.
Call the next case![32]

Upstream

Ferril spoke of how his father took him fishing, how he took his father's ashes back to the river, and how the rocks and the waters will outlast.[33] I thank my father for the fishing; my mother for the blessing; my wife for the loving inspiration.

FISHERMAN'S KNOT

Lord, my hands tremble,
I must take off my glasses,
Hold the line to my eye
And twist three or four
Times. This space between
The loop, Lord, help me
Hold it here, grant me
Just a little more light
To thread the gap between
My thumb and forefinger,
Let me cinch my filament
To your swivel. Lord, I am
Complete, I hear the stream
Behind me continuing.

Endnotes

[1] History can resonate in a state supreme court's consideration of a contemporary legal problem. I cite instances in the footnotes that follow.
[2] On the day he appointed me to the Colorado Supreme Court, Governor Roy Romer requested that I not put poetry into my judicial opinions. But he also wrote me a note eight days after I was sworn in, saying, "I hope you still take time to enjoy your poetry, hikes and other important parts of life." I am honoring these requests and hopes.

[3] THOMAS HORNSBY FERRIL, *Two Rivers*, *in* THOMAS HORNSBY FERRIL AND THE AMERICAN WEST 122 (Robert C. Baron et al. eds., 1996).
[4] *Id.*
[5] THOMAS HORNSBY FERRIL, *Drouth--1824*, *in* THOMAS HORNSBY FERRIL AND THE AMERICAN WEST, *supra* note 3, at 16.
[6] WALLACE STEGNER, *Living Dry*, *in* MARKING THE SPARROW'S FALL: WALLACE STEGNER'S AMERICAN WEST 226-27 (Page Stegner ed., 1998).
[7] WALLACE STEGNER, WOLF WILLOW: A HISTORY, A STORY, AND A MEMORY OF THE LAST PLAINS FRONTIER 36 (Penguin Books 1990) (1962).
[8] *Id.*
[9] *Id.* at 35.
[10] WALLACE STEGNER, *The Rocky Mountain West*, *in* MARKING THE SPARROW'S FALL: WALLACE STEGNER'S AMERICAN WEST 259 (Page Stegner ed., 1998).
[11] LOREN L. MALL, PUBLIC LAND AND MINING LAW: TEXT AND CASES 4-7 (3d ed. 1981); *see also* People v. Schaefer, 946 P.2d 938, 942-45 (Colo. 1997) (discussing, in the context of the Fourth Amendment's reasonable expectation of privacy the tent as habitation in the West from Lewis and Clark to the contemporary tourist); Lobato v. Taylor, 71 P.3d 938, 945-57 (Colo. 2002) (discussing, in the context of deeds to land of the Sangre de Cristo Grant in the San Luis Valley, Mexican land grant, settlers' rights, and Colorado Territorial law).
[12] MALL, *supra* note 11, at 7-8.
[13] WILLIAM GOETZMANN, NEW LANDS, NEW MEN: AMERICA AND THE SECOND GREAT AGE OF DISCOVERY 412-14 (Penguin Books 1987) (1986).
[14] *See generally* WILLIAM H. GOETZMANN & WILLIAM N. GOETZMANN, THE WEST OF THE IMAGINATION (1986).
[15] Gillett v. Gaffney, 3 Colo. 351, 358 (1877); Bd. of County Comm'rs v. Vail Assoc., 19 P.3d 1263, 1275-78 (Colo. 2001) (discussing taxation of private ski area on U.S. Forest Service Land in context of Colorado and United States public land law).
[16] Bd. of County Comm'rs v. Park County Sportsmen's Ranch, 45 P.3d 693, 705-08 (Colo. 2002) (discussing English common law and Colorado water law in the context of federal and state public land law); Yunker v. Nichols, 1 Colo. 551 (1872); COLORADO FOUNDATION FOR WATER EDUCATION: CITIZEN'S GUIDE TO COLORADO WATER LAW 4-5 (2003) (discussing Native American and Hispanic water uses and water structures).
[17] ANDREW ROLLE, JOHN CHARLES FREMONT: CHARACTER AS DESTINY 115 (1991).
[18] *Id.* at 114.
[19] *Id.* at 123.
[20] *Id.*
[21] *Id.* at 118.
[22] *Id.* at 120.
[23] STEPHEN E. AMBROSE, NOTHING LIKE IT IN THE WORLD: THE MEN WHO BUILT THE TRANSCONTINENTAL RAILROAD 1863-1869, 67, 79-80, 172 (2000); *see also* McCormick v. Union Pac. Res. Co., 14 P.3d 346, 352-53 (Colo. 2000) (discussing the federal railroad acts and land patents from the public domain).
[24] CARL UBBELOHDE ET AL., A COLORADO HISTORY 106-09 (8th ed. 2001).
[25] *See id.* at 109.
[26] ROBERT G. ATHEARN, WILLIAM TECUMSEH SHERMAN AND THE SETTLEMENT OF THE WEST 74 (1995).
[27] *Id.* at 75.
[28] *Id.* at 76-78.
[29] *Id.*
[30] *See* CARL ABBOTT ET AL., COLORADO: A HISTORY OF THE CENTENNIAL STATE 153, 283-87, 322 (3d ed. 1994); LOUISA WARD ARPS, DENVER IN SLICES 23 (1959).
[31] ABBOTT, *supra* note 30, at 365-66.
[32] Outlaw v. People, 17 P.3d 150, 153-54 (Colo. 2001) (discussing the unwarranted stop of an African-American person in Denver's Five Points neighborhood).
[33] THOMAS HORNSBY FERRIL, *Fishing Upstream With My Father* and *Time of Mountains*, *in* THOMAS HORNSBY FERRIL AND THE AMERICAN WEST, *supra* note 3, at 21, 114.

Justice Gregory J. Hobbs, Jr. is an Associate Justice for the Colorado Supreme Court. Justice Hobbs received his Bachelor of Arts degree, Magna Cum Laude, from the University of Notre Dame, 1966, and his Juris Doctor degree from the University of California at Berkley (Boalt Hall), 1971, where he was Supreme Court Editor for the California Law Review. Prior to his appointment to the bench, Justice Hobbs practiced law for 25 years, with an emphasis on water, environment, land use, and transportation law. Justice Hobbs was a law clerk for Judge William E. Doyle, United States Court of Appeals for the Tenth Circuit; senior partner with Hobbs, Trout & Raley, P.C.; partner with Davis, Graham & Stubbs; First Assistant Attorney General, Natural Resources Section, State of Colorado; and an Enforcement Attorney for the U.S. Environmental Protection Agency. In addition, Justice Hobbs also taught grade school and served in the Peace Corps in South America. Justice Hobbs was appointed by the Governor to the Colorado Supreme Court on April 18, 1996.

Disrespect in the Court: A Judge's Perspective

Christopher C. Cross†
County Court Judge, 18th Judicial District, Arapahoe County, Colorado

"If you do not stop rolling your eyes every time I make a ruling with which you do not approve, I will start rolling my eyes at every poor question you ask or objection you make."

I made this comment at a bench conference in a recent jury trial. It is how I handled a display of what I perceive is a growing number of outward signs of disrespect toward the court by attorneys. I base this perception and concern on my observations from over six years on the bench, discussions with fellow judges and with other members of the bar, and from reading about similar concerns stated in various legal publications.

Other authors have focused on the incipient lack of civility and professionalism between attorneys.[1] This article narrowly addresses actions by attorneys in court, generally subtle and often nothing more than "body language," which manifest disrespect for the court. I am not talking about inappropriate actions that are a product of inexperience or, at the other end of the spectrum, the egregious behavior that leads to a contempt citation or disciplinary action. Displays of disrespect may be directed only to a particular judge at a particular moment or, perhaps, not at a judge at all. I believe all displays of disrespect undermine the foundation of the judicial system and may violate the Rules of Professional Conduct.

Attorneys must respect the court. The Oath of Admission each Colorado lawyer takes includes the averment, "I will maintain the respect due to courts and judicial officers." The preamble to the Colorado Rules of Professional Conduct states, in part, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."[2] In *Losavio v. District Court,*[3] the court held, "[L]awyers, as officers of the court, must maintain the respect due to courts and judicial officers."[4] In *People v. Dalton*,[5] an attorney was publicly censured for conduct that "displayed disrespect for the county court judge, the prosecutor, and the court reporter."[6] Judges are not necessarily seeking "personal" respect. The legal system, however, demands that attorneys show respect for the "robe" and what it represents. An Ohio court iterated this point when it noted that "[r]espect for the law and obedience to the orders and judgments of the tribunals by which it is enforced lies at the very foundation of our society."[7]

In my experience, disrespect is not commonly seen in written material or in verbal presentations. It is most often through body language, including the type of gesture that got us all in trouble with our teachers and parents. It is one thing to think a judge is less than able or that a particular ruling is, or series of rulings are, incorrect. However, it is quite another to openly show disfavor with rulings by rolling one's eyes; slumping back in a chair in disbelief; turning one's back on a judge; throwing hands into the air; "retreating" with a heavy sigh; interrupting and arguing with the judge; or slapping a pen or pad of paper on the table or lectern. Disrespect can also be unintentional, such as wearing an overcoat to the lectern, having a tie loosened, or being late or unprepared. Judges are expected to maintain composure and "judicial demeanor" at all times, and are criticized when they do not. No less is required from the attorneys.

Obviously, the most egregious behavior can be the basis for a contempt action or disciplinary action. Contempt, however, is the final sanction of choice. I wonder what an attorney thinks he or she is trying to accomplish with real (or feigned) disapproval with a ruling or other demonstrations of disrespect. I submit that the actions I am discussing do nothing, just as being found in contempt does nothing, to advance the position an attorney is espousing in court. A judge is not going to reverse a ruling because an attorney shows disdain.

Jurors notice such behavior and routinely criticize attorneys who, through word or body language, are critical of a judge. Jurors largely identify with the judge and look to the judge, not the attorneys, for guidance. If an attorney is showing disrespect for the judge, I believe that jurors feel they are also being shown

disrespect.[8]

I am concerned that some lawyers think that they better represent a client or demonstrate their zealousness by openly showing disagreement after a ruling does not go their way. I disagree with such a belief. I would like to think that this is primarily a problem with younger attorneys who have not received adequate training or just do not know better. Unfortunately, I see these actions in younger and older attorneys alike. There is also a concern that as a lawyer becomes more "comfortable" showing subtle signs of disrespect or gains confidence that these actions are somehow helping his or her case that the displays of disrespect will escalate to a more contemptuous level. In Colorado, one attorney was publicly censured for, among other signs of disrespect, "talking in a loud, indignant voice and waiving his hands above his head" and "repeatedly interrupting [the] Judge."[9] It would be best if these actions were halted before contempt or disciplinary action is taken. In another extreme example, one appellate case outlines the escalation of disrespectful behavior throughout one trial. The attorney respondent in *In re Coe*[10] began showing disrespect by "gestur[ing] with her arms, legs and body, while facing the jury and audience, in order to express displeasure with the ruling."[11] She should have stopped when her actions would have cost her only $100.00!

Other behaviors are not necessarily directed at a judge, but do show disrespect for the judicial system. The Rules of Professional Conduct prohibit attorneys from berating clerks, probation officers, and other court personnel in front of their clients.[12] Attorneys should realize that court personnel report such behavior to the judge. I wonder what others think, especially clients, when an attorney stands at the lectern with overcoat still on or with tie loosened or is reading the newspaper in the gallery. Why should that client or a courtroom full of people show respect if the attorneys do not?

Cellular phones are a particular problem. A telephone ringing in court is really not the issue. A ringing phone is a product of today's technology and hurried world. Answering the phone is a problem! I once had an attorney answer his cell phone and begin conversation during a hearing while the opposing attorney was examining a witness. There are times when I enter the courtroom and attorneys are on their telephones. However, rather than terminate the call, the attorney will make a bee-line for the door, so that the conversation is not interrupted.

Additionally, most judges require and expect attorneys to be on time and prepared. Failure to meet these requirements is disrespectful to the court and judicial system.

The related topic of lack of professionalism deserves mention. Being disrespectful or showing disdain or condescension toward opposing counsel, a witness, or a party to the action, can be as harmful to the legal system as showing disrespect to the court. Petulant behavior can also lead to a more hostile courtroom environment. If an attorney is openly showing disrespect, everyone is more on edge, nerves fray, and people, including judges, say and do things they might not otherwise. I do not think this favors the attorney who is showing disrespect or does service to the judicial system as a whole. The Colorado Supreme Court has recently adopted a new rule requiring new admittees to the bar to take a "professionalism course," in part, in recognition of the overall problem of the declining civility among practitioners.[13]

An appropriate time, place, and method for disagreement and criticism exists within the bounds of ethical conduct. First and

FAST FACT

In Colorado in FY 2002, 469,993 cases were filed statewide among the 64 County Courts, and 164,237 cases were filed in the 22 District Courts.

Colorado Judicial Branch Website, Court Facts, http://www.courts.state.co.us/exec/pubed/courtfactspage.htm (last visited Apr. 20, 2003).

foremost, parties should make a record and then take their seats without argument or disapproving body language. If a judge does not allow you to make a record beyond the legal objection, sit down and take the matter up outside the presence of the jury at the next opportunity. Keep in mind, "[o]nce a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge."[14] If the ruling affects the proceeding's outcome, appellate options are available despite expense, delay, and common dissatisfaction.

Aggrieved attorneys have additional remedies. Most judges are willing to meet with an attorney, as long as the rules prohibiting *ex parte* communication are observed. Additionally, attorneys may complain to a chief judge. Furthermore, in Colorado, attorneys, litigants, and others affected by the court are "polled" near retention time (in Colorado, judges at the state level are appointed by the governor, then placed on the ballot every set number of years for retention). Polling responses anonymously critique a judge's performance and can lead to a recommendation that the judge not be retained. Criticism is carefully scrutinized and taken seriously by the Retention Commission, the judge, and, ultimately, the voters. Finally, an attorney can report inappropriate actions by a judge to the appropriate judicial regulatory agency.

Admittedly, there is a time and a place for public criticism of a judge. The Honorable Roger E. Miner, Circuit Judge for the United States Court of Appeals for the Second Circuit, wrote in *Criticizing the Courts: A Lawyer's Duty:*

> *Without question, the judiciary is accountable to the public, just like any other institution. If judges are arbitrary, if their behavior is improper, if their decisions are not well-grounded in constitutional and legal principles, the bar is in the best position to observe and evaluate the deficiencies, to inform the public, and to suggest corrections. When lawyers engage in criticism of the courts for constructive and positive purposes, grounded in good faith and reason, the judiciary is strengthened, the rule of law is reinforced, and the public duty of the bar is performed.*[15]

In his article, Judge Miner quoted United States Supreme Court Chief Justice Harlan F. Stone, who stated:

> *I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with the great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.*[16]

I agree that there is a place for public, valid criticism where the dignity of the judicial system is observed and maintained. I do not, however, believe "bad-mouthing" a judge at a bar meeting (or while meeting in the bar) is appropriate.

A judge is limited in how to respond to disrespectful behavior and criticism. Judges confront disrespect in various ways, sometimes saying something at the time it occurs, at a later time, or by doing nothing at all. Contempt citations are the last resort. It is important to keep in mind that "[e]ven in the case of unfair and unjust criticism, the bench should remain silent, leaving to the bar its ethical obligation to come to the defense of the judiciary in such situations."[17]

Finally, I frequently "judge" mock trial competitions at both the high school and law school levels. One of the gratifying

FAST FACT

Currently, there are 22 Judicial Districts within the State of Colorado, established by the State Legislature in 1963 and last revisited in 1975. Changes in District boundaries require a two-thirds vote of each house of the State legislature.

Colorado Judicial Branch Website, Court Facts, http://www.courts.state.co.us/exec/pubed/courtfactspage.htm (last visited Apr. 20, 2003).

aspects of that endeavor is to see how respectful the students treat each other, their adversaries, witnesses, and the court. Obviously, the coaches have advised their students that the way to a better result is to act with the utmost courtesy and respect. I only hope that law schools, district attorneys' offices, public defenders' offices, and others offering trial tactics courses, are not teaching something different.

Endnotes

† The author expresses his gratitude to the following for their comments, critiques, and assistance with this article: Judges Ethan Feldman and Rick Jauch, colleagues on the bench, both of whom have more than 20 years of judicial experience; James Coyle, better a friend than foe, who works in the Attorney Regulation Counsel's Office; Mary Frances Nevens, staff attorney to the Presiding Disciplinary Judge; and my lovely wife, Nancy.

[1] *See* Douglas R. Richmond, *The Ethics of Zealous Advocacy*, 34 TEX. Tech. L. Rev. 3, 4 (2002); Samual A. Rumore, Jr., *Reviewing Professionalism*, 61 ALA. LAW. 354, 355 (2002); Jeffery M. Vincent, *Aspirational Morality: The Ideals of Professionalism*, 15 UTAH BAR J. 12 (2002); Ben S. Aisenberg, *What it Meant to be a CBA President*, COLO. LAW., June 1999, at 15.

[2] COLO. RULES OF PROF'L CONDUCT, pmbl (2003).

[3] 512 P.2d 266 (Colo. 1973).

[4] *Losavio*, 512 P.2d at 268.

[5] 840 P.2d 351 (Colo. 1992).

[6] *Dalton*, 840 P.2d at 352.

[7] State v. Wilson, 285 N.E.2d 38, 39 (Ohio 1972).

[8] *See* J. Anne C. Conway, *From the Bench: Later Impressions*, 28 LITIG. 3, 6 (2002).

[9] COLO. LAW., Feb. 2000, at 109 (citing opinion of Presiding Disciplinary Judge in *In re Reveles*).

[10] 903 S.W.2d 916 (Mo. 1995).

[11] *In re* Coe, 903 S.W.2d at 916.

[12] *See* COLO. RULES OF PROF'L CONDUCT, R. 3.5 (2003).

[13] COLO. R. CIV. P. 201.14(3) (amended 2003).

[14] Maness v. Meyers, 419 U.S. 449, 460 (1975).

[15] J. Roger Miner, *Criticizing the Courts: A Lawyer's Duty*, COLO. LAW., Apr. 2000, at 31, 32-33.

[16] *Id.* at 32 (quoting Remarks of Justice Harlan Fiske Stone to Professor Thomas Reed Howell of Harvard Law School (Nov. 15, 1935), *in* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 398 (1956)).

[17] *Id.*

Judge Christopher C. Cross is a County Court Judge for the Eighteenth Judicial District, Arapahoe County, Colorado. Judge Cross received his undergraduate degree from Denison University, 1974, and his Juris Doctor degree from the University of Denver College of Law, 1979. Prior to his appointment to the bench, Judge Cross served almost five years as a Deputy District Attorney in Denver, Colorado, followed by 13 years in private practice. In August 1997, Judge Cross was appointed as a County Court Judge. Judge Cross currently presides over cases in Littleton, Colorado, of which his docket includes serious traffic offenses, misdemeanors, and civil cases.

perspective of an immigration judge

James P. Vandello[†]
Immigration Judge, Denver, Colorado

In writing about my experiences as an immigration judge, I recall an incident reported in a book about former Governor Huey Long of Louisiana, one of the most colorful politicians in American history. The attorney general of Louisiana was driving around with Governor Long in the state limousine. Governor Long decided to stop at a super market to take advantage of a sale on potatoes. The trunk of the limousine was full, so the attorney general got down on his knees and helped to tie several large sacks of potatoes to the bumpers of the limousine. The attorney general later stated that as he was on his knees, he wondered what the other attorney generals around the country were doing at that precise moment.

My duties sometimes vary considerably from those of other administrative judges and from civil and criminal court judges. I too sometimes wonder what other judges are doing at that precise moment. I have cases where there are hours of testimony concerning torture in Algerian prisons. I listen to the testimony of medical personnel who are torture experts. I have people appear in front of me with no attorney, all-alone, and they do not speak English. Not only that, they speak a rare language where

there are no interpreters available in this area, and only one or two in the United States. I see cases such as that of a young man who has been in the United States since he was six months old and is now facing deportation to the Philippines, a country he knows virtually nothing about. And there is absolutely no possibility of his remaining in the United States. I have many cases where the respondent has dealt with an "attorney" for many months (and at a great cost), only to find out later that the person was a notary public and not an attorney, and could not represent him in court.

I graduated from the University of Denver College of Law in 1973. I received a joint degree in law and international studies. I was appointed general attorney (nationality) by the Immigration and Naturalization Service that year, and was assigned to the district office in Denver, Colorado. After ten years in that position, I was appointed to be an immigration judge in 1982. At that time, immigration judges were part of the former Immigration and Naturalization Service (now part of the Department of Homeland Security). Over the years, many had questioned the propriety of judges being paid by the same agency that prepared and prosecuted the cases. As a result, in January 1983, a new agency was created within the Department of Justice called the Executive Office for Immigration Review.

Immigration judges were originally called "special inquiry officers." They presided over informal hearings that dealt with the right of aliens to enter the United States or to remain here after entry. In 1956, special inquiry officers were given independence from the local district director of the Immigration and Naturalization Service. In 1973, the title was changed to Immigration Judge and judges were authorized to wear robes in the courtroom. In 1983, the separate agency was created, resulting in a more independent court.

When I was hired by the Department of Justice in 1973, Title VIII of the Code of Federal Regulations (dealing with immigration law) was about 200 pages. Today it is quadruple that. There were two or three practicing private immigration lawyers in Denver and two government attorneys. Now there are more than 100 attorneys handling immigration cases in Denver, and 10 government attorneys. When the Immigration and Naturalization Service ceased to exist a short time ago, its budget and staff was probably 10 fold from what it was three decades ago. The caseload of the Immigration Court has increased commensurately.

The authority to determine matters relating to aliens falls under the Immigration and Nationality Act of 1952, as amended. Until recently, that authority was executed exclusively by the Attorney General. The Immigration Courts and Board of Immigration Appeals are within the Justice Department. The Immigration and Naturalization Service is now under the Department of Homeland Security. Decisions of immigration judges may be appealed to the Board of Immigration Appeals. If the alien appellant does not succeed on that level, he may take his case to the United States District Court or the United States Court of Appeals, depending on the type of case.

Immigration Courts are considered "high volume." I complete more than 1000 cases per year, as do most other immigration judges. Although the numbers may seem high, Denver has a Department of Homeland Security detention center, where each judge hears cases two days per week. Detention centers generate high case completions,

FAST FACT

In the past 10 years, filings in the District Courts of Colorado have grown by 18.8%. The growth has occurred primarily in criminal and juvenile matters, including delinquency and dependency and neglect matters. In this same period, filings in the Colorado Court of Appeals have risen by 21.4%.

Colorado Judicial Branch Website, Court Facts, http://www.courts.state.co.us/exec/pubed/courtfactspage.htm (last visited Apr. 20, 2003).

in that many such cases are routine matters (e.g., bond hearings).

Immigration judges have the authority to conduct formal proceedings to determine whether a foreign national shall be allowed to remain in the United States under color of law, or whether he shall be deported ("removed"). As such, judges are authorized to conduct hearings, rule on admissibility of evidence, examine witnesses, and issue findings, decisions, and orders.

Immigration judges are authorized to consider aliens for relief in removal proceedings, including adjustment of status to lawful permanent residency, asylum, and withholding of removal. We hear two types of cases dealing with long term, undocumented residents who seek to have their status legalized because of the hardship that their United States citizen children might suffer. These applications are for cancellation of removal and, formerly, for suspension of deportation. We also hear cases dealing with long-term permanent residents who have become deportable on account of a criminal record. In certain situations they are allowed to remain in the United States if their equities outweigh the adverse factors of record. These applications are for cancellation of removal and former section 212(c) of the Immigration and Nationality Act.

Immigration Judges are also authorized to make findings concerning claims to United States citizenship. In rare cases, they are authorized to hear cases concerning attorney discipline. There are also procedures to prohibit aliens from leaving the country, where national security might be compromised. These cases, however, are quite rare.

The caseload for immigration judges was, by today's standards, quite low in 1983. However, after the passage of the Refugee Act of 1980, a huge caseload was created when immigration judges were allowed to review claims for asylum, both those denied by the Immigration Service and those filed "defensively" in Immigration Court.

Immigration judges do not fall within the auspices of the Administrative Law Judge system. The Administrative Procedure Act of 1946 does not apply to proceedings before immigration judges. Rather, the Attorney General has the statutory authority to issue regulations dealing with aliens, and immigration judges are given authority pursuant to the Attorney General regulations. Presently there are more than 200 judges nationwide. They are supervised by the Chief Immigration Judge, Michael J. Creppy. Although the Immigration and Naturalization Service is now under the authority of the Department of Homeland Security, immigration judges will remain under the Department of Justice.

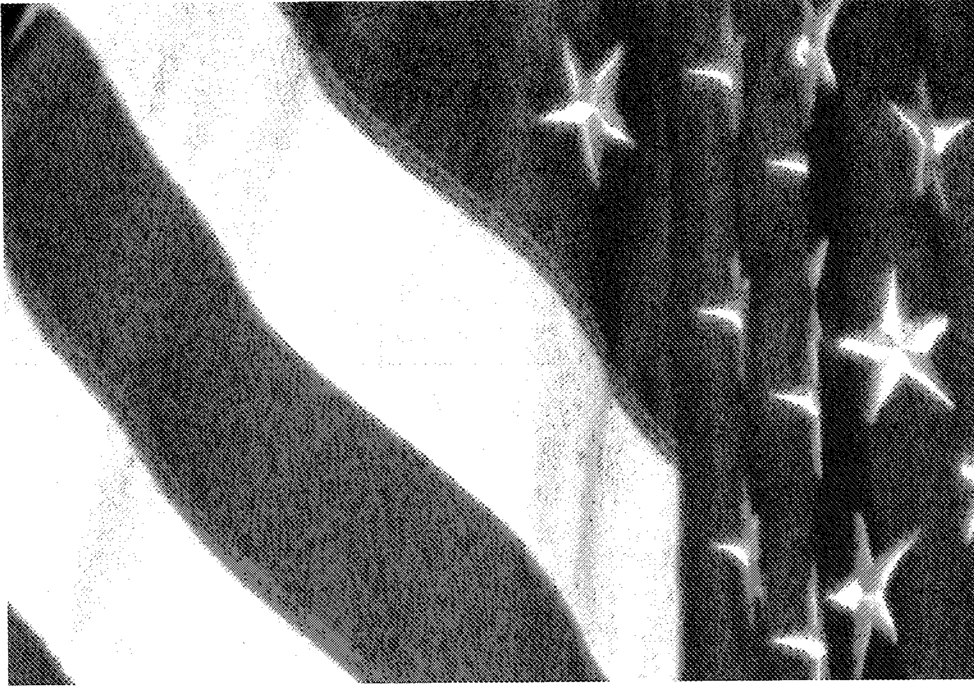
Immigration judges operate in detained and non-detained settings. A typical morning in a detained setting consists of handling a master calendar of 25 cases or more. Of those, several also involve bond hearings. Considerations for bond are the same as in criminal cases: the likelihood of absconding and whether one is a danger to the community. A respondent may be released on his own recognizance; however, if bail is imposed, it cannot be less than $1500.

The Immigration and Nationality Act states that an alien who has

FAST FACT

User fees for access to all Colorado courts were increased by 50% on March 18, 2003. According to the Colorado Judicial Branch, the increase is due to falling State revenues and increasing pressures on the State's court and probation systems. The increase comes on the heels of a $9 million dollar cut in the Judicial Branch's general fund budget for 2003. The last revision of users fees in Colorado was in 1995. Prior to this legislation, Colorado had the fourth lowest level of fees overall in the nation.

Press Release, Chief Justice Mary J. Mullarkey, User Fees Increasing March 18 in Colorado Courts, available at http://www.courts.state.co.us/exec/media/pressrelease/fees3-03.doc (Mar. 17, 2003).



been convicted of a crime may not be released on bail; however, the United States Court of Appeals for the Tenth Circuit has held that this law is unconstitutional as applied to permanent resident aliens. As a result, bond hearings are routinely held for respondents in that category.

Non-detained dockets are as follows. Immigration judges hold master calendar hearings weekly, where as many as 30 cases are scheduled in a session. These are routine settings in the nature of criminal arraignments. Attorneys enter their pleadings to the Notice to Appear (formerly the Order to Show Cause), state what relief they are seeking, and what country (if any) their client would choose to be removed to, if that should occur.

Respondents have the right to be represented by counsel in proceedings before immigration judges; however, they do not have the right to court appointed counsel. The statute declares that counsel must be "at no expense to the government." The Department of Homeland Security is represented by counsel in every case. Thus, immigration judges must meet the challenge of handling pro se cases and, to the extent possible, ensuring that the respondent has an opportunity to fully prepare and present his case.

Clients appearing without counsel are told the purpose of the hearing, the allegations are explained in non-technical language, and their rights are read. They are given a list of free legal services and are told how to contact them. Additionally, they are given one or more continuances for counsel.

In the detained setting in Denver, the majority of respondents are nationals of Mexico and the majority of them wish to return to Mexico as expeditiously as possible, either through an order of removal or an order of voluntary departure. With voluntary departure, the respondent pays for his own ticket and thus is not subject to a 10-year bar to his legal return to the United States. The remaining cases on a detained docket involve persons who have been released from federal or state prison, persons who have arrived at an airport and are considered to be inadmissible, and persons arrested by the government for other immigration violations.

The afternoon calendar at the detention center is for individual cases. These are merit applications for asylum, protection under the Convention Against Torture, and for cancellation of removal. At times, the respondent asserts a claim to United States citizenship either through birth in the United States, birth abroad to United States citizen parents, or derived citizenship through his parents' naturalization. Such determinations are sometimes difficult where the claimant states that he is a United States citizen, but where he has consented to deportation one or more times in the past.

In my career I have handled many memorable cases. In 2000, a Chinese ship containing hundreds of smuggled Chinese nationals was caught in Hurricane Iniki off of the Hawaiian Islands. Most of the Chinese applied for asylum. Approximately 20 were flown to Denver because of space available at the Immigration and Naturalization Service Detention Center. Their cases were handled there. Similarly, when the ship *Golden Venture* ran aground in New York City and more than one hundred Chinese nationals applied for asylum, I was detailed to hear some of the cases.

When President Carter was embroiled with Fidel Castro over the "Marielitos" leaving Cuba, thousands of new cases were created in our system and years of litigation resulted. Several such cases were placed on my docket when I was serving as an immigration judge in San Francisco. Some of the respondents had been born in institutions in Cuba, and had spent virtually their entire lives in social service and penal institutions. Some had spent many years of their lives in mental institutions in Cuba. Their cases presented serious challenges to all the parties involved.

I served as an immigration judge in New Orleans for two years. In 1983, I was assigned several Haitian asylum cases. At the time, boatloads of Haitian asylum seekers arrived on Miami Beach, and Key Biscayne, Florida. The Haitians streamed ashore and some made their way into the community. Most were apprehended. They were put in "exclusion" proceedings and their cases adjudicated by immigration judges. Exclusion proceedings were held to determine the admissibility of arriving aliens. Congress later passed ameliorative legislation that granted permanent residency to a great number of Haitians.

In 1987, I was appointed to hear a case in Los Angeles involving an alleged Nazi collaborator. The 1978 Holtzman Amendment (now at section 212(a)(3)(E) of the Immigration and Nationality Act) had stated that all persons who had aided and abetted in the persecution of Jews and other minorities in World War II were subject to deportation. They were deportable even if they had entered lawfully and fully disclosed their wartime activities. The amendment was proposed in order to cure perceived defects in the Immigration and Nationality Act. The Act previously had no provisions that would provide for the deportation of Nazi persecutors and abettors.

This particular case involved a man who had enlisted in the Waffen SS. He was a prison guard and "dog handler" at a concentration camp. The Office of Special Investigations ("OSI") was set up in the Department of Justice to investigate these cases. The OSI located witnesses in the United States, Canada, and Europe who identified the respondent from a photo lineup. Witnesses testified that they observed him shooting an old man who was unable to make the "Death March" from Dachau to Wiener Neudorf concentration camp. The OSI presented documentary evidence as to the respondent's military records, as well as volumes of material concerning the conditions in concentration camps, gruesome medical experimentation, and the horrors of day-to-day lives of the inmates.

The respondent was ordered deported and an appeal was filed. During the pendency of the appeal, Germany filed papers to extradite him for murder committed during World War II. He was extradited and thus, upon leaving the United States, he became a self deport.

The German prosecution had instituted proceedings in part because of evidence brought out at the deportation hearing in Los Angeles. However, after trial, the respondent was acquitted. The German court discounted the evidence from the hearing in Los Angeles because they thought it was improper for United States government attorneys to meet with their witnesses prior to deportation hearings in the United States. Under German procedure, witnesses cannot be prepared before a criminal trial. The testimony of a witness must be spontaneous. The German court found that the evidence in the deportation case was tainted by this conduct. Apparently, there was no independent evidence of sufficient competence to convict the respondent.

Immigration judges are also given authority to issue the oath of allegiance to new citizens of the United States. Formerly, this was the exclusive function of the federal or state judicial branches. However, with the advent of administrative naturalizations, the Executive Office for Immigration Review was given the authority to issue the oath. I recently participated in a swearing in ceremony at Ft. Carson, Colorado, where 60 new citizens were sworn in. Almost all were in the active duty in the United States Army or United States Air Force. This duty is particularly satisfying for me since I started my career as a nationality attorney with the Immigration and Naturalization Service.

My life on the bench changes with the vagaries of Congress. One expects changes in immigration law every few years, but since 1983, Congress has produced at least four comprehensive immigration bills that have

changed the substantive law, the procedures, and even the basic terminology used in the practice. It takes several months to get used to such wholesale changes, and then another comprehensive statute is passed to replace it.

Congress passes immigration legislation that is far reaching and, sometimes, quite unexpected. It results in a radical change in the types of cases judges hear. For example, Congress passed legislation stating that population control (i.e., forced sterilization or abortion in China) constitutes persecution and is grounds for asylum. There are special pieces of legislation that benefit only certain nationalities, such as Central Americans, Cubans, Haitians, and nationals from former Soviet republics. Congress has enacted legislation that lowers the threshold requirements for refugee status for certain religions and certain geographical regions. Congress provided the authority to legalize more than one million undocumented aliens, thus creating a huge new category of case that immigration judges might eventually hear.

Immigration regulations too are quite variable. Many regulations are considerably longer than the enabling statute.

An immigration judge must also be familiar with precedent decisions of the Board of Immigration Appeals, the appellate administrative authority within the Executive Office for Immigration Review. One precedent decision held that ritual mutilation of girls in African tribes is a form of persecution on account of social group. Therefore, such cases can be entitled to asylum. Additionally, case law has held that persons are entitled to asylum even if they enter the United States through fraudulent documents under a false identity.

I would estimate that in a given year, I hear cases emanating from at least 50 different countries. The Immigration Court is required to provide an interpreter for all non-English speaking clients. We sometimes have cases where the respondent speaks a dialect that is spoken by only a few thousand people in the world. I have a case pending now where the nation-wide contract interpreter service has no qualified interpreter in that language, and, thus, the case cannot proceed until such an interpreter is located and properly trained.

We have asylum cases where weeks ago an individual was living a nomadic existence herding livestock in Africa, and today he is thrust into 21st century America. Some respondents claim when they boarded a ship to be smuggled out of their own country, they had no idea where the ship would take them. At times they are unfamiliar not only with our language, but with basic amenities of modern life. Some respondents appear in court and have never been in a courtroom before, have never been in a high-rise building, nor even been in an elevator. The cultural gap that we sometimes see calls for sensitivity on the part of the judge. Immigration judges have an annual conference where we receive lectures on cross-cultural issues.

A regional crisis will (sooner or later) result in changed duties for immigration judges. When the Iranian hostage crisis took place in 1979, Iranian students were required to register with the Immigration and Naturalization Service. Eventually, several thousand were placed in deportation proceedings and several thousand applied for asylum. Likewise, the breakup of the former Soviet Union resulted in travel freedom for its citizens. This resulted in many new cases for immigration judges, where visitors overstay their visas and then apply for asylum. After the Gulf War, the United States allowed visas for several hundred Iraqi deserters. A few of these cases eventually made it to Immigration Court. Congress has permitted Vietnamese of Amerasian descent to immigrate to the United States. A small percentage eventually end up in deportation proceedings for various grounds of deportability.

My 30-year career with the Department of Justice has been exciting and stimulating. Each case I hear is a life story. I have been able to grant refuge to persons who have a genuine fear of persecution. I have been able to unite or re-unite families. On the other hand, in many cases I have had to deal with the frustration of not being able to grant relief to someone because of the precise requirements of the statute, even though on a personal level he appears to be worthy of some immigration benefit.

In those rare times when cases start to become routine, Congress changes the laws and new challenges emerge. I feel I

am fortunate to hold this position, and am honored to be serving the Department of Justice in this capacity.

Endnotes

† This article reflects the personal views of the author. It does not purport to reflect the position of the Office of the Chief Immigration Judge, the Executive Office for Immigration Review, or the United States Department of Justice.

An Egyptian Judicial Perspective

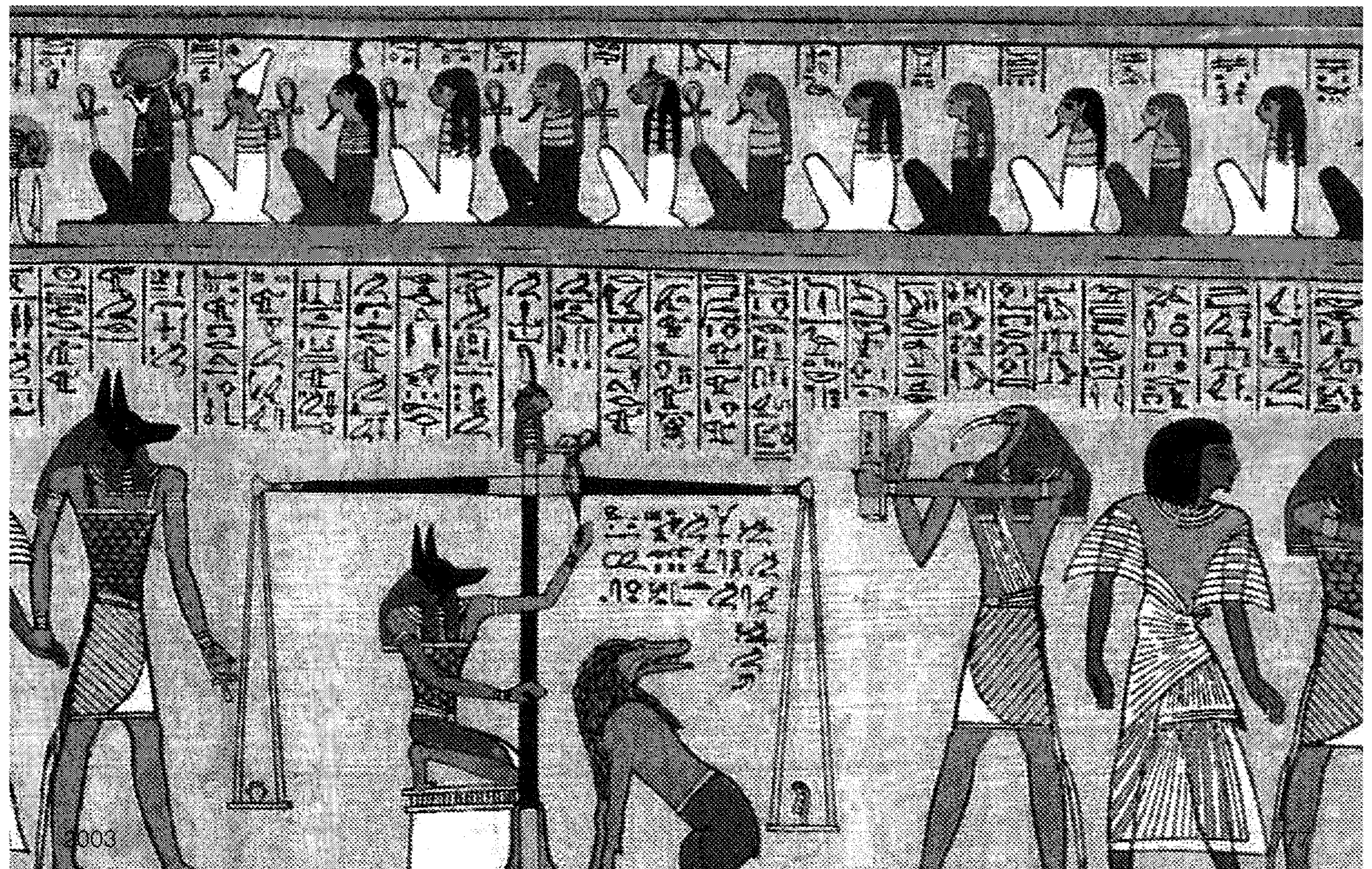
Aly Mokhtar
Judge, Egyptian Ministry of Justice

Introduction

The current article is a set of thoughts, which were put together; a common denominator might not exist save as that they are loud thoughts, generally related to the judiciary. The first section of the article is a brief look at the evolution of the Egyptian judiciary, especially since the Islamic era. The second section deals with divorce by women of their own will as stipulated in Law 1 of the year 2000. The third section discusses a practical application of the principle *nullum crimen sine lege, nulla poena sine lege*. The final section presents a subjective view about the judicial discretion in penalties.

A Historical Background of the Egyptian Judiciary

A casual observer to the Hunefer Papyrus, which dates back to about 1370 B.C., can easily tell that it represents a trial. Although the Hunefer Papyrus represents the trial of Hunefer on the Day of Reckoning, it clearly demonstrates that ancient Egyptians had an advanced and organized judicial system. In this Papyrus we can see "Hunefer kneeling before a table of offerings in adoration, in the presence of fourteen gods seated in order as judges. Below, we see the Psychostasia, or weighing the conscience; the jackal-headed Anubis examines the pointer of the balance, wherein the heart (conscience) of the deceased is being weighed against the feather, symbolic of law or right and truth[;] . . . on the right we see Thoth, the scribe of the gods, who notes down the result of the trial."[1]



The history of the judiciary in Egypt can be traced back to the ancient Pharos. However, for the purpose of understanding the present status of the Egyptian judicial system, one needs to briefly look at the evolution of the Egyptian judicial system since the Islamic period, i.e., since the seventh century. This is due to the fact that for over eleven centuries, all the procedures and legal doctrine in Egypt's judicial institutions were derived from Islamic *Sharia*. Throughout this period, judges were required to run the judicial system in accordance with Islamic rules.

The following incident explains what is meant by running a judicial system in accordance with Islamic rules. After having been appointed as Yemen's judge, Mu'az ibn Jabal visited the Prophet (i.e., Muhammad) to take permission before leaving to take up office. The following conversation took place: "On what basis shalt thou decide litigation? According to the provisions in God's Book (the *Koran*)! And if thou doest not find any provision therein? Then according to the conduct of the Messenger of God (i.e., Muhammad)! And if thou doest not find a provision even therein? Well, then, I shall make an effort based on my own opinion!" The Prophet was so delighted by this reply that, far from reproaching him, he exclaimed, "Praise be to God who hath guided the envoy of His envoy to what pleaseth the envoy of God!"

During the Islamic era, courts usually consisted of one judge who would sit in judgment of criminal, civil, and family cases. That is to say that this judge had a general *ratione materiae* within a specified territory.

In addition to being a religion regulating the relationship between God and believers, Islam is characterized by two main traits. First, it regulates the conduct of Muslims in their daily life, i.e., criminal matters, commercial relations, contracts, marriage, divorce, inheritance, etc. Second, Islam is applicable for all times and places. Despite the fact that there are some immutable rules in Islam, describing a religion that has existed nearly 1500 years with the two aforementioned characteristics makes it impossible to speak of completely rigid regulations.

The two main sources of Islamic *Sharia* are the *Koran* and the *Sunna* (the prophet's tradition). Additionally, there are other sources that complement these two main sources: *Al-Ijtihad*[2] (interpretative effort), *Al-qias* (analogy), and *Al-Ijma* (consensus of opinion reached by early Muslim jurists). Bassiouni maintains that besides the *Koran* and *Sunna*, other sources of law render the application of Islam to contemporary situations possible.[3]

To this author, *Al-Ijtihad* is not only a source that complements the *Koran* and *Sunna*, but it is one of the main sources of Islamic *Sharia*. This view could be supported by the above-mentioned conversation that took place between the Prophet and the Judge of Yemen. Additionally, one of the Prophet said *Hadith's*[4] states: "If a ruler performed *Al-Ijtihad* then judged and he was right, he would be double rewarded, but if he was mistaken, he would be rewarded once."[5] The aforementioned *Hadith* runs counter to the normal rules; usually if there is a reward for doing something right, there would be a punishment for doing the same thing wrong. However, this *Hadith* speaks of rewarding the mistaken. This clearly indicates that the Prophet is urging us to perform *Al-Ijtihad*.

Islamic *Sharia* and the Egyptian Judiciary

Many developments have taken place in the Egyptian judicial system since the beginning of the nineteenth century, each of which left a mark on the present judicial system.[6] However, to a certain extent, the Egyptian judicial system did not lose its Islamic identity.

Article 2 of the Egyptian Constitution of 1971 stipulated that "Islamic *Sharia* is a principal source of legislation in Egypt." In 1980, Article 2 was amended to raise the status of *Sharia*, stating: "Islamic *Sharia* is the principal source of legislation in Egypt." Needless to say, this amendment aimed at bringing all Egyptian laws in conformity with Islamic *Sharia*.

The effect of Article 2 of the Egyptian Constitution is to impose limitations on the lawmaker, i.e., the lawmaker is not allowed to enact any law embodying provisions that contradict Islamic *Sharia*. Similarly, this limitation applies to the Executive Authority's decrees.

Article 2 of the Egyptian Constitution caused considerable turbulence. Many legislative

enactments were challenged before the Egyptian Supreme Constitutional Court on the basis that they infringed upon Article 2 of the Constitution and Islamic *Sharia*.

Law 1 of 2000 was challenged on the aforementioned grounds. Before the promulgation of Law 1 of 2000, divorce was the husband's privilege. Nevertheless, the wife could obtain divorce by a judgment. However, for the wife to obtain divorce by judgment she had to provide proof of *darar* (damage, injury, or harm) and convince the judge that *darar* took place. Reasons for obtaining divorce for *darar* could be systematic abuse or mistreatment, incurable disease, lengthy absence or imprisonment, and non-provision of maintenance. This is called judicial divorce for *darar*. Divorce for *darar* preserves all the wife's financial legal rights, i.e., dowry, alimony, etc.

However, divorce for *darar* was much easier said than achieved. I witnessed a considerable number of wives struggling in the courts for over five years to obtain divorce for *darar*, and some may not have obtained it in the end. The complexity of obtaining divorce for *darar* became so famous that many wives were discouraged from filing for divorce for *darar* and lived in misery. Similarly, the situation was depressing for judges who sat in the hearings of such cases, sometimes unable to act due to procedural and legislative reasons.

In 1979, Presidential Decree 44 amended Family Law 25 of 1929, expanding the legal category of *darar* in marriage. Presidential Decree 44 interpreted the mere fact that a husband takes a second wife as *darar* to the first wife. Thus, the first wife could obtain a judicial divorce if she presented proof that her husband took another wife.[7] This decree was challenged on the basis that it contradicted Article 2 of the Egyptian Constitution since it contradicted Islamic *Sharia*. The Supreme Constitutional Court of Egypt nullified Presidential Decree 44 and declared it unconstitutional on May 4, 1985. However, this nullification was based on the lack of adequate constitutional basis to modify Family Law 25 of 1929 by means of a presidential decree.[8]

The misery continued until Law 1 of 2000 was enacted. I consider Law 1 of 2000 as the life jacket that saved the wives drowning in the choppy sea of family troubles. According to Law 1 of 2000, a wife may obtain divorce of her own will and without proving *darar*, conditional on the wife forfeiting all financial legal rights and returning the dowry she had received from the husband. However, the right to child custody and the children's rights (child support) are not affected by this type of divorce, which is called *Khula'* in Islamic law (literally meaning ousting or uprooting). Many lawyers, scholars, and judges argued that *Khula'* runs counter to Islamic *Sharia*. Nevertheless, *Khula'* is one of the rules provided by Islamic *Sharia*, but never incorporated into legislation.

At this juncture, one should note that there is a muddle-up between the Islamic *Sharia* and the customs in the Islamic countries. This is crystal clear especially in issues related to women. The Prophet Muhammad in his last speech spoke about women, stating: "You people fear God as to women, I am commanding you to be courteous to them."

On December 15, 2002, the Supreme Constitutional Court of Egypt declared in a landmark decision[9] that *Khula'* is in compliance with Islamic *Sharia*. Similarly, this was the view of the *Grand Sheikh of al-Azhar*,[10] who proclaimed that Law 1 of 2000 is consistent with Islamic *Sharia*. The law was approved

FAST FACT

The U.S. Supreme Court delivers between 80–90 formal written opinions each Term, with another 50–60 cases being disposed of without granting plenary review. The Court's written opinions, including concurring and dissenting opinions, account for an approximate 5,000 pages per Term.

United States Supreme Court Website, The Justices' Caseload, at http://www.supremecourtus.gov/about/justicescaseload.pdf (last visited Apr. 20, 2003).

by a majority vote in the Islamic Research Academy.

According to a study presented to the United Nations Development Program in August 2001, Egypt has one of the most highly developed and influential judicial structures in the Arab world. Thus, I strongly urge Arab and Islamic countries that do not apply *Khula'* to follow the Egyptian model in applying Law 1 of 2000.

Nullum Crimen Sine Lege

The principle that there must be no crime or punishment except in accordance with fixed, predetermined law, known as the principle of legality, and in its Latin dress known as *nullum crimen sine lege, nulla poena sine lege*, stands at the very head of many constitutions and domestic codes, and has been included in most of the human rights instruments as one of the basic rights and as a self-evident principle of justice.

The well-known twofold maxim *nullum crimen sine lege, nulla poena sine lege*, has different aspects. It includes the prohibition against *ex post facto* criminal laws and its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Moreover, the maxim has four important corollaries: penal statutes must be strictly construed, the prohibition or limitation on the use of analogy in judicial interpretation, the requirement of specificity, and the prohibition of ambiguity in criminal legislation.

Although this maxim has been the basis of criminal law, it is a matter about which there is a great difference of opinions. This difference in opinions begins with identifying the origins of the principle and extends to its application.

The principle *nullum crimen sine lege* is deeply rooted in the Egyptian judicial traditions. The Egyptian Court of Cassation, in several judgments, expressed the view that it is absolutely prohibited to widen the interpretation of text in criminal legislation. It even went further by holding that the rule against retroactive legislation is a basic principle of jurisprudence that should be considered by the legislature; otherwise, the judge should refrain from applying laws enacted contrary to that rule.[11] In the Islamic *Sharia*, the principle of *nullum crimen sine lege* can be best illustrated by the following verses of the *Koran*: "We never punish until we have sent a Messenger,"[12] and "Your Lord would never destroy cities without first sending to the chief of them a Messenger to recite Our Signs to them."[13] The principle was also embodied in the Islamic instruments of human rights. For instance, Article 5 of the Universal Islamic Declaration of Human Rights[14] stipulates: "Punishment shall be awarded in accordance with the Law; . . . [and] "No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law." Similarly, Article 19 of The Cairo Declaration on Human Rights in Islam[15] stipulates: "There shall be no crime or punishment except as provided for in the Shari'ah."

In 1998 while I was working as a senior prosecutor in the Tax Evasion Prosecution, I engaged my peers in a heated discussion concerning the application of a tax provision. The law defines tax evasion as any one of 6 exhaustive fraudulent means or acts triggering potential imprisonment. The sixth act was the failure to disclose one or more of the activities that is subject to taxation.

Meanwhile, the same law considers the non-presentation of the tax return as a misdemeanor charged by a fine. Thus, those who do not present their tax returns are legally in a better position than those who present an incomplete tax return. Abuse of the flawed law followed.

My colleagues expressed the view that those who do not

FAST FACT

To date, the U.S. Supreme Court has seen 16 Chief Justices and 97 Associate Justices (three of which went on to become Chief Justices of the Court).

United States Supreme Court Website, Members of the Supreme Court, at http://www.supremecourtus.gov/about/members.pdf (last visited Apr. 20, 2003).

present their tax returns should be indicted for a felony under the law for failure to disclose activities that are subject to taxation. They argued that fraud was satisfied and strict application would deter continued activity. I argued that those tax violators were aware of and had accepted the punishment prescribed for their tax code violation and could not be indicted under another provision that aggravates the punishment of the original violation. I believe that additional punishment would violate the principle of *nullum crimen sine lege*. The presiding judges shared my view, thus triggering a legislative amendment.

A Subjective View on the Judicial Discretion in Penalties

In the application of the law, very few legal provisions are so phrased that the judges are left completely devoid of discretion. This is because legal notions often have to cover a variety of legal situations (usually difficult to enumerate considering other social and moral concepts). Thus, a provision of a law might provide for a set of penalties for the committing of a certain act or omission, leaving the judge wide discretion to decide the suitable penalty.

If any of these penalties are so harsh that it is obviously disproportionate to the violation, it becomes an inoperative penalty or provision, since the judge does not apply it. After a certain period of non-application of this provision, it would be peculiar to subsequently apply it. To what limit may a judge abide by this customary non-appliance?

Let us first discuss the implication of non-application of a certain provision of law. Clarification of this implication will unfold considering the following incident that took place recently in Ireland. "I don't think any Nigerian is obeying the law of the land when it comes to driving. I had a few of them in Galway yesterday and they are all driving around without insurance and the way to stop this is to put you in jail."[16] Judge Harvey Kenny made this statement while a Nigerian woman was appearing in his court on a charge of driving without insurance.

Section 56 of the Irish Traffic Act of 1961 provides for 3 types of penalties for driving without insurance. Those penalties include a fine; or, at the discretion of the court, imprisonment; or both a fine and imprisonment. Nevertheless, imprisonment is not the usual penalty for merely driving without insurance. I consulted some Irish citizens outside the judicial and legal sphere, asking them their opinion on a judge imprisoning someone for merely driving without insurance. Some of them expressed the view that this would constitute inequality, since this is not the usual penalty, while other citizens stated that this is not in the penalty prescribed for driving without insurance as they believed the penalty was either a fine or disqualification.

Applying such a provision is not in violation of the principle of legality. Additionally, arguments could be raised to bring into play the principle that ignorance of law is no excuse. On the other hand, one could counter argue that this is a violation of the essence of legality. This argument could be based on the fact that consistently applying a certain penalty for a certain violation automatically induces an impression to the addressees that this is the penalty prescribed for this violation. However, consistent non-application of a certain provision induces the contrary effect to the addressees, i.e., that this provision does not exist.

In sum, within a personal parameter, it is preferable that judges remain within the remit of the customary application of penalties, especially in cases where a certain penalty is disproportionate to the conduct in question.

Endnotes

[1] E. A. Wallis Budge, Book of the Dead: Facsimiles of the Papyri of Hunefer, Ahhai, Kerasher and Netchemet, with supplementary text from The Papyrus of Nu, Plate Ch. CXXV, pg. 4 (London: Harrison and Sons 1899). The Hunefer Papyrus is on exhibition in the British Museum.

[2] Literally means to exert effort—the attempt of Muslim scholars to interpret the Sacred Texts, the *Koran* and the *Sunna*. In other words, it means that exerting the sum total of one's ability attempting to uncover God's rulings on issues from their sources.

[3] M. Cherif Bassiouni, The Islamic Criminal Justice System XIV (Oceana Pub. 1982).

[4] *Hadith* are the reports on the sayings and the traditions of the Prophet Muhammad or what he witnessed and approved. These are the real explanations, interpretations, and the living examples of the

Prophet for teachings of the *Koran*. His sayings are found in books called the *Hadith* books.

[5] Author's translation

[6] *See* ADEL OMAR SHERIEF ET AL., HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME COURT OF EGYPT (Kluwer Law Int'l 1997).

[7] In Islam the husband is permitted to have more than one wife. However, many rules in Islam are permitted but conditional on almost impossible conditions. Marrying more than one wife is allowed under conditions that might be impossible to comply with. In the case of having more than one wife, the condition is to be fair to all wives; that is to say that a husband should treat his wives equally. This equality also includes equality in feelings and emotions, which is impossible to achieve. Thus, unless equality and justice are fully achieved, the rule of having more than one wife is not applicable. This is because the verse in the *Koran* that speaks about having more than one wife reads as follows: "Marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly [with them], then only one. . . . Ye are never able to be fair and just as between women, even if it is your ardent desire." Qur'an Al-Nisaa (Women) 4:03, :129.

[8] *See* Case No. 28 Judicial Year 2 (constitutional), 16th of May 1985; *see also* OSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 173 (Kluwer Law Int'l 2001).

[9] *See* Case No. 201 Judicial Year 23 (constitutional), 15th of December 2002.

[10] The *Grand Sheikh of al-Azhar* is the highest Islamic authority in Egypt and the Islamic world. His authority to the Moslems all over the world could be compared to the authority of the Pope of the Vatican.

[11] Egyptian Court of Cassation, 19 Oct. 1953, Compilation of the Ct. of Cassation Judgments, Year 5, No. 13, at 39; *see also* MAHMOUD MOSTAFA, AL-TAALIK ALA QANOON AL-OKOBAT: AL-KESM AL-AM 99 (Cairo Univ. Press 10th ed. 1983) (Commentary on the Penal Code: The General Part). Prof. Mostafa asserts that although the principle is constitutional in France, however, the judge in France has no authority to overrule the constitutionality of the substance of the laws. Thus, if a law was enacted to be applied retroactively, he should apply it.

[12] Qur'an Al-Isra' (The Night Journey) 17:15. For this translation of the Holy *Koran*, see ABDALHAQQ AND AISHA BEWLEY, THE NOBLE QUR'AN: A NEW RENDERING OF ITS MEANINGS IN ENGLISH (Madinah Press 1999).

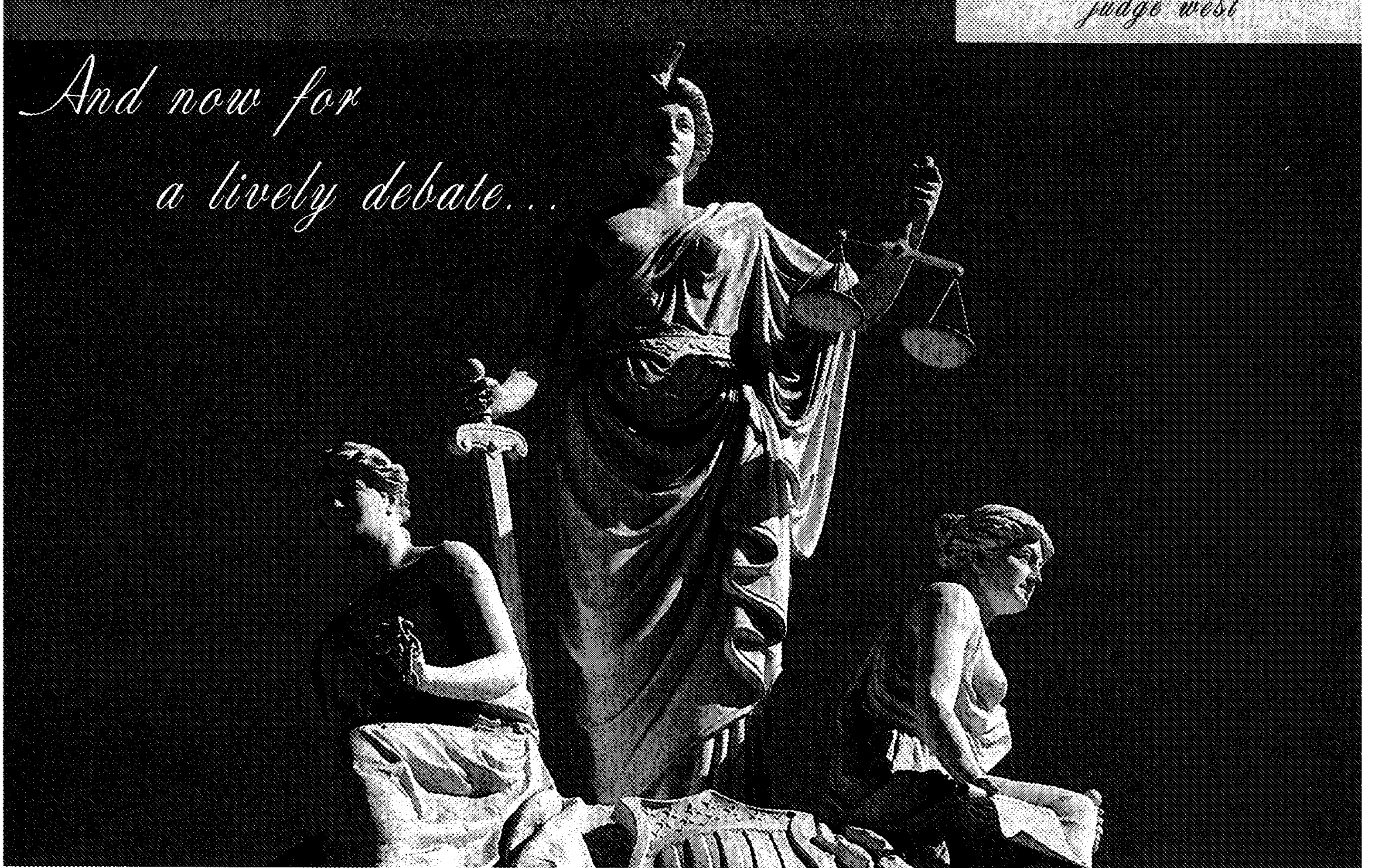
[13] Qur'an Al-Qasas (The Story) 28: 59.

[14] Universal Islamic Declaration of Human Rights 21, Dhul Qaidah 1401 (Sept. 19, 1981).

[15] The Cairo Declaration on Human Rights in Islam (Aug. 5, 1990).

[16] Despite the fact that this is a racist comment that was highly criticized by human rights proponents and that this actually led to an apology by Judge Harvey Kenny to the Nigerian woman, the issue of racism is not considered in this article.

Judge, Egyptian Ministry of Justice; Deputy Resident Representative of the International Development Law Organization (IDLO) in Afghanistan; and Vice President of SUNSGLO Associates (the center for Studying the United Nations System and the Global Legal Order). Judge Mokhtar received his LL.B. (Cairo 1991); Baccalaureate of Police Sciences (Cairo 1991); LL.M. (Irish Center for Human Rights); and is a Ph.D. Candidate. Prior to taking the bench, Judge Mokhtar was a Criminal and Tax Evasion Prosecutor, as well as a Police Officer.



Debate Between Judge Lee R. West and Judge Robert H. Henry

Remarks By Lee R. West
Senior District Judge, United States District Court for the Western District of Oklahoma

American College of Trial Lawyers
Boca Raton, Florida
March 22, 2003

Although I am pleased and honored to be invited, I did not realize when I signed on for this dog and pony show that I would be debating both Judge Henry and Andy Coats. I will spend only a minute on Dean Coats, who has earned the reputation as a man who frequently misses the opportunity to shut up, and he is the perfect example of one who talks exactly twice as fast as he thinks. Despite the many occasions that he has taken to mock and ridicule me through the years, I have remained a great admirer of Andy's. You simply have to admire any man who has retained a sense of humor even though he can't seem to retain a job or a client very long.

But, I truly am honored to be here on this program with such outstanding individuals as Judge Griffin Bell, White House Counsel Alberto Gonzales, Dean Kathleen Sullivan, et al.

Griffin Bell is a man whom I have long admired as one of the great corporate raiders in history. He has probably taken more money from Fortune 500 companies than any other lawyer in America. It got so bad—or good—that Bill Paul said the ABA required him to buy a hunting license before he was permitted to attend a recent meeting of Fortune 500's general counsel.

I have also been privileged to quail hunt with Judge Bell on several occasions and he is equally impressive in that field. I well recall the first time my dogs pointed a covey, Judge Bell got three quail with his very first shot. Even more impressively, he got one more after the birds flew! I do believe that Griffin Bell has done the best job of rehabbing after being an appellate judge of any person I have ever known.

And what a privilege to meet

White House Counsel Alberto Gonzales. Who knows, his name may soon become a household name just as John Dean's did. Being a Harvard graduate, I suspect Alberto is a lot smarter than John Dean. I'm sure he at least learned to follow Ed Bennett Williams' practical advice to a lawyer: "When it becomes abundantly clear that someone is going to jail, be damned sure it is your client and not you!"

But as we all know, Alberto aspires to that highest of all callings—and I am not talking about the Priest Hood. However, as we also know, obtaining a presidential appointment to the Supreme Court and Senate confirmation is very much like staging a successful rain dance—and as my friend Baxter Black, the cowboy poet, points out: "Timing is extremely important in the success of a rain dance!"

But seriously, I am most honored to be on the program with Dean Kathleen Sullivan, who is second only to Andy Coats as my favorite law school dean. I frequently quote her defense of lawyers. She very succinctly states: "In this country if we didn't have lawyers, we would have to invent them!" My father, who could neither read nor write, once warned me: "Doncha see an awful lot of well educated people burn up all their brains getting an education." Dean Sullivan is one academic who has not done that.

Dean Sullivan, I only hope that you will give careful consideration to returning to Cambridge as Dean. You might even consider building a lavish little cabin across the river in Allston as a place to relax in. Harvard needs you.

I am also very honored at this invitation to "debate" Circuit Judge Robert Henry on the resolution that Trial Judges are inherently superior to Appellate Judges. I may not deserve this honor, but I have sinusitis and I don't deserve that either.

This is a somewhat classier group than I normally appear before, but just looking around I believe there is still a high risk that this gathering could be classified as a terrorist organization under one or more of Attorney General Ashcroft's definitions. You are then subject to being held incognito without an attorney and would have to represent yourself—Now that would be a calamity.

I always enjoy being around lawyers and I also rather like Boca Raton. This is my first visit, and having spent two days here, I am reminded of Henny Youngman's statement: "If it were not for pick pockets, I would hardly have any sex life at all."

Any comparison between this and the Lincoln-Douglas debate is entirely laughable. I even agreed to go first, leaving Judge Henry free to take closing pot shots at my remarks because that is the same position in which we trial judges normally find ourselves. Any advantage he might enjoy is more than reasonably offset by giving me the better side of the question and pitting me against somewhat of a dull blade in this knife fight.

But to be completely truthful, it is a very daunting experience to debate Judge Henry because he has not only been an outstanding legislator, a celebrated Attorney General, and a distinguished law school dean, he is a very confident man. As a matter of fact, when science finally locates the center of the universe, Judge Henry will be surprised to learn that he's not *it*. I wish I was as sure of anything as he is of everything. He has a brilliant mind—until it is made up. Reminds me of at least *two* of our Supreme Court Justices in that regard.

He is also incredibly well read on a wide variety of subjects. Furthermore, he quotes a lot

FAST FACT

From April 1, 2001 to March 31, 2002, the U.S. District Courts commenced 63,515 criminal cases across the country, with 4,802 being commenced in the eight federal districts that comprise the Tenth Circuit, and of which 547 were commenced in the District of Colorado.

Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending During the 12-Month Period Ending March 31, 2002, available at http://www.uscourts.gov/caseload2002/tables/d01cmar02.pdf (Mar. 31, 2002).

of what he reads. However, I have never been quite sure if he understands what he quotes.

In addition to all this, he has as much energy as a whole litter of bird dog pups, yet the cool indignation of George Orwell.

But, the two of us are considerably different in more than just outlook. I am a recovering anorexic, and he looks like he could stand a good worming. I am so well recovered that my knees buckle but my belt will not. When he turns sideways you think he's left town.

Now, at the outset, let me humbly admit that trial judges are just like mules—We have no pride in the past and no hope for the future. We are very much like friendly drunks—Speak to us, and we will take up with you. We don't try to achieve immortality by our work—We try to do it by not dying. As Woody Allen says: "We are not afraid of dying, we just don't want to be there when it happens." We really don't mind being reversed all that much, but that damned Sisyphean remand stamp should be outlawed.

We are further handicapped in that trial judges must do twice as well as appellate judges to be thought half as good. Luckily, this is not very difficult.

My good friend Duke Logan says: "The appellate bench is a place where the air is less rarified than is believed by those who breathe it." I'm not so sure—I have noticed that the higher the court, the more lightheaded the judges seem to act. To paraphrase Vaclav Havel, the lower a judge is, the more proper his place seems, and the higher he is, the stronger the suspicion is that there has been some mistake.

Oliver Wendell Holmes once said: "Judges are apt to be naive, simple-minded men." Note that he only served with appellate judges.

After having sat on the Circuit Court several times, I tend to put circuit judges under a pedestal. If legal claptrap were a religion, the appellate court would be a cathedral.

Appellate judges never get to learn the two basic trial judges' rules.

1. *On credibility* — Never believe a man is telling the truth if you know you would lie in similar circumstances.
2. *On juries* — Don't put too much faith in people who were not smart enough to get out of jury duty in the first place.

Being an appellate judge is somewhat like being poor—It's no shame, but it's no great honor either.

You have all heard the definition of Appellate Judges as "those who come onto the field of battle after the fighting is over to shoot the wounded." But my favorite is: "Appellate Judges are much like dogs—they are friendly and affable one on one, but dangerous in packs!"

Have you noticed that not long after a pretty decent ol' boy or gal gets appointed to the appellate bench, he/she starts actin' kinda funny—sort of like an old hen who starts roosting with the guineas way up in the tree tops—she gets real nervous and mad at anything going on down below—starts making a helluva racket when even slightly disturbed. Notice how all appellate judges soon become obsessive nail biters or xenophobics—absolutely terrified at any new thoughts or action on anyone's part down below. Judge Henry has already gazed too long into the abyss. And now as Nietzsche admonished, the abyss is gazing into him.

I have tried to lecture Judge Henry on anger management. I told him: "If Bobby Knight can almost do it, you should be able to."

My problems with Judge Henry probably started at his swearing-in ceremony. As Chief Judge of the Western District of Oklahoma, I was called on to assign him temporary quarters in the courthouse while his palatial chambers were being renovated. I assigned him interior offices with no windows and no bathroom. My aim was to bring him more quickly to the same outlook and mindset held by all his fellow appellate judges. And, it worked! As you might guess, I was the very first trial judge he reversed.

However, we trial judges long ago adopted a motto: "Just because you get reversed doesn't necessarily mean that you were right!"

I would not like for any of you to think that I resent the fact that I was the very first trial judge reversed by Judge Henry, but I did take offense when someone asked him what he did as an appellate judge. He quoted Appellate Judge Holloway: "I seek error—I seek error—and in Judge West's cases, it is never hard to find."

A trial judge's frailties are sometimes tolerated, but never overlooked, by appellate judges.

Minor flaws are picked at until they are inflamed and aggravated. Judge Henry once wrote: "The right of district judges to be heard does not include the right to be taken seriously." He has adopted Disraeli's attitude that it is much easier to be critical than to be correct.

I will be the first to admit that Judge Henry has very quickly distinguished himself and has emerged as a towering figure among appellate judges, which is somewhat akin to being the tallest building in Antlers, Oklahoma.

Will Rogers once said: "Some people learn from reading, others by observation." Appellate judges have to pee on the electric fence to acquire knowledge. You notice that we Okies all like to quote Will Rogers. My favorite quote is his famous last words to Wiley Post: "Wiley, I believe you have that patch on the wrong eye!"

Judge Henry was kind enough to agree to do the epilogue to my biography. I truly appreciated his effort, although it largely damned me with faint praise. Writing anything laudatory is very difficult for appellate judges.

I am happy to note that Judge Henry's cousin and closest friend, The Honorable Brad Henry, has recently been elected Governor of Oklahoma. I am even happier to report that Gov. Henry has proven to be an excellent lawyer, an outstanding legislator, and a courageous, capable Governor. It just goes to prove that one can, with great effort, overcome breeding.

Judge Henry recently went to China with Justice Sandra Day O'Connor. I sent him a message, "I still miss you Judge, but my aim's getting better."

One wise old senior trial judge once told a group of us, "Remember—when you are shooting at appellate judges—aim low boys 'cause they all ride Shetland ponies."

Let me close by saying to Appellate Judges: The old adage "If we didn't love you, we wouldn't tease you" just doesn't apply here. But I do want to wish my opponent Judge Henry well. May you win the lottery and spend it all on bird dogs from my kennel and may you grow so rich your widow's next husband never has to worry about making a living.

FAST FACT

Justices and Judges in Colorado are paid the following: Chief Justice of the Supreme Court, $116,137; Associate Supreme Court Justices, $113,637; Chief Judge of the Court of Appeals, $111,637; Court of Appeals Judges, $109,137; District Court Judges, $104,637; and County Court Judges, $100,137.

Colorado Judicial Branch Website, Court Facts, http://www.courts.state.co.us/exec/pubed/courtfactspage.htm (Apr. 20, 2003).

Judge Lee R. West is a Senior District Judge for the United States District Court for the Western District of Oklahoma and has served on the federal bench for 23 years. Judge West received his Bachelor of Arts degree from the University of Oklahoma, 1952, his Juris Doctor degree from the University of Oklahoma College of Law, 1956, and an LL.M. degree from Harvard Law School, 1963. Prior to his appointment to the federal bench, Judge West's professional career included serving as a Lieutenant in the U.S. Marine Corps; private practice in both Ada and Tulsa, Oklahoma; District Judge for the Twenty-Second Judicial District in Oklahoma; Special Justice, Oklahoma Supreme Court and Court of Criminal Appeals; and Member of the Civil Aeronautics Board. Judge West was nominated by President Jimmy Carter as a United States District Judge, and received his commission on November 2, 1979. Judge West served as Chief Judge for the District Court from 1993 to 1994. Judge West assumed senior status on November 26, 1994.

Debate Between Judge Lee R. West and Judge Robert H. Henry

Remarks By Robert H. Henry
Circuit Judge, United States Court of Appeals for the Tenth Circuit

Perhaps I should just rest on the evidence of appellate judicial quality just presented by former Appellate Judge Griffin Bell. But then Judge West would just make me explain his speech to him, so I had better go ahead with my remarks. I did notice Judge West taking notes during Dean Kathleen Sullivan's wonderful remarks. One hesitates to imagine how Judge West will use those notes. However, Dean, I can tell you from experience that in the rare case that he uses them successfully, it will not be with attribution.

Judge West and I have debated before. Our debate appeared, without our knowledge, in the Fifth Circuit District Judges newsletter. I was, of course, overwhelmingly successful in that contest. I granted rehearing in this timorous *tete a tete* in hopes that this time Judge West might stick to the facts—the law, typically, exceeding his reach and grasp. However, as usual, he has gone for his (as he calls them) "ad hominy" attacks, cheap shots, and jokes recycled from Milton Beryl's "deleted for advanced age stack." (Most of Lee's jokes were first recorded on the walls of the older Neanderthal caves of

Europe.)

The most appropriate response to what we just heard is two numerals and a letter: 12(b)(6). Someone explain that one to Judge West. But, against my better judgment, and in all judicial humility (hmm—what a concept!) I shall respond to the dirty deprecations of the judge, regrettably with a few earthy comments of my own. It is, alas, all that he understands.

In our last "debate," to use a charitable descriptive, I *routed* Judge West. True, a few sniveling sycophants with scheduled settlement conferences before Judge West blandished about diatribe with a reference to "science" and its quest to locate the center of the universe. Such a reference from this judge is itself bordering on the hysterical. When Judge West thinks of Daubert he is thinking of Daubert "Georgie" Orwell, who runs a bait house and clipped wing quail farm down in his old stomping grounds of Antlers, Oklahoma, in a part of the State non-pejoratively termed by the locals as "Little Dixie." Daubert Orwell is an old friend of Judge West's, and a plaintiff in Oklahoma State Senator Frank "Chopper" Shurden's lawsuits to reinstate the cock-fighting recently prohibited by initiative petition in Oklahoma. Daubert says that after they take over, the second thing the Commies do—after they take the guns—is outlaw cockfighting. But at least old Daubert is for the lottery—anything, he says, to level the playing field.

Judge West went on to try to invoke the words of distinguished lawyers, judges, and even a poet to his cause. He claims that fellow quail hunter and noted Oklahoma trial lawyer Duke Logan referred to the rarification of appellate air. But here is what Duke Logan really said of Judge's West's recent effort to invade the province of appellate judges—by writing a so-called "book." Lawyer Logan wrote Judge West the following letter, and I have obtained a copy from the FBI's voluminous "West" file. In the letter, Logan is criticizing Judge West for suggesting to Logan that he would get a favorable review from his performance. They will lose anyway. And they will learn that compared to a settlement conference with Judge West, trial by ordeal has its benefits—at least someone *wins* in trial by ordeal.

FAST FACT

From April 1, 2001 to March 31, 2002, the U.S. Courts of Appeals commenced 56,534 cases and terminated 57,607 cases. Of this, the Tenth Circuit commenced 2,688 cases and terminated 2,630 cases.

Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. Courts of Appeals—Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2002, available at http://www.uscourts.gov/caseload2002/tables/b00mar02.pdf (Mar. 31, 2002).

Today Judge West began by insulting his audience, and once again taking an attempted humorous pot shot at our Attorney General, John Ashcroft. The AG himself is kinder; in fact, I understand that Judge West's name has appeared on his prayer list three more times than have the names of Nadine Strossen and Jacques Chirac.

Judge West began his dangling

Back to Judge West's science. Lee thinks that being any kind of a gatekeeper is beneath his status. He always gets his head caught in those "bob whar" fences when he is out groundshooting clipped quail, so he has his clerks do all that gatekeeping stuff. That's why he occasionally gets it right.

After the hysterical reference to the very concept of science, the conservative local newspaper, *The Daily Oklahoman*:

> Dear Lee Roy:
>
> You may carve this in your desktop as a permanent reminder that I will purchase no more Sunday *Daily Oklahomans* in anticipation of reading some reaction to "the book." But for your recent gift of used dog boots, I would say this weekly outpouring of my money has now exceeded the value of our friendship.
>
> Before departing the subject for all time, did you ever, in a clear light, seriously perceive that a lifetime of not-so-subtle verbal abuse and vitriolic amateur journalistic

FAST FACT

In the one year period ending March 31, 2002, the U.S. Courts of Appeals terminated a total of 28,899 cases on the merits—23,170 affirmed/enforced, 2,343 dismissed, 2,364 reversed, 727 remanded, and 295 other. The Tenth Circuit itself was responsible for terminating 1,405 cases on the merits—1,111 affirmed/enforced, 132 dismissed, 129 reversed, 31 remanded, and 2 other.

Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2002, available at http://www.uscourts.gov/caseload2002/tables/b05mar02.pdf (Mar. 31, 2002).

criticism would even produce an acknowledgment of your existence, much less provoke a favorable book review?

As my sainted mother often said, "If you act ugly, you will be treated ugly, and, indeed become ugly." God knows you are ugly.

As ever,
J Duke

P.S. – You might sanction the paperboy.

Other critics were equally non-praiseworthy of Lee's non-literary effort. Oklahoma City trial attorney Bob Milsten said, "*The Life of Lee West* is the kind of a book if you put it down—you can't pick it up again." Cowboy, dogtrainer, and radio D.J. Rex Tackett said, "This book is a crime against nature—what a waste of trees." And Marine Corps buddy T.C. Smith observed in a note to Judge West, "You need to change the cover photo—Nobody recognizes you with your mouth closed."

Lee also misquoted Oliver Wendell Holmes, Jr., in his principal remarks today. Now, Justice Holmes, like most appellate judges, would repeat or reuse a particularly prescient phrase down the line. This is true with one of his most famous phrases, first used, not in the famous *Buck v. Bell* opinion, but upon hearing of Judge West's birth in the 1930s: "Three generations of imbeciles is enough."

Although most people naturally sympathize with my efforts to dispose of Judge West's bunkery, they do not know that he did in fact start our feud. As the sitting Chief Judge (and sitting is the part of judging he does best) when I was appointed, he did, as he likes to brag, misuse his powers here to locate me in temporary chambers with no windows, underneath the U.S. Marshal's gymnasium and weight room ("shhekung!, shhekung!"), and in a room with no bathroom during my time of diverticular difficulty. It is an established truth that he spoke at my swearing-in ceremony with words titled "Defamatory remarks." He then with gustatory self-bulimious congratulation intones that he was the first judge that I ever reversed.

In my defense, I would say that I have tried to affirm Judge West just out of geographical generosity, but I have never been able to convince one of my colleagues. In appellate judging as in the tango, it takes [at least] two. Judge West's "reversed and remanded" reputation simply precedes him like a celebrity motorcade. His opinions change course more than Henry Hudson did, and, like Hudson, one feels left adrift on the bay after reading them.

In a last ditch effort (or what Lee calls a "latrine" effort) to rehabilitate his flagging argument, Lee seeks to evoke my own words in the epilogue of his book, which was hilariously titled "Law and Laughter"—as if Lee West would know anything about either of those subjects. He once again misconstrues my remarks. I did not "damn him with faint praise." I "feinted him with damn praise." I mean what can you say about a guy whose Little Dixie Dipthongs allow him to make the excremental expletive into five syllables? (That's about as far as I could go with that one in public—in my chambers we refer to this as an "excrement deleted" concept.)

And speaking of the excremental expletive, do you all recall the one word that makes 500 Southeastern Oklahomans push back their chairs and invoke the expletive? It is "BINGO."

I want to recall something I said in the last debate (and unlike Lee's performance today, you did get a few new things from me). In my antepenultimate paragraph

(and that word does not refer to a relative, Lee), I said:

> *Finally, I would also note that Judge West is getting a little bit bad on his memory lately—in fact, so much so that he even forgets his bird dogs names. But, with Southeastern Oklahoma cleverness, he finally figured out an ingenious solution—he named his last pair with phrases so familiar to him that he could never forget them. And it is a beautiful sight indeed to watch Abuse of Discretion and Clearly Erroneous running quail in the field.*

I do want to say that I must admit to surprise at how well Lee West's book has done. It has sold a whopping 376 copies. The records reflect that 370 copies have been shipped to an office at 4th and Robinson in OKC, the locale of Judge West's chambers. An additional 3 copies were purchased by lawyer Duke Logan, for, as he termed it, "outhouse readin'" (Duke has the only remaining 3 holer on ancestral West land). And an additional 2 copies went to the FBI counter-terrorism initiative. The other single copy is unexplained: it was mailed to something called PETA.

So, better luck next time Lee, old pal. I note that in a truly desperate effort to better me in civilized debate you scheduled this final round for us in Florida, the only jurisdiction in which you think you can prevail. But regardless of the evaluations we receive today, with or without dimpled chads, let me just remind you that an appellate court will be the final arbiter.

In closing, let me say that I realize this debate has not completely addressed the ancient metaphysical question posed. But I thought it would be best to prevail on this topic by simply letting Lee West have full vent on presenting his side of it. I may, regrettably, be a dull knife, but you can still gut catfish with a dull knife. I also admit that it is unfair to clothe the entire federal trial bench in what Lee West terms his "jury prudence," but with what we appellate judges and wannabe appellate judges have to put up with these days, we must be excused for an occasional cheap shot. Finally, to those of you who have not figured it out, I think you must say that I won even if it is because of a time-honored appellate tactic—I have subtly changed the question: appellate judges are to be evaluated under this debate topic individually, and not in packs or panels. And with this standard, even assuming the truth of all the nastiness Judge West has spewed forth today, I must admit, with all judicial humility, that I am still the better man. It is, and I have spoken to you before on this subject, purely a matter of 12(b)(6).

One final warning to you good people. Judge West will, with his typical shamelessness, probably attempt to hock a few volumes to you lawyers here who might have settlement conferences scheduled in Oklahoma. I beg of you, do not purchase and thereby pander. The evil you would do would live long after you. You see, there are rumors of a sequel . . . .

Judge Robert H. Henry is a Circuit Judge for the United States Court of Appeals for the Tenth Circuit. Judge Henry received his Bachelor of Arts degree from the University of Oklahoma, 1974, and his Juris Doctor from the University of Oklahoma College of Law, 1976. Prior to his appointment to the federal bench, Judge Henry's distinguished career included private practice in Shawnee, Oklahoma, for 10 years; serving as a State Representative in the Oklahoma House of Representatives; serving as the Attorney General for the State of Oklahoma; and as Dean and Professor of Law at the Oklahoma City University School of Law. Judge Henry was nominated by President William J. Clinton as a Circuit Judge to the United States Court of Appeals for the Tenth Circuit, and received his commission on May 9, 1994.

Book Review

Silencing Political Dissent:

How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties.
By Nancy Chang. New York: Seven Stories Press. 2002. Pp. 168. $9.95 [Paperback].

Reviewed by Ben Lieberman*

Since the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, and the informal declaration of a "War on Terrorism" by President George W. Bush, global terrorism and its progeny of wars in Afghanistan and Iraq have been the center of attention for politicians, the media, and the American public. In the days and weeks directly after September 11, a terrified America wanted answers, and it turned to its leaders for a swift response. Part of that response came on October 26, 2001, when President Bush signed the USA PATRIOT Act[1] into law, giving the executive branch of the federal government many new or increased powers.[2] In her book *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*[3] (hereinafter *Silencing Political Dissent*), Nancy Chang[4] of the Center for Constitutional Rights[5] responds critically to this "radical"[6] legislation and warns of the danger to the political freedoms of every American.[7] First, she explores the history of Constitutional law and government intervention in political freedoms in the context of conflicts like World War I, World War II, the Vietnam War, and the Cold War.[8] Second, she states her lengthy objections to the USA PATRIOT Act and other post-September 11 actions by the United States government in the name of national security.[9] Finally, she concludes with a brief chapter regarding how the country can correct the alleged attack on the civil rights of its citizens.[10] This article reviews the author's main arguments against the USA PATRIOT Act in Part I, and offers commentary on those

arguments in Part II.

I. The Author's Argument

Silencing Political Dissent challenges the federal government's response to the September 11 terrorist attacks with a three-pronged argument against the USA PATRIOT Act and various actions of the executive branch. First, it condemns the new powers of the executive branch under the act as "undemocratic,"[11] invasive, and, in the case of its powers over noncitizens, a violation of due process.[12] Second, it attacks the secrecy of the Bush administration with regard to Immigration and Naturalization Service ("INS")[13] detentions and deportations in a domestic "shadow war."[14] Third, it suggests that the Bush administration has acted to quash dissenting opinions by branding anyone holding those opinions as unpatriotic.[15] It touts a strong judiciary as the solution, encouraging members of that branch not to "acquiesce in [the] surrender" of the Bill of Rights.[16]

A. How the USA PATRIOT Act Undermines Our Civil Liberties

The author first alleges that the USA PATRIOT Act undercuts the liberties of Americans by jeopardizing First Amendment[17] speech and association freedoms with the new crime of "domestic terrorism"[18] and discriminates against noncitizens on an ideological basis.[19] Her main concern is the broad sweep of the definition of domestic terrorism, which includes all activities that "appear to be intended to . . . intimidate or coerce a civilian population."[20] She argues that such broad language authorizes the government to investigate many political organizations that engage in "legitimate political dissent,"[21] citing pro-environment, anti-globalization, and anti-abortion groups as potential domestic terrorists under the USA PATRIOT Act.[22] The Act also requires the INS to deny entrance to persons from "a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities."[23] The author equates this disparate treatment of foreigners under the USA PATRIOT Act to the McCarran-Walter Act of 1952,[24] a Cold War-era statute allowing the State Department to exclude "aliens who are members of or affiliated with the Communist Party of the United States."[25]

The author's second concern with the Act is that it jeopardizes privacy rights by granting the executive branch excessive surveillance and information sharing powers;[26] specifically, the increased power to track Internet activity,[27] the power to conduct "sneak-and-peek" searches,[28] and the new limitations on the Fourth Amendment's[29] requirement for probable cause.[30] She is again concerned with the breadth of such powers. The Act allows surveillance of "dialing, routing, addressing and signaling information,"[31] and the author argues that all Internet activity could fall into one of these four categories.[32] Thus, the Act essentially allows for unlimited surveillance of Internet activity.[33] The author's second and third apprehensions concerning privacy are related to the execution of searches.[34] Section 218 of the Act allows law enforcement to bypass the probable cause requirement if a "significant purpose" of the search is to gather foreign intelligence.[35] She argues that this erosion of the probable cause requirement, coupled with the authorization of "sneak-and-peak" searches, are contrary to the "knock and announce" doctrine adopted by the Supreme Court[36] and required by the Fourth Amendment.[37]

The author's third attack on the USA PATRIOT Act is her argument that it serves to erode the due process rights of noncitizens because it broadens the class of noncitizens subject to deportation and expands the class of noncitizens subject to detention.[38] Section 411 of the Act broadens the definition of "terrorist activity" to include crimes that involve a "weapon or dangerous device (other than for mere monetary or personal gain)."[39] It also prohibits the material support of a terrorist organization,[40] even when that organization has other legitimate means.[41] The author points out that a noncitizen using a knife in a heat of passion crime could be deported under section 411,[42] and someone donating money to a designated terrorist organization, yet earmarking it solely for humanitarian assistance, could be guilty of engaging in terrorist activity.[43]

B. Edging Toward Government by Executive Fiat

Though the USA PATRIOT Act increased the powers of the executive tremendously, the author alleges that the Bush administration is even abusing those heightened powers by exercising preventative detentions,[44] abusing detainees,[45]

and monitoring attorney-client conversations,[46] all under a veil of secrecy.[47] She questions the detentions of the Bush administration, as well as the living conditions of those being detained.[48] She cites Georgetown law professor David Cole's estimate of approximately 2000 domestic detainees by April 2002,[49] as well as various allegations of physical and mental abuse of detainees by prison guards.[50]

The author is particularly enraged with the recent Department of Justice regulation permitting the monitoring of attorney-client conversations of federal inmates without notice when "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism."[51] She contends that such surveillance cuts to the core of the criminal defendant's rights secured by the Constitution because it "is designed to chill, if not freeze, the confidential discussions between an inmate and his attorney that are essential to a well-prepared defense."[52]

Perhaps the greatest point of fear for the author is the secrecy with which the United States government acts in the post-September 11 world. The government has often kept the names of federal detainees a secret, prohibited them from communicating with the outside world, and barred the public and the press from immigration hearings.[53] She accuses the Bush administration of erecting a wall of secrecy around the detainees to hide the fact that they were detained only on the basis of a racial or ethnic profile and without a link to terrorism.[54] Additionally, the lack of public access to even a list of detainees, let alone communication with them, effectively strips those detainees of their rights to an attorney.[55]

C. Silencing Political Dissent

The author's final group of assaults on the federal government centers on the Bush administration's efforts to demonize dissenters, labeling them un-American or unpatriotic.[56] She claims that since September 11, the Bush administration has been so fearful of dissent that it takes any opportunity to undermine and criticize it, as well as attempting to police thought by investigating law-abiding Americans who hold controversial viewpoints.[57] Angered that administration offi-

cials such as Attorney General John Ashcroft "refus[e] to recognize the distinction between core political speech . . . and the crime of treason,"[58] Chang fears that political speech, coupled with any protest or civil disobedience, could now lead to charges of domestic terrorism.[59] She concludes that the increased powers of the administration, along with the increased secrecy in which it acts, "threaten the vitality of our democracy."[60]

D. Reclaiming Our Civil Liberties

After a 134-page tirade against the USA PATRIOT Act and the Bush Administration, the author concludes her book with a four paragraph solution on reclaiming our civil liberties.[61] She encourages Americans to protest measures that infringe on their liberty by organizing, educating, and reaching out to people.[62] She calls on the courts to be vigilant in upholding the freedoms granted by the Bill of Rights, and she closes by arguing that "our future safety lies in the expansion, rather than the contraction, of the democratic values set forth in the Constitution."[63]

II. Analysis

Silencing Political Dissent raises many compelling concerns about protecting our liberties and the general human rights inherent in every person. As the author suggests, Americans must be proactive in protecting our civil liberties. We cannot allow a return to the xenophobia of the past, and we must be vigilant to avoid plunging into a "cycle of restricted freedom"[64] in which Arabs are forced to live through an experience mirroring the Japanese internment experience of World War II. Openness of government and the freedom of the press are fundamental requirements for democracy because they allow Americans to hold their government accountable for its actions and call for change in the case of abuse. However, there are two specific areas—support for terrorist organizations and the sharing of intelligence between government agencies—where I respectfully disagree with the author. The changes in these areas since September 11 have helped and will continue to help in preventing terrorist attacks.

A. Supporting Terrorist Organizations

The author argues that Americans should be concerned that the definition of "engage in terrorist activity" would include a monetary donation to a terrorist organization with humanitarian ends when the donor earmarks the donation only for those lawful ends.[65] Her argument contains two fatal flaws. First, the author seems to envision a world in which terrorist organizations are transparent and publish audited financial statements. In reality, we have no way to ensure money earmarked for humanitarian ends will ultimately be utilized for such purposes. Many terrorist organizations operate and raise funds under a veil of charity.[66] Second, when a terrorist organization offers aid to a community, common sense allows the deduction that the community becomes less likely to bite the hand that literally feeds it, i.e., less likely to rise up against the violence and terror that the organization perpetuates. Thus, even assuming that a humanitarian donation ultimately reaches those lawful ends, it indirectly supports a terrorist organization's violent ends.

An examination of the notorious Middle-Eastern terrorist group Hamas illustrates why the aforementioned donations must be outlawed.[67] The Hamas military wing has claimed responsibility for many acts of terrorism, including many suicide attacks on Israeli civilians.[68] Under the same name, the group also builds schools and hospitals in the Palestinian controlled areas of the West Bank and Gaza Strip.[69] Though the humanitarian ends that Hamas

FAST FACT

The Colorado Constitution prohibits nuclear detonation in the state.

Colo. Const. art. XXVI.

supports are aimed at helping the Palestinian people survive and thrive, those legitimate and moral ends also bolster its reputation and support, thus indirectly furthering its violence. Other Palestinian charities, such as The United Palestinian Appeal,[70] provide a less destructive alternative, supporting Palestinian civilians without the murder and terror of Hamas. The USA PATRIOT Act correctly equates a donation to Hamas as engaging in terrorist activity, regardless of the conditions placed on that donation. The failure of the author's argument is in her unrealistic vision of a transparent terrorist organization and in ignoring the indirect effects of terrorist organizations distributing humanitarian aid.

B. Information Sharing Between Government Agencies

In discussing her objections to preventative detention, noted *supra*,[71] the author questions whether the detention policies of the Bush administration will have any effect on terrorism.[72] Yet later, when she voices her objections to information sharing among government agencies, notably absent from her commentary[73] is the fact that many blame the lack of this very information sharing for the intelligence failures of September 11 and point to information sharing as an essential element in the prevention of future terrorist attacks.[74] Though the author's main argument relates to sharing of grand jury information, she also raises a more general concern about sharing among government agencies.[75]

In her argument against intelligence sharing, the author cites the now infamous report by the Church Committee in 1976,[76] revealing CIA and FBI files on, among others, anti-Vietnam War protesters and civil rights leaders.[77] However, the author's reliance on this example is misplaced. In the instance of a repeat of the Church Committee, loosening of intelligence sharing would not materially alter the scenario. The Church Committee's injustice was that the files *existed in the first place*, not that they were shared between government agencies. It is an example of a disturbing government abuse of power rather than a flaw in how agencies share information obtained using lawful powers. New information sharing laws do not make such abuses more or less probable. In the end, the author's broader argument against the sharing of information is unconvincing. As the key weapon in fighting terrorism,[78] "working-level"[79] cooperation will aid law enforcement agencies in preventing future attacks.

Conclusion

On September 11, 2001, the United States was not only violently thrust into another crossroads in our own history, but the history of the world as a whole. *Silencing Political Dissent* provides a thorough and well-organized argument against the federal government's reaction to the events of that day. Nancy Chang points out many potential dangers of the USA PATRIOT Act, and she looks to the judiciary to hold other branches of government to the limits imposed on them by the Constitution. All Americans should share the author's concern with the threat to our civil rights and the human rights abuses relating to federal detainees.

Unfortunately, the USA PATRIOT Act swings the pendulum too far towards a police state, and away from a free society. However, while protecting and reclaiming our civil liberties, it is in our interest to support key provisions of the Act that protect citizens without materially sacrificing liberty. We must cut off all funding to terrorist organizations and share intelligence among all law enforcement agencies. In doing so, America has no small task. We must compile lessons from Cold War and World War II xenophobia, as well as the policy and intelligence failures of September 11, in order to both protect our citizens and concurrently protect the values and ideals of this great nation.

Endnotes

[*] J.D. Candidate, University of Denver College of Law, 2003; M.B.A. Candidate, University of Denver Daniels College of Business, 2003.

[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001).

[2] *See e.g.*, USA PATRIOT Act § 213(b), 115 Stat. at 376 (authorizing "sneak and peek" searches), § 802, 115 Stat. at 376 (creating crime of domestic terrorism).

[3] Nancy Chang, Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties (2002).

[4] Nancy Chang is a senior litigation attorney at the Center for Constitutional Rights in New York

City. *See id.* at 167.

[5] The Center for Constitutional Rights is a nonprofit organization in New York City dedicated to protecting Constitutional rights. *Id.*

[6] CHANG, *supra* note 3, at 43.

[7] *Id.* at 44.

[8] *Id.* at 13-42.

[9] *Id.* at 43-134.

[10] *Id.* at 135-37.

[11] *Id.* at 44.

[12] *Id.*

[13] On March 1, 2003, the INS was integrated into the newly created Department of Homeland Security ("DHS") as the Bureau of Citizenship and Immigration Services ("BCIS"). *See* Homeland Security Act of 2002, H.R. 5005, 107th Cong. § 451 (2002).

[14] CHANG, *supra* note 3, at 67.

[15] *Id.* at 93-94.

[16] *Id.* at 136.

[17] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

[18] *See* USA PATRIOT Act § 802, 115 Stat. at 376.

[19] CHANG, *supra* note 3, at 44.

[20] USA PATRIOT Act § 802(a)(5)(B)(i), 115 Stat. at 376.

[21] CHANG, *supra* note 3, at 44; *c.f.* R. Kenton Bird & Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, 7 COMM. L. & POL'Y 431 (2002) (examining disciplinary actions against college and university faculty members who criticized U.S. foreign policy after Sept. 11, 2001 terrorist attacks).

[22] CHANG, *supra* note 3, at 44.

[23] USA PATRIOT Act § 411(a), 115 Stat. 345-46.

[24] Immigration and Nationality Act, Pub. L. No. 414-477, § 212(a)(27), (28), 66 Stat. 163, 182-85 (1952).

[25] *Id.* § 212(a)(28)(C)(i), 66 Stat. at 182-85.

[26] *See* Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DEN. UNIV. L. REV. 375 (2002) (discussing concerns related to sharing of financial and educational records and information).

[27] *See* USA PATRIOT Act § 216, 115 Stat. at 288-90.

[28] A "sneak-and-peek" search is a search without the presence of, or prior notice to, the person being searched. *See* USA PATRIOT Act § 213(2)(b), 115 Stat. at 288-90.

[29]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[30] CHANG, *supra* note 3, at 44.

[31] USA PATRIOT Act § 411(a), 115 Stat. at 345-48.

[32] CHANG, *supra* note 3, at 54-55.

[33] *Id.*

[34] *Id.* at 51-59.

[35] USA PATRIOT Act § 218, 115 Stat. at 291. The Foreign Intelligence Surveillance Court of Review recently upheld a Fourth Amendment challenge to § 218. *See In re* Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

[36] *See* Wilson v. Arkansas, 514 U.S. 927, 930 (1995).

[37] CHANG, *supra* note 3, at 51-59; *see also* Mell, *supra* note 26 (noting that sneak and peek searches create "a vague standard under existing law").

[38] CHANG, *supra* note 3, at 44, 62-66.

[39] USA PATRIOT Act § 411(a), 115 Stat. at 345-48.

[40] *See* Global Relief Found., Inc. v. O'Neill, 315 F.3d 748 (7th Cir. 2002) (upholding seizure of assets of terrorist organization under USA PATRIOT Act's revision to 50 U.S.C. § 1702).

[41] USA PATRIOT Act § 411(a)(1)(F)(iv), 115 Stat. at 346-47.

[42] CHANG, *supra* note 3, at 62.

[43] *Id.* at 62-63.

[44] *Id.* at 70.

[45] *Id.* at 67, 85-87.

[46] *Id.* at 87-91.

[47] *Id.* at 77-85. For a discussion of the constitutionality of the Bush administration's actions, see Lisa M. Ivey, *Ready, Aim, Fire? The President's Executive Order Authorizing Detention, Treatment, and Trial or Certain Non-Citizens in the War Against Terrorism is a Powerful Weapon, But Should it be Upheld?*, 33 CUMB. L. REV. 107 (2002).

[48] CHANG, *supra* note 3, at 69; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 951, 985 (2002).

[49] CHANG, *supra* note 3, at 67-69.

[50] Cole, *supra* note 48, at 985-87.

[51] National Security; Prevention of

FAST FACT

Of the judges presently sitting on the federal bench, 166 were nominated by our current President, George W. Bush.

Federal Judicial Center Website, Judges of the United States Courts, at http://air.fjc.gov/history/judges_frm.html (last visited Oct. 31, 2003).

Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

[52] CHANG, *supra* note 3, at 87.

[53] *Id.* at 79-85; *see also* Deborah Charles, *Secret Court Says U.S. Has Broad Wiretap Powers*, S. FLA. SUN-SENTINEL, Nov. 18, 2002.

[54] CHANG, *supra* note 3, at 77-79.

[55] *Id.*

[56] *Id.* at 92-94.

[57] *Id.* at 94, 109-14.

[58] *Id.* at 94.

[59] *Id.* at 112-13.

[60] *Id.* at 134.

[61] *Id.* at 135-37.

[62] *Id.* at 135.

[63] *Id.* at 136-37.

[64] Margret A. Blanchard, *Why Can't We Ever Learn? Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM. L. & POL'Y 347, 348 (2002).

[65] *See* Part I.A., *supra*, and accompanying footnotes.

[66] *See, e.g.*, Global Relief Found., Inc., 315 F.3d 748 (7th Cir. 2002) (alleging putatively charitable organization funded terrorism).

[67] Kathryn Wescott, *Who Are Hamas?*, BBC NEWS (Oct. 19, 2000), *available at* http://news.bbc.co.uk/1/hi/world/middle_east/978626.stm.

[68] *Id.*

[69] *Id.*

[70] *See* United Palestinian Appeal online, *at* http://www.helpupa.com.

[71] *See* Part I.B., *supra*, and accompanying footnotes.

[72] CHANG, *supra* note 3, at 70-71.

[73] The author does concede that "some additional information sharing between agencies is appropriate given the nature of the terrorist threats we face." *Id.* at 61.

[74] *See* Robert M. Gates, *A Former CIA Chief on Connecting the Dots*, TIME, May 27, 2002, *available at* 2002 WL 8386412 ("A key problem prior to Sept. 11 was structural. Since 1986, representatives of a number of national security organizations and the FBI have worked together daily in the CIA's Counterterrorism Center, where information from abroad is shared, integrated, analyzed and acted upon. Before Sept. 11, there was no comparable formal organization for working-level contact among the domestic agencies of government—or between them and the national security agencies. While there appears to have been a few dots to connect, there was no effective mechanism for those connecting lines to cross domestic and national security boundaries."); Edwin J. Feulner, *Intelligence: A Smarter Route*, WASH. TIMES, Oct. 3, 2002, *available at* http://www.washtimes.com/commentary/20021003-554110.htm; Abraham McLaughlin, *Lessons from Pre-9/11 Warnings*, CHRISTIAN SCIENCE MONITOR, May 17, 2002, *available at* http://www.csmonitor.com/2002/0517/p01s02-usju.html.

[75] CHANG, *supra* note 3, at 61.

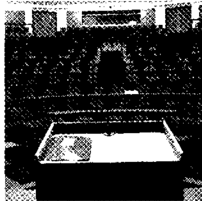
[76] Select Committee to Study Government Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans*, S. REP. NO. 94-755 (1976).

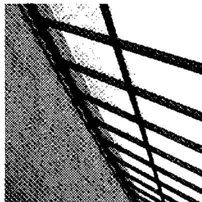
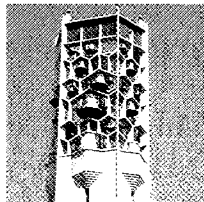
[77] CHANG, *supra* note 3, at 61.

[78] Cara Garretson, *Panel: Government Info Sharing is Key to Fighting Terrorism*, IDG NEWS SERV., Dec. 19, 2001, *available at* http://www.computerworld.com/securitytopics/security/story/0,10801,66770,00.html; Gates, *supra* note 74.

[79] Gates, *supra* note 74.

DU LAW REVIEW



80 YEARS OF EXCELLENCE