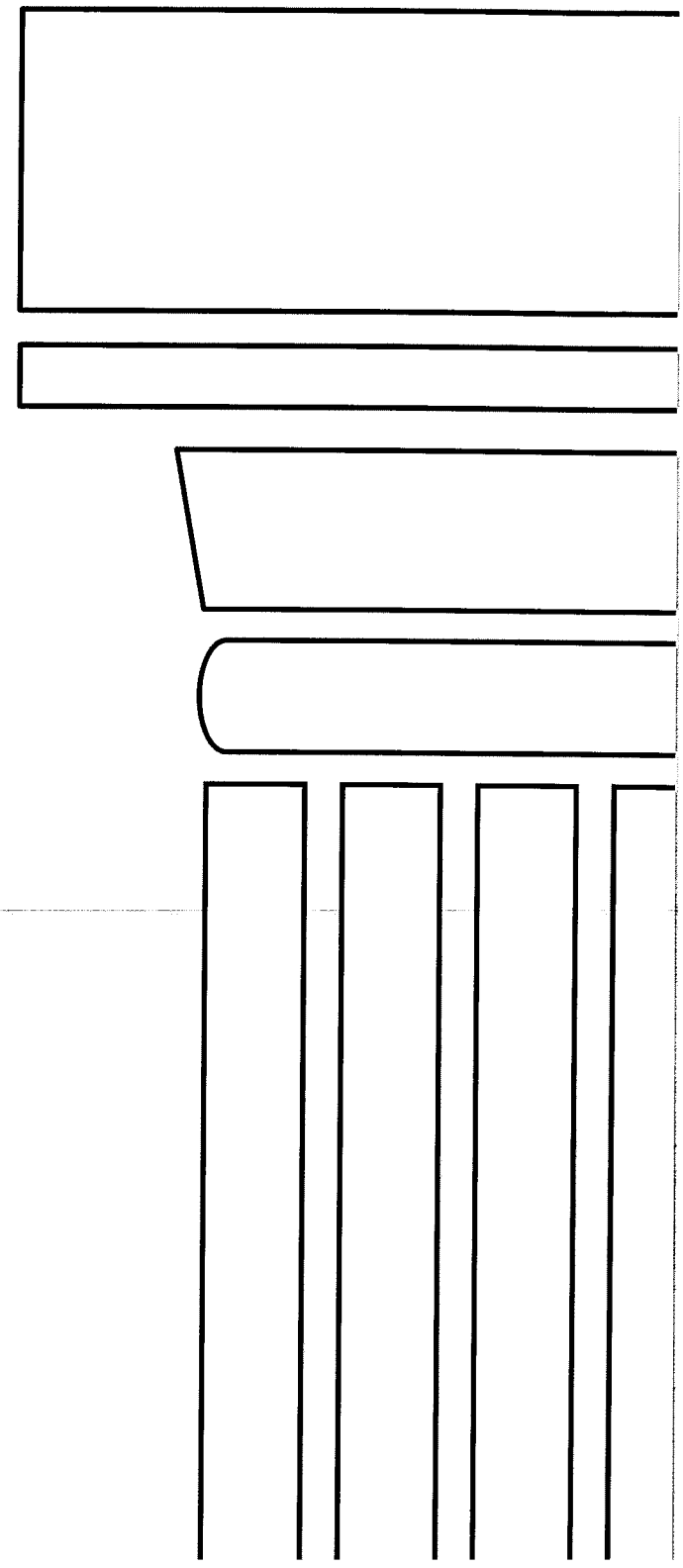
Papers of The Roscoe Pound Foundation

PRESERVING THE INDEPENDENCE OF THE JUDICIARY:

The Dual Challenge of Democracy and the Budget Crisis



Report of the 1993 Forum
for State Court Judges

Cosponsored by
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TABLE OF CONTENTS

FOREWORD

This forum was the second in a collaborative partnership between the Yale Law School and The Roscoe Pound Foundation designed to foster dialogue between the judiciary and the legal academy that illuminates and strengthens state court jurisprudence. The forums provided a rare opportunity for state court judges and constitutional scholars to come together to discuss issues that have both theoretical significance and practical ramifications.

The 1992 forum on the role of state constitutionalism in protecting individual rights examined issues that are being defined in state appellate courts across the nation. The topic of the 1993 forum, preserving the independence of the judiciary, has even greater immediacy because of its focus on questions of judicial selection as well as the ongoing crisis of funding, both of which threaten the integrity of the judiciary as a co-equal third branch of government.

The ideas and opinions presented in this report emerged in an uninhibited exchange of views among the academicians, judges and practicing lawyers who sought to resolve some of the inherent conflicts between judicial independence and public accountability. Their discussions are a powerful expression of the depth of scholarship, professional dedication and creative pragmatism represented by these diverse groups that make up the American legal community.

Guido Calabresi
Dean
Yale Law School, June 1994

PREFACE

The theme of this year's forum lies at the heart of American jurisprudence, where constitutional doctrines of judicial autonomy confront the hard realities of public accountability and severe funding shortages. State court judges now find themselves dealing on the one hand with a disaffected, often hostile electorate, and on the other with legislatures whose reluctance to allocate a sufficient portion of diminishing state resources toward the operation of the courts poses a constant challenge to the integrity of the system of justice. The different perspectives that judges and legal scholars bring to these issues, as well as the strategies they suggest for defusing them, generated a thoughtful and stimulating dialogue. The views presented in this report illustrate the rich diversity and willingness to experiment that still characterize state jurisprudence as it operates within the framework of American federalism.

We appreciate the efforts of all those who participated in the dialogue presented in this report. We particularly wish to honor the memory of the late Leonard Ring — Trustee of The Roscoe Pound Foundation, colleague, and friend — who served as a moderator of one of the small discussion groups. His many unstinting contributions to the profession, inspired by his love of the law, will long be remembered.

Russ M. Herman
President
The Roscoe Pound Foundation

Robert L. Habush
Forum Chair

Note: *Preserving the Independence of the Judiciary*, the second Pound/Yale Forum for State Judges, deals with some of the issues discussed at the 1993 Pound Roundtable on Underfunding of the Courts—*Justice Denied*. The roundtable, an informal dialogue among a small group of experts, took a comprehensive look at how funding problems affect every aspect of our system of justice and attempted to outline possible long-term solutions. Participants included a state legislator, a local prosecutor, federal and state judges, the director of a state public defender system, a bar association representative, the legal consultant who conducted the surveys that yielded data on the current funding crisis nationwide, a law professor, a reporter from a major newspaper, and practicing attorneys. Judge Rosemary Barkett, then Chief Justice of the Florida Supreme Court, chaired the Roundtable. *Justice Denied*, the report of the Roundtable, is available from The Roscoe Pound Foundation and may be read as a companion piece to this forum report.

REPORT OF THE CONFERENCE

INTRODUCTION

Background

Since the early days of the Republic, the concept of absolute judicial independence, the notion that judges are beholden to no party or interest group, has been central to the American ideal of constitutional governance. Nevertheless, this theoretical vision of an autonomous judiciary has been challenged throughout our history by the exercise of legislative power, executive prerogative, and, in the states, the will of the electorate.

The issue of judicial independence is most strenuously tested in two areas. The first is getting, and staying, on the bench. The 50 states and the District of Columbia present a patchwork quilt of judicial selection methods, including partisan and nonpartisan elections, so-called merit selection, as well as appointment by the governor or the legislature. Even within states, methods may vary widely according to the particular court for which a judge is selected. The need periodically to come before the voters poses an inherent threat to judicial independence in that judges may be pressed to tailor their decisions to suit public opinion.

The second area is adequate funding. The lack of sufficient resources to carry out constitutionally mandated judicial functions is increasingly seen both as a threat to the integrity of the court system and to the independence of the judiciary itself. During the past few years, budget cuts in a significant number of states have resulted in the suspension of civil trials and in criminal dockets so clogged that potentially dangerous defendants have had to be released on bail. Recent surveys have confirmed the perception of those working in state court systems across the country that the delivery of justice is endangered by the funding crises that afflict a growing number of states and that show few signs of abating in the future.

The Diverse Forms of Judicial Selection

A look at the ways in which state court judges are first chosen and then maintained in office reveals remarkable diversity among state constitutions and in local and regional tradition. The persistence of these traditions bears out Justice Holmes's dictum that a page of history is worth more than a volume of logic. In some states—Alabama, Arkansas, Louisiana, Mississippi, North Carolina, Texas and West Virginia—judicial selection is thoroughly enmeshed in the political process: judges first attain office through partisan elections and then run, in contested elections, for additional terms. Illinois and Pennsylvania judges are initially selected through partisan elections but then stand for subsequent terms in retention elections.[1] Illinois' nonpartisan retention elections require judges to obtain at least 60 percent of the vote. In twelve other states, judges are first chosen in nonpartisan elections and then run for re-election in campaigns that may be contested.

In 29 states judges are named to the bench either as a result of some form of merit selection through a nominating commission, or by the governor or legislature. In 16 of those states, the appointed judges are then subject to retention elections. Some states use a combination of merit selection and election, frequently with different methods applied to appellate and trial court seats.

In addition to the variety of judicial selection methods, term lengths vary enormously from state to state. Judges are initially appointed for one year in states as diverse as Florida, Iowa, Wyoming, Maryland, Oklahoma and Missouri, while in Rhode Island, at the other end of the spectrum, both legislative appointments (for the supreme court) and gubernatorial appointments (for superior court) are for life.

Partisan politics is the meat and potatoes of judicial selection in some states in which judges run in open and often fiercely contested elections, while states that practice merit selection via a broad-based commission pride themselves on insulating the judiciary from political pressure.

Each state's selection system is an outgrowth of its unique political history and local tradition. For example, the deep-rooted Texas

[1]Retention methods also vary widely among states, ranging from simple "yes or no" procedures, to processes that may resemble full-scale contested elections.

brand of populism is reflected in its requirement that district court judges stand for election every four years, while in states that historically have given more power to central institutions, the governor or legislature appoints judges for extended terms. In the District of Columbia, where home rule is still limited, the system is almost a mirror of the federal process. Initial appointments for 15-year terms are made by the President of the United States, with confirmation by the Senate; judges who receive high evaluations from a D.C. nominating commission are automatically reappointed for additional terms.

The extent to which running for election or re-election potentially compromises the independence of judges, and the degree to which the often considerable expenses of campaigning makes them vulnerable to interest group influence, has not been studied extensively.

The Threat of Inadequate Funding to Judicial Independence

In many jurisdictions across the country, financial constraints pose a serious challenge to the system of justice. Data compiled by national surveys conducted in 1992 and 1993 under the auspices of the American Bar Association Special Committee on Funding the Justice System led the committee to conclude that "the very notion of justice is threatened by a lack of adequate resources to operate the system which has protected and extended our rights for more than two centuries." At a time when court budgets have been cut, personnel slots eliminated, and public defender programs reduced, the system has been swamped by an ever-increasing wave of drug-related cases that monopolize the lion's share of a diminished allocation of resources. Citizens' access to courts for adjudicating matters—including divorce, child custody, and landlord-tenant disputes, as well as liability and commercial cases—has been blocked. Civil cases are so delayed in a majority of states that the delivery of justice may be in danger.

According to the Special Commission, this lack of funding "for the third branch of government [has] created an environment where the

need for a decision, to clear a docket, outweighed due process and fairness." Can judges do their job when the courts are so starved of resources?

Despite strenuous efforts on the part of the courts to adjust to fiscal realities and reduce their costs, belt-tightening has its limits and often involves stop-gap measures that merely postpone essential expenditures. Administrative reforms, creative techniques of case management, an increased use of computers (assuming a budget allows for updating obsolete systems), delays in filling judicial vacancies, and moratoriums on new construction and necessary repairs to courthouses and other facilities are desperate solutions that do not address the long-term funding problem.

Conflicts Between the Legislature and the Judiciary

As a result of a remarkable demographic shift that has affected the composition of state legislatures in the last decade, lawyers no longer constitute a majority of delegates, senators or assemblymen. In many states, a small minority of legislators are attorneys, a phenomenon that appears to make legislative bodies less receptive to the needs of the courts and noticeably less willing to vote for judicial appropriations. Given the circumstances in which the bench faces an annual struggle with the legislature to secure even minimum funding for state court systems, what methods can judges use to obtain adequate, reliable and balanced funding from state legislatures?

Judges have experimented with a variety of approaches ranging from quiet negotiation with key legislators to outright lobbying. They have taken actions that include refusing to conduct trials under conditions inimical to constitutional guarantees of due process. In rare cases, judges have followed the extreme course of constitutional litigation on the ground that the judiciary as an independent and co-equal branch of government has an inherent power to compel "reasonable and necessary" funds be allocated to operate the court system.

The most famous example of an assertion of the inherent power doctrine was the suit filed by the chief judge of New York State against the governor and the legislature. Constitutional litigation of this magnitude raises new questions of standing, enforceability, and the very nature of the separation of powers. Even if such claims are valid, are they justiciable? Who would adjudicate and enforce rulings in such disputes? Indeed, in New York, both parties moved back from the brink and negotiated a settlement.

More and more, state court judges find themselves thrust into roles they are traditionally unprepared to play. On one hand, they are increasingly blamed by the public for the perceived failures of the criminal justice system and subject in election campaigns to vituperative charges to which the canon of ethics forbids a response. On the other, they are forced to become aggressive advocates in a never-ending effort to secure funds sufficient for operating the court systems for which they are responsible. The pressure of having to respond to an angry electorate and the indignity of having to go before their legislatures as supplicants raises questions of judicial independence and autonomy that the current generation of state judges is only beginning to face.

These dual themes were the focus of the dialogue among the participants at the Pound/Yale Forum.

The Forum

Nearly 120 judges from 42 states and the District of Columbia took part in the forum. Senator Bill Lockyer, Chair of the Judiciary Committee of the California State Senate, welcomed the judges.

The discussions were based on two papers written for the forum by Professors Stephen L. Carter and Ruth Wedgwood, both of the Yale Law School. The papers were distributed to participants in advance of the forum, and the authors presented their ideas to the audience in an informal talk. Each presentation was followed by a commentary by a distinguished appellate court judge. Judge Charles W. Chapman, Fifth District Appellate Court, Illinois, commented on

Professor Carter's paper, "Does Democracy Threaten Judicial Independence?" Chief Justice Stanley Feldman of the Supreme Court of Arizona commented on Professor Wedgwood's paper, "Is There a Constitutional Claim to Minimum Funding of the Courts?"

After each presentation and commentary, the judges separated into six groups to discuss the issues raised in the paper. The small-group sessions were led by Fellows of The Roscoe Pound Foundation. Professors Wedgwood and Carter visited each group to respond to specific questions that arose during the judges' exchange of ideas. The forum closed with a plenary session, where the moderators summarized the judges' views of the issues under consideration and outlined any consensus that had been reached.

Under the ground rules of the forum, comments by judges were not for attribution in the published proceedings. As a result, the discussions were candid, free-wheeling and often provocative, as the judges shared some highly personal thoughts and experiences.

THEMES AND ISSUES

The judges' approach to potential challenges to their independence from voters on the one hand and legislators on the other was in general marked by a sense of pragmatism and professionalism. Many judges expressed pride in the craft of judging, as well as a pride of place that led them to accept and appreciate the selection process in their states, despite its perceived drawbacks. As one judge said, "Everybody feels that basically his or her state's own system can be tinkered with and improved, but not revolutionized."

On the issue of resources, the judges agreed that there is a constitutional claim to minimum funding of the courts but were extremely cautious about carrying this belief to the ultimate extreme of bringing suit against the other branches of government. "I don't mind fighting the legislature," a judge said. "It is putting governors in jail that scares me." Although they unanimously rejected such forms of confrontation, the judges were willing to consider a range of actions aimed at convincing legislatures to vote adequate funds to operate the courts.

The following issues were the focus of discussion.

I. Getting and Staying in Office

The Success of Diverse Forms of Judicial Selection

In general, the judges were fairly satisfied with the specific selection method that brought them to the bench, whether election; appointment; or some version of the Missouri plan, with its combination of appointment and retention elections.

They also acknowledged that political connections play a role in virtually all forms of judicial selection, whether by "merit" or partisan appointment. Even "independent" commissions that nominate judges are appointed by individuals or groups with political power within a state.

Representative Views

I've been a candidate for all four tiers in our state, have been opposed and non-opposed, and have been involved in campaign committees and raising money. In the research I have done, and the teaching I do, I have not found any empirical data that says any of the election processes produces a better quality of judge.

■ ■ ■

It is time to stop calling it merit selection. As a trial court judge I ran for election four times in a partisan election. Then, to go to the court of appeals, I had to be appointed by the governor after coming through a merit selection commission; and then last fall I stood for retention. Quite frankly, the most difficult and longest campaign was probably the campaign to get appointed by the governor.

■ ■ ■

I was elected in a nonpartisan election in 1980 in a race in which there was no incumbent. I like the elective system because I have the idea that a person like me wouldn't be a judge if it weren't for the elective system.

■ ■ ■

My state is one of the few in which judges never have to face the voters in an election. We have the Missouri plan without the retention election. We have a judicial selection commission that goes through an extensive screening process. It is highly political, not along party lines, but in terms of interest group pressure and the jockeying for position among competing candidates.

■ ■ ■

I've been through partisan elections. I lost one and won two. I've been appointed by two governors, and I've been through one of these commissions. I think they are all equally bad insofar as political pressure. Partisan election is even more bizarre than just contested elections, but I agree that politicking in the newspapers and on the radio is

a little different than the pressures that go on behind the scenes. I hate to sound cynical, but name a system, I've been through it. I think they are all bad.

■ ■ ■

I think I am a better judge as a result of having had to run and then having had to run in a retention election.

■ ■ ■

I don't think you are going to find a model because the political traditions in every state are different. My sense is that the political systems in the various states tend to deal with whatever it is they have to deal with. That is why you don't find any great movement for us to adopt anyone else's system.

■ ■ ■

One of our former chief justices is fond of saying that there are several ways of selecting judges and none of them is worth a damn. I think you will get unanimity on that.

■ ■ ■

With respect to the states that use a judicial selection commission, that in itself is no panacea. A commission, no matter what its genesis, is still subject to intense politicking, small "p." In my state, each member of the commission is politicked and lobbied intensely. In some respects it is no better than the election system.

■ ■ ■

We have a nonpartisan elective process for all our courts. When I was a trial court judge, I liked the Missouri plan. I was wrong. I would much prefer to go before the electorate and find myself in a political downswing when people are angry and throw all the rascals out without regard to competency. At least in the elective process I can go out and talk to people who give me some understanding of what I am.

■ ■ ■

I'm from a county that's the most political in my state. As an associate judge, I didn't suffer from any illusion that I got my job because I was the man most qualified to have it, and I absolutely believe that judges who think they have their job because they are the most qualified to have it ought to be retired in the next minute.

■ ■ ■

In my [New England] state, we are appointed by the governor, with approval by the senate. The governors for the most part have not paid any attention to political affiliation. I myself was appointed by a governor of the opposite party. We feel our system has worked very well, and it has been an appointed system since revolutionary days. We are fond of saying that nobody in the state has enough money to bribe anybody.

■ ■ ■

I'm a product of merit selection, and I'm not saying we necessarily get better judges than those who are a product of the elected system, but I think we do. I practiced as a young lawyer when my state had a partisan election system. I went into a courtroom. The judge's bailiff got hold of me and said, "You have a trial coming up, you know judge so and so is on the ballot, and we would like to get a contribution from you." This was the political system and one reason I have worked to get the nonpartisan commission system. I think it works.

■ ■ ■

I'm convinced that the people of [a mountain state], who are populist to the core and rugged individualists, would elect their dog catchers if they could. I'm also convinced they will never give up their right to elect anyone, certainly not their judges.

■ ■ ■

I have been in politics all my adult life, and I must say that at the beginning I was firmly committed to the Jacksonian idea of the people's voice. If I were forming government today, I would still go for the elective process

for judges. However, I would have conditions imposed that I don't think any state could possibly satisfy.

■ ■ ■

Let me suggest that we agree that there is a healthy diversity of state systems. It keeps all of us on our toes, and whatever system we choose, we need to do it a little bit better knowing there is an alternative available that could replace our system.

■ ■ ■

Tensions Between Independence and Accountability

Their reservations about campaign excesses and abuses notwithstanding, many judges believed that some form of accountability to the electorate is a healthy phenomenon. Others viewed tensions between independence and accountability as inevitable and ultimately irreconcilable but felt they could adjust to them. Some judges, however, strongly believed that the very nature of judging, as exemplified by the oath they take to the law and the constitution, makes it a process that ought to be immune to any form of overtly political influence.

Representative Views

The idea of popular voting for judges seems to be antithetical to the idea of what it is they do. They ought not to be so responsive to the people, but they really need to be responsive to the constitution and the laws. That is difficult sometimes when you are asked to uphold a right that belongs to some minority position that is protected by the constitution, because then you get this majoritarian backlash. Much of what we do is by definition anti-majoritarian, so the idea that we should be subject to majority rule, as are the executive and legislative branches, is to me antithetical to the idea of what is means to be a judge.

■ ■ ■

In my small [plains] state, people tend to know each other well. I had run for election before. I was on the state public service commission and in the governor's cabinet and served as assistant attorney general. I personally found campaigning to be very good for keeping us in touch with reality. You learn a lot talking to people—things they wouldn't come to the capital and tell you. It does give a good understanding of what is really happening in your state.

■ ■ ■

In terms of independence, our rural judges who run for election tell me in confidence at our judicial conferences that they really can't do what they want to do and wish we could somehow visit merit selection upon them.

■ ■ ■

I think the fact that in my state we are insulated from suffering the direct consequences of voter disapproval creates an atmosphere that has generated some decisions that probably couldn't happen in a state in which the judges had to face the voters. We became the first state in American history to entertain the possibility of same-sex marriage. We did it on constitutional grounds. I doubt that many courts would be willing to do that kind of constitutional experimentation, whether the judges regarded it as the right result or the result was mandated by the constitution, if one's professional future was going to be determined by voters who would be making their decision on the basis of whether they liked the result or not.

■ ■ ■

Perhaps because I have always existed in the system my state has, I think it is by far the best to resolve that inevitably insoluble tension between independence—the capacity politically and intellectually to decide whatever case may come before you—and accountability. I believe in both concepts.

■ ■ ■

We are not supposed to be accountable to the people. We are supposed to be accountable to the basic charge [of

administering justice]. If people understood that notion, then we should not have any trouble consigning our electoral destiny to the people.

■ ■ ■

I am about to commit heresy in front of a group of fellow jurists by saying that when I am involved in a difficult case and I am worrying about a decision, if I give some consideration to how that decision will be perceived by the electorate, I am not sure that is a bad thing. Part of the debate goes back to the idea of being in touch with the people whose lives we affect when we decide these issues. So I think the idea of electoral accountability is a good thing for a judge. I agree that running a campaign can make a judge more humble.

■ ■ ■

It all comes down to a debate between Hamilton and Madison. Are judges going to be a very elite group selected by a small, blue-ribbon nominating commission or are they going to be selected by the electorate at large and accountable to the electorate at large?

■ ■ ■

From the standpoint of accountability versus independence, a judge's integrity is key. In my [deep South] state, I have to run in the partisan election every six years. I have run four times. I was appointed initially by the governor to an expanded court. That was kind of political. I was the governor's legal advisor. Then, in 1970, I had to announce my candidacy for a six-year term. At that time I had written the opinion for a death penalty case involving a black defendant and white victim. It was obvious to the court that the case had to be reversed. Some evidence had been admitted that should not have been. I had the case ready to go out about two weeks before I had to qualify for the election. I asked the senior judge, what would you do? He said, well, you could wait. I went home that night and got to thinking about it. If I have to sit on this bench and worry about whether I am going to be elected or doing what's right, then I don't need to be here. So I put the opinion out.

■ ■ ■

I find there is something humbling about going through an election process. Sometimes we have a tendency to get isolated in our lives and away from mainstream thinking. If you have the flexibility that we all ought to have, regardless of the system, I think sometimes you are put to the task of reinforcing some of your thinking. You are not going to get legal arguments out there.

■ ■ ■

Sure, judges should get out to the countryside more and meet with people and make them familiar with what you do. The reality is that if you don't have to do it, you probably won't. The justices of our supreme court, who have to run for election five years out, are at every bar meeting, speak to church groups and business groups—you name it. They are all over the state, just like a governor.

■ ■ ■

If one accepts the notion that our form of government is a limited grant of power by the people to its government, then why should we be afraid of being responsive to the source of the power? My state, up until last year, sent the worst congressman in the country, at least by all popular polls, back to Congress three times. Aren't those constituents entitled to do that? Don't the people really get the judges they want in an elective system? They have a right to have judges who share their philosophies; they have a right to know the philosophies of their judges before they vote for them. What's wrong with it? It's the basic form of government we live under. Can you imagine the cry if we had nominating commissions for senators, for members of Congress? We hold direct primaries in my state. Whatever is done in back-room politics still has to pass muster with the people.

■ ■ ■

I think we have to be careful to distinguish undue influence from due influence. One of the things I have been struggling with—and I've been a judge almost ten years—is the fact that we do become isolated and there is a real danger of us not knowing how people feel about decisions. We ought to know. I would suggest that perhaps part of

what guides the imaginative, innovative decisions is a real sensitivity to change in society, and that can't come if we are completely independent of public opinion.

■ ■ ■

It seems to me that Professor Carter answered the question succinctly when he said the courts are profoundly undemocratic, although their undemocratic character is necessary to their function. I think if the judiciary made decisions based upon its perceptions of the popular will, then African Americans would still be drinking out of special fountains and many of our woman judges would be paralegals and we would still be in the 19th century. The judiciary has historically become the final protector of people's liberties. Political scientists have known for years that, if left up to the American electorate, there would be no Bill of Rights. If the judiciary were a mere reflection of the majority's preference, issue by issue, we wouldn't have a democracy for very long.

■ ■ ■

When I drive by a Veterans Administration building, the first thing that catches my eye is the sign that says the price of freedom is visible here. Maybe the price of freedom is visible in California, where the assumption is that a turnabout in political philosophy took three people off the bench. That is the price we pay.

■ ■ ■

The Ordeal of Campaigning

Although many judges said they recognized the value of elections, particularly the benefit of touching base with the community they serve, few of them actually enjoyed campaigning. The most unpleasant aspects of campaigns were voter apathy and negativism, and the need to raise money. The consensus was that the vituperation and media irresponsibility that has increasingly characterized political campaigns generally during the last decade

now colors judicial campaigns as well, to the detriment of rational discourse. And even though the near-universal use of independent fundraising committees effectively insulates judicial candidates from asking for money or having to respond to contributors, many judges found the process distasteful and embarrassing.

Representative Views

Have you stood for election? I have. It was a fascinating experience. I had been practicing for 27 years. I had all the academic ratings I needed. Every newspaper had endorsed me. I ran against a man who decided he wanted to run because his name was similar to a politician in the community. I prevailed by only 18,000 votes. It was a humiliating and sobering experience.

■ ■ ■

In my state almost no information is provided to the voters to enable them to make an intelligent decision in a retention election. That has been the biggest threat to the entire system. The public and the press say that merit selection does not work because once a judge is appointed by the governor, the voters don't know anything about his or her performance and whether that judge ought to be retained.

■ ■ ■

I'm a chief judge in the court of appeals. We have contested elections. Because of the result of the last election, I am referred to as Landslide [name of judge]. *There are 3 million people in my district, and I prevailed by 18,000 votes. I spent $145,00, which I raised. My opponent spent $3,000.*

■ ■ ■

When the ballot in a nonpartisan judicial election is down at the bottom, or off to the side [of the voting card], the number of people who vote drops off—there is so little interest in the election. People don't care. They just don't pay attention. League of Women Voters meetings that you

go to are not attended. Citizen groups that you go to—maybe there are a few people. You cannot get a podium to speak as a candidate in my state. My sense is that since the democratic, small "d," process isn't working, merit selection might be an effective way to get the best people for the judiciary.

■ ■ ■

You don't campaign in the retention election unless you face vocal opposition. Otherwise, you just keep your head low and do your work and go to the polls. When I stood for retention, I experienced a negative vote of about 22 percent. Nobody said anything bad about me. I was on the right side, if you will, in controversial cases, but 22 percent of the people thought I was no good anyway.

■ ■ ■

We need to do a better selling job. We need to give the electorate a good, hard civics lesson every way we can—by taking the court to the public as often as you can, or by enlisting the aid of not only the bar associations but the League of Women Voters to get this damn apathetic voting public off their butts and get them thinking.

■ ■ ■

I kept score. I campaigned from May 12th last year to election day and was out almost every night and weekend. I kept track of the number of people that appeared at meetings I addressed. In total I didn't address more than 2,000 people in a district of more than 3 million. One television ad, or one newspaper editorial or ad, reaches 12 times—or even 1,200 times—this number of people.

■ ■ ■

In the end, notwithstanding the political dimensions of the merit selection in my state or elsewhere, we don't have the evil that comes from raising funds. It seems to me that that is the significant evil associated with the popular election of judges, and I can't imagine anything more destructive.

■ ■ ■

The bar association set up a committee, and I had no idea who was contributing to it or how the funds were raised. I found myself personally very ill at ease to drive down the street and see a lobby sign with my name. If they had not done away with that sort of process in my state, I probably would have gone back to my law practice.

■ ■ ■

It is not a perfect world. It is not degrading to me to run and never has been. I was appointed first, and there was more politics in that than there was at any time. To hell with contributors to your campaign. If you can't say that, you shouldn't be on the bench anyhow. I say we have a pretty good system.

■ ■ ■

The Effect of Anti-Lawyer Sentiment on Judicial Elections

Second only to complaints about voter apathy and ignorance was the concern about the backlash against judges that appears to have become part and parcel of what the judges perceived as intense public antipathy toward lawyers. This hostility is so prevalent, the judges reported, that bar polls designed objectively to evaluate judges who stand for election are frequently counterproductive. Many instances were cited in which a favorable bar poll became the kiss of death, while voters eagerly supported candidates with unfavorable ratings.

Representative Views

In my [western] state we have nonpartisan elections. In my county, the bar association gives ratings to candidates. A few years ago there was a four-man contest in which they gave one rating of "well qualified," two of "qualified," and one of "not qualified." As you might guess, the candidate with the "not qualified" rating was elected.

■ ■ ■

Some people believe that in an election process the public, with its usual dislike of lawyers, generally votes the opposite of what the bar association recommends. They figure it would be a tribute to a judge to get an "unqualified" rating.

■ ■ ■

We all like to privately liken ourselves to Cardozo or Brandeis or whomever our heroes may be, but the fact is that appellate court judges have about as low a visibility as any human beings in public life. People don't know us. The bar doesn't know us. The last bar poll I went through rated me below average on my appointment of receivers and trustees. No judge on my state's court of appeals has ever appointed a receiver or trustee!

■ ■ ■

I am beginning to change my mind about the elective system. I just was re-elected without opposition. I was lucky. In the current political environment, almost all judges get opposition, and the reason I disfavor the system now is because of the degradation of the process, at least in my state. Our legislature said that all political officers in the state have to run with a place on the ballot that says "none of the above." This has no legal effect except to demean you. All people who run for office—except legislators—have to run against "none of the above." Thirty percent of the people just say, "throw the rascals out."

■ ■ ■

We have had a bar poll that has not been a healthy experience. It provided information that the voters ignored. On several occasions, the lawyers saying that the judge ought to be retained was the kiss of death. When the lawyers said a judge ought to be removed from office, that judge usually got more votes than anybody else up for retention, usually by campaigning on the basis that "I'm a hell of a judge and the fact that the lawyers don't like me proves it. It shows how independent and great I am."

■ ■ ■

My experience in a large metropolitan area is that the electorate simply doesn't have knowledge of judicial candidates. I suspect that in many rural areas it is possible for the voters to know something about the people they elect to judicial offices. In my city, people are elected on the basis of their names. The more Anglo or Irish the name is, the more likely victory is going to occur. I considered changing my name. People tell me I am on the right track. If you are a Democrat, you generally win in our city. If you are a Republican, you win in the suburbs. I ran as a Democrat, and since I had won the primary, there was no way I was going to lose to a Republican. I had the number-one ballot spot and my opponent's name was almost as bad as mine. That is how I won; it was not because the people knew how great I was. I tried to tell them, but I was scratching the surface. It seems to me that the appointed system at least ensures a selection of more than mediocre judges. In my city, mediocre is a compliment for many of those elected. We had one of the greatest percentages of people elected who were deemed unqualified by the major bar associations.

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II. Funding The Court System

The Dimensions of the Problem

While a number of judges reported that their court systems have remained relatively unscathed by the budget constraints affecting states throughout the country, some described a pattern of reduced appropriations that forced them, as Professor Wedgwood put it, to keep their court systems "glued together with twine and gum." Conditions tended to be significantly worse where courts depended on local resources. While recognizing the merits of competing social needs, the judges also believed that the unique constitutional function of the judiciary should give court systems a special claim.

Representative Views

In my state all government was cut, including the courts. Last year we had two mid-year cuts. The committee on the crisis of court funding identified 17 items that indicated

stress in the court system. We had 12 of them. We started the year with $5 million less than what we had spent the year before. We did everything you could think of. We had six judicial vacancies that we carried most of the year. We cut out virtually all judicial education. We cut out all out-of-state travel. We cut a lot of things like mediation programs. Then we deferred everything you could possibly defer.

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When you have to look to the local unit of government for funds, you are in trouble. My state pays the salary for the appellate judges and their staffs, but the counties are responsible for physical facilities. I ran my office last year on $9,000. I have two law clerks. We do about 120 cases a year, full opinion, and it is a hardship. But I live in a part of the state where all but one or two counties are in Appalachia. They are cutting off government services to their constituents, and I can't go to them and say, "hey, I need an extra law clerk or a new copier." At that level of state funding there is a real crisis.

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We all recognize there are crushing needs for all kinds of services, but the court system is one which was established constitutionally.

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At the local level, judges don't have a constituency. If it comes down to providing extra law clerks or paving township Road 127, there isn't even a close call.

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What is the definition of access to justice? This argument probably spans everything from judges wanting salary increases, to new desks, to more secretaries, to fundamental things, such as paying the defense lawyers. I think you have to talk differently about the salary increase and the new desk versus representation for indigent defendants.

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The Power to Say "No"

Although the judges firmly believed in the validity of a constitutional claim to court funding, they shrank from direct confrontation with the legislature on such a theoretical ground. "You get more with honey than you do with vinegar," one judge said. "It pays bigger dividends than standing up and flexing our muscles and saying we are the third branch of government and you can't push us around." Many judges, however, had already refused to preside over courts that did not meet constitutional standards, with some success. Some had taken a gradual, non-antagonistic approach, while others advocated a vigorous assertion of their constitutional authority.

Representative Views

You have to learn how to scare legislators and, just like judo, you use the other person's weight and motion to your advantage. You use the public's fright over criminals being out on the street, which you are never going to change their mind about, against the legislators. When they short you on funds, you go to a meeting with the speaker or the president pro tem *and say, "We are going to start letting these people out on the street, and we are going to blame you. We are going to send out press releases saying that these people are walking the street because you didn't give us enough money to put them in jail." You have to be tough. That's the only thing they understand.*

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When you talk about closing the doors of a courthouse, why close the door to commercial litigation, to injured people? Why not close the door to the county and the municipality and the state's cash cow, and that is traffic court. If you shut down traffic courts, you have a tremendous reallocation of your resources. We devote more than 20 judges out of 400 every day to hearing traffic court matters. If you shut that down, you get the moral high with the people because they don't like traffic court to begin with, and you have brought the municipalities, the counties and the state to their knees. You turn around and say, "We have a constitutional mandate. Injured people have the right to a trial by jury, and we have to take care of criminals. So when you provide us with some more money, we will open up the traffic court again."

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The courts have plenty of power to demonstrate that acts and omissions have consequences. That is what Professor Wedgwood meant by the power to say no. We have the key to the prison. We have the key to the courthouse door. It is up to you, legislature. We understand you have the purse, but we are going to accord people their constitutional rights; and if they are languishing in prison pending briefing on their appeals or are unduly detained pre-trial because of resource shortages, we are going to let them out. We are either going to dismiss their cases or put them out on bail, and you can explain that to the electorate.

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Last year in our state we were underfunded. It was obvious we were not going to be able to get through the year. We cut out travel for all the judges. We cut out the annual meeting for the court reporters and the clerks of the court. We cut out extra trials. We banned purchases. We publicized this through the newspapers every time we did something to let the public know exactly what was happening and why. Later we closed one of the courthouses. That caused a hue and cry. Then we reduced access to the courthouse. In three counties, instead of keeping it open until 5:00, we closed it at 3:00. This was because we didn't have enough clerk-of-court help for the filing, and all the filings were so far behind that the judges trying the cases didn't have a current file. It worked. We got more money this year.

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Legislatures Without Lawyers

The judges noted with some distress the nationwide decline in the percentage of state legislators who are lawyers, a trend which appears to have left these bodies increasingly unsympathetic to requests for court funding. They ascribed this to a fundamental lack of understanding on the part of nonlawyers of the role of the courts and their constitutional mandate to provide due process.

Representative Views

One of the things we have to remember is that lawyers are getting out of government. In our state, we are down to two dozen lawyers out of 177 elected, and most of those are from our largest city. We think people understand what we are talking about. One of the supreme court justices told me that it dawned on them suddenly last year, when they were talking about public defenders, that the president of the senate, a nonlawyer, had no idea that people had a constitutional right to be represented in criminal cases. He had just assumed that was a waste of the taxpayers money. We have to realize that we first have to educate the legislature as to what we do before we can make any demands on them. They don't understand the system.

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I think [this decline] is probably one of the most significant developments in the last twenty years in terms of judiciary/legislative relations. You could bank on the fact that most of the state legislatures at least had a basic understanding of the system. In several midwestern states that is no longer true. What it presents is an opportunity for constituency building. The opportunities and challenges are there. If we don't begin building constituencies with nonlawyer interest groups, I think whatever funding problems we have now will be really magnified by the turn of the century.

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In legislatures all over the country, there are fewer and fewer lawyers. They are not interested in serving. Lawyer-bashing has carried over to the judiciary. When you don't have enough lawyers in the legislature that are concerned, you have people who are overtly antagonistic to both lawyers and judges.

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The Various Forms of Legislative Lobbying

There was a consensus among the judges that better communication with their legislatures was the most sensible, indeed probably the only realistic avenue for securing adequate court funding. Such efforts ranged from informal social contacts with key legislators, to formal presentations of "state of the court" reports by chief judges, and even to the hiring of professional lobbyists. In some states, court administrators take on lobbying duties, while in others the chief judge assumes the responsibility of spokesperson. Although many judges found the notion of full-scale lobbying out of keeping with the dignity of the courts, most of them took the pragmatic view that some form of lobbying was necessary, if only to educate legislators about the courts and their needs.

Representative Views

We have to realize that the justice system is not just courts but involves prisons and legislative determinations and limited resources. For the last two years we have been preparing judicial impact statements, not really trying to express if we think something is a good idea or a bad idea, but saying, "You set the policy, you decide how you want to spend your dollars. You want a mandatory minimum for drugs, here's what it is going to cost; you want to shorten the mandatory time limits for drunk driving prosecution, here's what it is going to cost in additional staffing and judges; and so forth. We have been successful in getting added dollars.

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We have a lobbyist that we hired last year, a professional lobbyist who was the previous governor's executive assistant. He really knows his way around and has been very helpful on some issues. There was some resistance initially. The idea of judges having to hire a lobbyist seemed a little unseemly, but it has certainly been effective.

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We all have to become public relations experts and politicians and lobbyists in addition to being judges. That is a true aspect of practicing law and being a judge in this century. It is not enough just to be a good lawyer or a good judge. It is a shame.

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We have to understand that we live in a political system. That is how we got where we are and that is how we have to deal with the legislature. I have never comprehended why judges, who probably know more about their business than anybody else, are so reluctant to go to the legislature and talk not just about funding, but about criminal justice and drugs. I have no objection to having a lobbyist, somebody who is over there pressing the point. You know very well that if you are not there on Sunday night in the committee meeting, you are going to get killed.

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It appears to me that the states that do the best are those where leadership has been taken by the supreme court or the chief justice to establish ongoing good relationships with key people in the legislature. Absent that, I think it is pretty much a lost cause.

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We had good results with an emergency request. We got $3 million out of a total surplus budget of $12 million—and we represent only 2 percent of the state budget. That reflects the fact that we have a lobbyist on our payroll, a former member of the appropriations committee who stays day and night while the committee is in session. We couldn't believe a few years ago that anyone would tolerate the judiciary hiring a lobbyist. It never raised an eyebrow and everyone said what a wonderful thing it is. If we didn't have him, I don't think we could do nearly as well.

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One of the problems we experienced was that when you get to the end of the session and push comes to shove, and all those political things inevitably happen, your lobbyist and other lobbyists are running together. Instead of being a third co-equal branch of government, you suddenly become just another special interest.

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PROCEEDINGS OF THE CONFERENCE

Does Democracy Threaten Judicial Independence?[2]

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Professor Stephen L. Carter
Yale Law School

Professor Carter based his remarks on the assumption that democracy is a threat to judicial independence, and that the systems of judicial election that evolved in the states as part of the democratization movement of the early 19th century were in fact designed to weaken judicial independence. Judges came to be elected, he argued, precisely for the purpose of controlling judicial decisions and making them more responsive to the popular will.

He outlined the tensions that arise between the check on judicial independence that is inherent in elections and the modern ideal that judging should be autonomous. The rules that prohibit judges from defending themselves when their rulings are attacked during the course of a contested election serve to exacerbate these tensions, he noted. The imposition of silence, Professor Carter suggested, undermines the very purpose of subjecting judges to a popular vote.

He suggested that if we are to have judicial elections, candidates should be allowed to campaign on the issues. He concluded by positing an ideal system in which politicians refrain from blaming judges for problems in their states and that encourages the electorate to vote for candidates on the basis of how well they practice the craft of judging rather than on the results they reach.

Of course democracy threatens judicial independence. The question is the extent to which it does. Much of our history has represented a struggle by forces of democracy to gain a degree of influence over judicial decisionmaking. Part of the problem is deciding the best way of designing a conception of judicial independence that will work well within the contours of this democracy.

In virtually every state (with a few exceptions), judges must on some occasion face the voters. Many states have adopted the Missouri plan, under which judges who are initially appointed by the Governor with the consent of the legislature must later stand for retention elections. We have come to accept this as the way things are and maybe the way things should be. But at the time of the founding, only one state required judges to face the voters. Everywhere else, judges were selected by either the legislature alone or by the governor with the consent of the legislature. In many

[2]*Professor Carter's remarks are excerpted from the presentation of a paper he prepared for the forum. A copy of the paper may be obtained from The Roscoe Pound Foundation.*

cases they had life tenure. Over the next 70 years, that changed so completely that by the beginning of the Civil War, only four states provided for life tenure—Maine, New Hampshire, Massachusetts and South Carolina. Every state that joined the union since the middle of the 19th century has provided in its constitution for some form of judicial election.

The Evolution of Judicial Elections

What happened? What happened is that people became very unhappy with what the courts were doing. The cherished ideal of judicial independence that we talk about so much today, and that the framers talked about, turned out not to serve the needs of a democracy.

The relationship between the courts and the democratic branches of government has not always been happy. Judges have always had the authority to hold legislative enactments unconstitutional, and when they did this, the federal legislature got angry at the federal judges, and state legislatures got angry at state judges and federal judges. The early years of 19th-century judicial history were characterized by this struggle. In a number of states, judges were impeached for holding state enactments unconstitutional. In others, they were occasionally invited to come down to the legislature and give an accounting of themselves before getting the following year's budget. Several states adopted statutes telling courts how to decide cases. One state adopted a statute directing a Supreme Court not to hold any more statutes unconstitutional. Three states adopted statutes ordering their courts not to cite any British common-law authorities. (British common law was seen as the creation of wealth and privilege, a sign of government by the few and profoundly undemocratic, and that is the way the Jeffersonians and later the Jacksonians tended to describe the courts.)

In the most extreme case, Kentucky grew tired of its highest court, the Court of Appeals. The legislature was unable to get the two-thirds vote necessary to remove the judges from office, so it abolished the court and created a new one. The judges of the old court refused to leave, so for a few years there were actually two courts of last resort. This created a great problem for litigants because the two courts handed out contradictory rulings.

The most dramatic change in the first half of the 19th century was the switch to judicial elections, to the idea that anybody who is going to have the power to hold unconstitutional an enactment of the state legislature should be willing to face the people who elected that legislature. That was Jefferson's idea and it swept the country in the first part of the century.

Voting As a Means of Influencing Judicial Results

Critics of judicial elections argue that if you force judges to face the voters, the judges will feel pressured and this will influence decisionmaking. Of course judicial elections are designed to influence decisionmaking, but it is not clear whether they do. Defenders of judicial elections point out that merit selection processes can also be caught up in trying to select judges on the basis of the same thing voters in elections tend to care about—concrete results.

When California voters in 1986 turned out of office three justices of the Supreme Court after a campaign that criticized them for allegedly being soft on criminals in general and on the death penalty in particular, the voters had not read the decisions. But they had an image, fair or unfair, of what the judges were like, and the image rested on a vision of the concrete results that they thought these judges had reached and would continue to reach in the future. That vision is said to be the threat posed by judicial elections. Critics have argued, however, that in merit selection processes at the state level and the appointment process at the federal level, exactly the same vision drives the people doing the selecting.

Restraints on Judicial Campaigning

The canons are in a way quite clear and in a way somewhat ambiguous about judicial campaigns. Until the 1990 amendments to the model code, Canon 7(B)(1)(c) stated that a candidate for a judicial office "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, should not announce his views on disputed legal or political issues and should not misrepresent his identity, qualifications, present position or other fact." The 1990 amendments to the model code created a new Canon 5(A)(3)(d)

which is a little simpler. It deleted the old provision that a candidate should not make a statement on a disputed issue. Instead, it places two important requirements on judges who are running: "A candidate shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, and shall not make statements that commit or appear to commit the candidate with respect to cases or controversies that are likely to come before the court."

Of course, we don't select federal judges that way. But at the court level where judges have to face the voters, they are prohibited from making comments of that kind. For many voters, however, this is precisely the information they want. It is all very well for candidates to say they cannot make any comment that would tend to commit them or be a promise of anything other than the impartial carrying out of their duties. But the voters want to know where judicial candidates stand on the death penalty, how they feel about school busing, how they feel about equal funding for schools, how they feel about the variety of issues that state courts are deciding in the great ferment of state constitutional law. The answer the candidates give is that they can't say.

There is an important question as to whether those prohibitions are constitutional. The majority of courts that have considered the constitutionality of those restrictions have struck them down as violating the First Amendment in two senses. One is that the free speech of the candidate is being violated, and this is tied to the more fundamental sense that a political campaign is the single place where we need the richest and most robust debate. The unconstitutionality question only arises when some candidates violate the canon because they have a sense that there are things the voters would like to know that are not being talked about in elections.

Reforming Judicial Elections

The majority of judges in a retention election will return to office and a great majority of judges who are in contested elections will return to office as well. Indeed, some studies suggest that, at least through the mid-1980s, the greatest single indicator of who would win a contested judicial election or who would be ousted in a

retention election was the position of the organized bar association. Judges who were opposed by the organized bar tended to lose. That suggests a responsible role for the bar in mediating this tension.

To the extent that it is deemed wise that judges should be able to serve additional terms after facing the voters, I think some changes ought to be made. The most important is that we should have retention elections rather than contested elections. There is, I think, a greater chance of lowering the level of emotions in a debate and raising its level of sophistication when that debate involves the record of a single candidate, as opposed to a contest in which charges go back and forth among candidates.

My preference is for retention elections instead of contested elections, but if contested elections are going to be held, I do think candidates should be allowed to campaign. If the record of the incumbent cannot be criticized, the purpose of a contested election is difficult to see.

However, the procedural changes I have described are only cosmetic and mask the larger problem. The reasons that the tensions I described arise at all is not because a fundamental tension exists between judicial independence and democracy, but because the way society views the craft of judging is confused and maybe a little dangerous. We are encouraged in America—and law professors are some of the worst perpetrators of this—to think of judges simply as people who reach results. The questions are, how is this person going to rule? how is this person going to vote? and what result will be reached? The questions are not, what qualifications does this person have? is this a good judicial craftsman? or does this person write sensible, thoughtful opinions (whether I agree with them or not)? but rather, is this person going to vote the way that I want?

Here again I think the organized bar can be of great assistance. We have to develop an image that we present to the public of judging being an activity that is autonomous and separate from politics, that it is not simply a matter of reaching results, and that it is possible to imagine that someone whose views you disagree with is a good judge. If we cannot implant that view in the public mind, then none of these cosmetic steps will do very much to overcome the tension I've mentioned.

Political Self-Denial

The most important of my proposals, and maybe the least likely, is political self-denial. Can we get politicians to stop running against the courts? Can we get politicians to stop telling voters that all the problems we have in this state are caused by those darn judges down there in the state capital and all their rulings, meaning "Elect me and I will change all that." If we can't get politicians to stop talking to the voters that way, it's very unlikely that any of the changes I've suggested are going to make any difference.

I opened by saying that of course there is an incompatibility between judicial independence and democracy. The system is designed that way. But I also think it important in the modern era, when we have a much more sophisticated vision of judging than the Jeffersonians and Jacksonians had, that we try to find ways to moderate or to mediate that tension by trying to convince people—voters, politicians, lawyers, law professors and judges—that judging is a craft that involves something other than just reaching results. If we can do that, it will be possible to imagine campaigns of any sort in which the question is not how a person voted, but whether he or she is a good judge.

Response

by Judge Charles Chapman, Fifth District Appellate Court of Illinois

Judge Chapman argued against lifting restrictions on judicial campaigning on the grounds that this would foster the kind of negative advertising that is already seen in some state elections. Nor would he ban campaign contributions by lawyers, noting that such contributions have proved to be essential in state judicial elections and arguing that judges need not be influenced by them.

He also disagreed with Professor Carter's suggestion that retention elections would somehow be purer and conducted on a higher level than contested elections and cited egregious examples of negative campaigning in retention elections. Judge Chapman concluded that, even though democracy may be a threat to judicial independence, this is not necessarily a bad thing, and that it is a healthy phenomenon that judges be aware of the political context in which they do their work.

There are some areas in which I agree with Professor Carter's paper and others in which I disagree. First, I agree that politics is involved in every form of judicial selection, whether it's an appointive system, an elective system, or a so-called Missouri nonpartisan merit plan. To say that politics are not involved in any of these plans is to ignore reality. The question is, if judicial selection is political, why put it into an elite selection process? Why not instead have the people involved? As Professor Carter points out, there are problems involving restrictions on making campaign commitments, and problems—which he didn't mention—with the financial aspect of judicial campaigns.

Professor Carter suggests that we open up the debate in judicial campaigns to give the electorate a greater amount of information so that they can, we hope, make an intelligent choice. While I disagree with this, on an intellectual level, I recognize the argument that restrictions on judicial campaigning may not be warranted under the First Amendment.

Dangers of Full-Scale Campaigning

I think that opening up campaigns, particularly in this era of negative campaigning, will degenerate quickly to levels that we do not want. I think it probable that individual judges and the judiciary as a whole will be damaged. I also think that if we expand the area of what can be said in a campaign, there is a danger that candidates will make commitments in advance. For example, a lot of people like the death penalty, and we can imagine an escalating dialogue in which candidates go from supporting the death penalty to supporting torture in an effort to top their opponents in pleasing potential campaign donors.

In California, during the famous election in which Judge Rose Bird and other judges were defeated, $4.5 million was spent by the three candidates up for re-election and $7 million was spent against them. The perception was that this was because of their stance on the death penalty, but those amounts of money suggest to me that something more was involved.

Financing Judicial Campaigns

Campaign financing is a problem—$4.5 million dollars and $7 million is a lot of money. Where does it come from? I hate to sound like Willy Sutton, but the bank robber went to the bank because that is where the money is; judges go to lawyers because, for judicial candidates, that is where the money is. The contribution of lawyers is an important element in judicial campaigns, and this is another area in which I disagree with Professor Carter. He suggests that to avoid any appearance of impropriety, perhaps lawyer contributions to judicial campaigns should be banned. He also acknowledges in his article that that would not necessarily solve the problem because frequent litigators could also make contributions.

I cannot disagree with the statement that the public perceives lawyer contributions as a problem when those lawyers may appear before judges in the future. But I also feel that, if the system is going to work at all, judges have to be above that. I think that the financial aspects of lawyers' assistance is important and, although I cannot disagree that it presents problems, I would not ban it. I also feel that lawyers probably know as much or more about the judicial candidates, at least they should, as any other segment of society.

Bar poll results may or may not be helpful in an election. If people don't like judges, they really don't like lawyers. Unfortunately, the fact that a candidate flunks a bar poll can help that candidate in a judicial election.

Retention Elections and Single Terms Not the Solutions

I have another area of disagreement, although this one is minor and I raise it more as an excuse to give you a couple of examples of retention campaigning in our area than as a major bone of contention. Professor Carter suggests that retention elections are less polarizing than contested elections.

[Judge Chapman played a tape of a challenger in a retention election blatantly accusing the sitting judge of being "soft" on criminals, and read excerpts from scurrilous flyers sent out anonymously in another retention election.]

What are the solutions? The one that Professor Carter mentioned—a single term—is probably not feasible. Although he said most judges wouldn't like it, I think that would depend upon the length of the term: life would be fine, at least with me. In terms of politics, I don't see the legislatures changing it, and as a practical matter I don't see judges willing to give up law practice to take the single term and then go back and start up a practice again.

Living with Democracy

I want to close with a question: Democracy probably is to some degree a threat to the independence of the judiciary, but is that necessarily a bad thing? Obviously, it can be a bad thing: if a judge is examining a case and he or she says, "clerk, get me my campaign list and let's see who gave me what before I rule on this case," I think that certainly is a serious problem. If the judge says, "well, an election is coming up, I have to rule this way because otherwise I won't be retained," I think that's a serious problem. But if this awareness of the political process is a nagging reality, is it necessarily bad?

I recommend to you two articles by Professor Carter that he cites in the paper he has presented at this forum and that discuss the confirmation process of Supreme Court nominees. His titles are not subtle. The first one is called "The Confirmation Mess." The second one is called "The Confirmation Mess Revisited." However, he has some excellent ideas. In the first article he talks about the Senate as a deliberative body and contrasts it with the House, whose members are up for re-election every two years and are always running. He refers to the House, because of its closeness to the elective process and the people, as the heart of democracy. He then characterizes the Senate, because of its greater deliberative capacity, as the soul of the democracy. To continue the metaphor, he says that the executive branch would be the brains and the judiciary would hopefully be the conscience.

In this light, perhaps the specter before us of a future election may not necessarily be a bad thing. And perhaps those of us on the state courts who do have elections can see in them the possibility of serving as a judicial conscience.

Is There a Constitutional Claim to Minimum Funding of the Courts?[3]

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Professor Ruth Wedgwood
Yale Law School

Professor Wedgwood argued that although there is a legitimate constitutional claim for at least minimal funding of the courts by the legislature, and that courts can make a case that even more than minimal funding is needed for effective functioning, these claims are not always necessarily justiciable. Carrying these claims to the ultimate limit can be dangerous and self-defeating, she noted.

She discussed a variety of alternative approaches judges can use to obtain sufficient funding, including raising some user fees that are unrealistically low. She suggested that the power to say "no," to refuse to go forward with cases where reduced funding makes due process impossible, may be a useful strategy in the fight to secure adequate appropriations.

Judges can be political actors, she said, in employing high constitutional rhetoric that helps convince both the legislature and the public that the courts are efficient, innovative, and entitled to adequate support.

Judges are perennially underpaid, at least in contrast to the sums that are to be earned in private practice, but academics share that same distinction, and the salaries of both are at least liveable. The harder challenges lie in funding the apparatus of a modern justice system: employing the appointed defense counsel who protects the interests of indigent felony defendants, a function essential in making trials an effective search for truth; employing the probation officers who work at helping defendants put their lives back together and provide an alternative to the high expense of incarceration; maintaining adequate courtrooms to allow trials to be conducted with dignity and concentration; staffing and operating civil courts that are important to ordinary citizens, such as small claims court and housing court; and preserving the efficacy of civil courts that help provide security for commercial and business transactions. The question I want to ask today is whether there is a constitutional claim to minimum funding of the courts. Is there a point at which the requirements of operating an effective court system should be removed from ordinary politics and placed on the higher plane that we reserve for constitutional entitlements? If so, is such a claim justiciable? Budgeting lies at the heart of legislative and executive politics; if there is a constitutional claim to minimum funding, perhaps the claim must be addressed as part of a constitutional debate within the political branches.

[3]*Professor Wedgwood's remarks are excerpted from a paper she presented at the forum. A copy of the paper may be obtained from The Roscoe Pound Foundation.*

In the face of funding shortfalls, what is a judge or chief judge to do? There is, of course, the capacity to engage in politics to justify a budget to legislators and to the public. The Canons of Judicial Conduct do not permit judges to engage in politics, with the discrete exception of their own re-election, but they are permitted to make the problems of the judicial system known to the public and the legislature. Professional associations of trial lawyers and local bar associations have supported the judiciary in its reasonable requests and should continue to do so. Courts also could experiment, more than they have, with user fees for certain kinds of cases. The filing fees for civil cases in state and federal courts throughout this country are only a small fraction of the cost of processing and deciding those cases. To preserve equal access to justice, any increased fee schedule can be adjusted for indigent parties. Courts might experiment with back-loaded fees—requiring the payment of a small fraction of a percent of civil judgments entered or judgments collected. While justice is a standard that belongs to the public, in civil cases it does not seem inappropriate to ask those who use the courts most heavily to contribute a realistic sum toward their operation.

A third route, of course, consists in the power to say "no." A conscientious judge will decline to participate in a proceeding that cannot be conducted fairly. When the absence of resources interferes on the most fundamental level with the ability to protect defendants' due process rights, courts have refused to go forward. The Mississippi trial court in which witnesses could not be heard because of inadequate acoustics and lumber trucks rumbling by was directed by the state supreme court to vacate the defendant's conviction. In Florida, chronic underfunding of the public defender offices created a "tremendous backlog" of as many as 1,700 appellate cases, with delays as long as two years before a defendant's appeal could be briefed; some defendants finished serving substantial prison terms before their appeals were presented.[4] The Florida Supreme Court concluded that it could not constitutionally continue to detain convicted defendants who were effectively denied their statutory right of appeal and warned the state legislature that it would be forced to release defendants on bail unless the public defender service was allocated sufficient funds to present timely briefs on appeal.

[4]*See In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 15 Fla. Law W. 278 (1990); "Court Tells State to Pay or Convicts Go Free," United Press International (May 4, 1990); Randall Samborn, "Funding Cuts Spark Court Crisis," National Law Journal, Aug. 31, 1992, at 3. See also Yanke v. Polk County Board of Commissioners, No. 88-878-Civ-T-17 (S.D. Fla 1990).*

In dire situations, some courts have also resorted to a theory of "inherent power" to muster funds. [5] The theory of "inherent judicial power" is still controversial, at least among law professors. Most inherent-power cases have concerned subordinate units of government – cities or counties that failed to vote necessary funds for the enforcement of state-wide laws. The difficult question of sovereign immunity is avoided at this level of government; in addition, a state court order to a local unit of government often shimmers in Cardozean ambiguity between statutory and constitutional grounds.

Controversy abounds when a state court orders a state legislature to appropriate funds. In some cases, textual glosses might ease the way. For instance, if the state constitution says that "No money shall be drawn from the treasury, but in consequence of appropriations made by law," a judge can generously offer that "law" includes court orders as well as statutes, at least when the order is essential to preserving a functioning court system.[6] But this Hamiltonian position was scathed by Jeffersonian Republicans in the first decade of the Republic; it is likely to provoke wide disagreement in the present day. A theory of inherent power . . . may deter some thoughtless legislative acts as an *in terrorem* device; but rather like nuclear deterrence, it works best as reserve. At a minimum, it would seem prudent for a state supreme court to limit itself to a declaratory judgment, rather than flirting with the spectacle of sending a sergeant-at-arms to enforce a coercive remedy against the legislature.

One would like to have a cure to announce for judicial financing. Legislatures create burdens for the courts without much forethought. Within the limits of maintaining judicial independence, I would like to see more attention by prosecutors and legislatures to the views of judges on what constitutes effective law enforcement policy; many federal judges have sounded the alarm, for example, that the federalization of small narcotics cases threatens the federal courts' function as a forum for civil justice by crowding civil litigation from the docket. An informal "court impact" statement for new legislation and administrative policies would be a healthy caution. In august company such as this, I can only express admiration for judges and administrators who manage to keep their court systems glued together with twine and gum, and hope, with you, that the education of the public to these problems will provide the necessary fiscal support.

[5] *Alabama is the only state court that has rejected the doctrine. See Morgan Country Commission v. Judge Newton B. Powell, 292 Ala. 300, 293 So.2d 830 (1974).*

[6] *Compare Allen County Council v. Allen Circuit Court, 549 N.E.2d 364, 366-67, 1990 Ind. LEXIS 5 (Ind. 1990).*

Response

by Chief Justice Stanley Feldman, Supreme Court of Arizona

Justice Feldman outlined the pitfalls of attempting to take the constitutional claim of minimum funding to its limits, citing a range of practical and political obstacles that make pursuing this claim unrealistic. In his view, legal action on the part of the judiciary would be extremely dangerous and should not be contemplated.

His solutions for easing the funding crisis included increased participation by judges in efforts to educate legislators and the public about the needs of the court system. Judge Feldman also outlined specific steps judges can take in cautiously refusing to try cases if the constitutional guarantees are not met.

The Dangers of Constitutional Litigation

Professor Wedgwood warns us of the need for caution. I don't think a good argument exists against the position that there is a constitutional claim to minimum funding of the courts. The courts are created as a separate branch of government. Obviously, there is a constitutional argument that they must be funded. But there is a subsidiary question: Which entity decides upon that funding and which entity enforces that funding? It is very difficult to make a constitutional case for the argument that the courts may write their own budget, may require the funding authority to adopt that budget, and may take appropriate action if the funding authority refuses to do that.

You quoted Alexander Hamilton as saying in Federalist Number 78 that we need not fear the courts because they do not have the power of the purse. But the rest of his phrase was, "nor do they have the sword nor the power of the army." In this field, as in no other, we need to think about results. If you start down the road of requiring the funding entity to appropriate a certain amount of money for a specific court-related purpose, what will happen at the end of that road if all goes badly, if you can't get them to agree with you?

When the Chief Judge of New York attempted to sue the governor for funds, what could he have done if the governor had not given in? It could be argued that the Supreme Court of New York has the authority to hold the Governor of New York in contempt and to put him in jail until the proper appropriation is made. (In my

estimation, going to jail to prevent being forced by a judge to spend the people's money to hire lawyers to protect criminals and murderers would make a hero out of any politician.)

But who says the court has this power? On what would you rest that power? If the court can do this to get its budget, why can't the executive do it to get its budget? If you can hold that the county supervisors may be jailed for contempt for failing to obey a court order to appropriate enough money to establish another division of the court, why wouldn't you be forced to hold that they could also be held in contempt if the sheriff came to court and proved that the county supervisors refused to levy enough taxes and appropriate enough money to enable the sheriff to perform his or her duties according to the constitution and laws of the state? And if you can do that with the sheriff's office, where do you stop and how far do you think the courts can go down this road before the people of this country just simply say, "That's enough, this can't be our system of government"?

I realize that many cases say that the courts have this power. But if you start to look through them, you will find very few, if any, cases—and I think none involving a chief executive or state legislature—in which the courts have tried to enforce that power by the ultimate weapon of contempt and jailing someone who will not agree with their orders for funding.

Responsible Lobbying and Coalition Building

Let me recommend two things that might work that at least are less controversial. I believe that we have an obligation to participate in the political process insofar as it comes to appropriating funds for courts; we must explain what we need, why we need it, how we intend to use it and how we are going to try and be as frugal as possible. I think that's an obligation that must be fulfilled both by going to the people; by appearing at public fora and explaining what is needed, why it is needed, and how it's going to be used; and by establishing relationships with the legislature so that people will listen to us. I think we need to enlist allies in this, not just the bar. We need the help of responsible organizations throughout each state to help us with the necessary funding for our courts. We need to build bridges with them and get them on our side for responsible requests for funding. One thing I think we need to do better is participating in the political process that leads to the appropriation of funds.

How to Say "No"

The second thing that I can recommend, although it presents its own dangers, is the ability to say no: "We have enough money to try so many criminal cases; we will try no more than can be done within the bounds of the constitution. When we have no more money, we will not have any more trials."

Those who can't get to trial because there is no courtroom, no judge, no jury money, will have to make whatever argument they can under the Sixth Amendment and under the state constitution with regard to the violation of their speedy trial rights. If the trial judge feels that failure to appropriate enough money for the court to try them is a violation of their rights, then they will have to be turned loose. Judges cannot be faulted in taking this action because the Constitution states certain requirements for criminal trials. I have told people in Arizona that we will not try jury cases in trailers. If the public won't build a courthouse or add a courtroom, they shouldn't buy a trailer for $14,000 and expect us to hold a jury trial in it, because it is not a proper facility.

If cuts must be made in what is spent on the courts, I think such cuts should always be directed first at things that are not the core functions of the court. The presiding judges in every county should be told that if not enough money is appropriated, they should cut out whatever they can that is not the core function of the court; then if that's not enough, they will have to start reducing even the core functions of the court.

I don't believe we can say comfortably that we have the power to tell the legislature or the funding authority how much to appropriate and how much to give us, but we certainly have the power to say to them that they cannot tell us how to run our courtrooms, they cannot tell us what the Constitution requires. The judges are the arbiters in determining constitutional requirements, and if we don't have the money to do what we are required to do, we will go as far as we can and then stop.

The purse strings are getting tighter and we are more often running out of money. Again I caution you, before you start down the road of legal action, to think about all the problems involved. They are outlined in Professor Wedgwood's paper. What will be the final result? Can you go down the last mile, and if you get there, what will you do then?

The Call for Outreach and Public Education: The Judges Reflect

The topic that elicited the strongest consensus among the judges was the overriding need to reach out to their constituencies—citizens and students as well as legislators—and explain how the court system works and what the craft of judging entails. They supported increased public education through bar associations, but believed that judges themselves must play a primary role in establishing contacts with local groups, the media and schools. "The one thing that I have gotten out of this conference," a judge said, "is the great need to explain to people that judges are technicians, that their knowledge and experience are valuable. People do not understand what judges do."

Representative Views

I think we have to put more of ourselves into the community to get people to understand that we have a real job to do. I didn't campaign on how good I was going to be as a judge; I had a stock speech about what judges do. One day a woman had been kidnapped and locked in the trunk of the automobile of a felon who was out on bond and was going to the courthouse to get a continuance in another case. She was in the trunk, beating against the lid, people were ignoring her, while the driver—who had kidnapped and raped her—was in the courthouse getting a continuance. After I did my little speech before the Lions, they asked, "how could you allow a situation like that to occur?" That gave me the perfect opportunity to explain what our constitution requires by way of bail—to stand there in front of our citizens and explain that we are trying to follow the law as we do things that seem to them to be absolutely inexplicable. Unless we go out and explain things and tell them something about ourselves and what we are doing, they are always going to consider us "them."

■ ■ ■

If you are talking about educating people, you have to start with the kids. You go into the grade schools and the high schools. You don't bring them to the courthouse, but you go there as representatives of the courts—family courts, children's courts, civil courts, so they know there is more to courts than criminals. That is where your hope for the future is.

■ ■ ■

The average person doesn't have any idea what goes on in the court system other than that it is where people charged with crimes are let out on bail and maybe convicted. The only contact they have is with traffic court when they get a ticket, or divorce court, or they may get involved in an estate problem when someone dies. But most people who come away from a jury experience think it was terrific. What about having jurors do evaluations of their experience and then put together a book for the last 12 months in your city or town—jurors stating how wonderful it is. Take that book of testimonials about how great the system is to schools or clubs or other places. It is all part of the educational process.

■ ■ ■

Part of the problem in terms of public perception is the attention paid to criminal versus civil cases. When I was a criminal trial judge I was in the newspaper every day. Then I switched to adjudicating civil cases. No coverage. The cases I was handling were in many ways more complex from a legal standpoint. Somebody came up to my husband and asked, "is your wife all right?" He said, "yes, why?" The person said, "I used to read her name in the paper every day, and suddenly I haven't seen it."

■ ■ ■

All the public hears about are criminal cases. Those are the kinds of questions you get from your educated constituents: Why are we spending money on jails, that kind of thing. That is a serious problem.

■ ■ ■

Whatever the constraints on you in commenting on cases, you have a responsibility to comment about the state of the judiciary, and you should be commenting on it. This is an important campaign. The courts have been very remiss in defending themselves. And although I think cutting off services is a good weapon, you should not make it a turf war but use it as a demonstration of the importance to the public of these things. All of this goes under the heading of public relations.

■ ■ ■

Building Constituencies: The Closing Plenary

At the plenary session that concluded the forum, the six Roscoe Pound Fellows who led the small-group discussions summarized the views of the judges on the central issues raised by the papers, presenting consensus as well as divergent opinions expressed in the sessions. They reported a remarkable sense of agreement on the following central issues that dominated the forum:

- **The system of selecting judges works, warts and all.** Judges are not threatened by the democratic process; rather they saw the need to touch base with the electorate as a healthy and essential part of our system of democratic governance.

- **There is a constitutional claim to minimum funding of the courts.** No judge had any doubt about this question. Academic theory aside, however, the issue comes down to what constitutes minimum funding and how it can be obtained. The judges agreed that all practical solutions depended on reaching a working accommodation with the legislature.

- **Public education is essential if citizens are to develop an understanding of the role of judges and courts in our constitutional system.** The judges believed they should exercise greater leadership in public education and outreach efforts aimed at developing a constituency that would recognize the need to support the operation of the courts.

- **Judges can take the lead in building coalitions in support of the courts.** As one judge summed up: "The public has to understand that it costs money, although not a great deal comparatively speaking, to run the third branch of government. If we are not the ones to take the leadership role on that point, I don't think we can count on others to do it for us. We need allies. We need to be very canny and skilled at building alliances, but we have got to take the lead."

■ ■ ■

"I think it ill befits judges to complain too much about the system. One of our shortcomings is that we have not been prepared to defend the system, whatever it is. I think that the law and the courts and the judiciary have an inordinate amount of good will among the people in this country. It always amazes me that we put out an order and the people obey it.

We should become advocates of the system. We have a profound duty to explain the importance of justice, the importance of the operation of the court system, the integrity of the system and that it is in people's interest that it remains that way."

■ ■ ■

APPENDIX

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Ruth Wedgwood, Professor of Law at Yale Law School, teaches American legal history, constitutional law, international law and criminal law. After graduating from Harvard University, the London School of Economics and Yale Law School, where she was Executive Editor of the *Yale Law Journal*, Professor Wedgwood was a federal prosecutor, serving as special assistant to Assistant Attorney General Philip Heymann. She also clerked for Justice Harry A. Blackmun, United States Supreme Court, and Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit.

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Honorable Stanley G. Feldman was appointed to the Arizona Supreme Court in 1982, where he has been Chief Justice since 1992. He also supervises the Administrative Office of the Courts, which is responsible for such diverse programs as judicial education, probation services and juvenile justice services. Before his appointment to the Supreme Court, Justice Feldman was in private practice for nearly 30 years, specializing in civil litigation. He was also a member of the faculty of the University of Arizona College of Law, where he earned his LL.B. in 1956.

Honorable Charles W. Chapman has been with the Illinois Fifth District Appellate Court since 1988. Before that he served as a circuit court judge for 9 years and in 1984 was honored as the Outstanding Trial Judge in the United States by the Association of Trial Lawyers of America. Judge Chapman received his J.D. degree from St. Louis University School of Law in 1967 and clerked for Federal District Judge Omer Poos before entering private practice. In 1992 Judge Chapman received an LL.M. in Judicial Process from the University of Virginia Law School.

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What is The Roscoe Pound Foundation?

The Roscoe Pound Foundation was established in 1956 by trial lawyers to honor and build upon the work of Roscoe Pound, Dean of the Harvard Law School from 1916-1936.

What is the purpose of the Foundation?

The Foundation sponsors programs and publications that encourage open, ongoing discussion and debate among lawyers, academics, jurists and others on issues of social importance.

What programs does the Foundation sponsor?

Pound Roundtables

Private discussions among Fellows and other distinguished professionals bring a variety of views to bear on complex problems such as health care and the law and injury prevention in America.

Papers of The Roscoe Pound Foundation

Reports of the Foundation's programs on health care and the law, injury prevention in the American workplace, the safety of the blood supply and other topics are made available to jurists, academics, regulators, legislators, the media and other decision makers.

Chief Justice Earl Warren Conference on Advocacy

This pioneering conference, held from 1972 to 1989, confronted critical issues such as product safety, the jury in America and health care and the law and resulted in nationally distributed reports. The conference pioneered the exchanges among Fellows and other professionals which are continued today in the Roundtable series, the Judges Forum and other programs.

State Judges Forum

Judges from state Supreme Courts and Intermediate Appellate Courts come together with Pound Fellows and law professors to analyze issues of state constitutional law in a program cosponsored by Yale Law School.

Pound Foundation Grants to Legal Scholars

Grants for research on a variety of topics of concern to the trial bar are awarded by a jury of academics, jurists and lawyers.

Richard S. Jacobson Award for Excellence in Teaching Trial Advocacy

Each year an outstanding law professor receives this prestigious award.

Roscoe Pound Award For Excellence in Teaching Trial Advocacy as an Adjunct

Given annually to an exemplary trial advocacy professor who also maintains an active law practice.

Elaine Osborne Jacobson Award For Women Working in Health Care Law

Given each year to a woman law student who is committed to a career in health care law.

Roscoe Hogan Environmental Law Essay Contest

The Pound Foundation now administers this 24-year-old contest which annually honors a law student's writing ability in the area of environmental law.

THE ROSCOE POUND FOUNDATION PRESENTS
Educational Materials

REPORTS OF THE CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY

1980:	*The Penalty of Death (32B)*	**$25**
1981:	*Church, State and Politics (34B)*	**$25**
1982:	*Ethics and Government (40B)*	**$25**
1983:	*The Courts: Separation of Powers (39B)*	**$25**
1984:	*Product Safety in America (03B)*	**$25**
1985:	*Dispute Resolution Devices in a Democratic Society (47B)*	**$25**
1986:	*The American Civil Jury (48B)*	**$25**
1989:	*Medical Quality and the Law (01R)*	**$25**

Papers of the Roscoe Pound Foundation

Pound Foundation/Yale Law School State Court Judges Forums

1992 *- Protecting Individual Rights: The Role of State Constitutionalism*
Report of Forum in which more than 100 judges of the state supreme and intermediate appellate courts, lawyers, and academics discussed the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

(08R) $35

1993 *- Preserving the Independence of the Judiciary*
Report of second-annual Forum for more than 110 state court judges, lawyers, and academics. Discussions include the impact on judicial independence of two contemporary issues: judicial selection processes, and what resources are available to the judiciary.

(09R) $35

Justice Denied: Underfunding of the Courts
Report on 1993 Roundtable, examines the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

(10R) $20

Safety of the Blood Supply
Report on Spring, 1991 Roundtable, written by Robert E. Stein, a Washington, DC attorney and Adjunct Professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV, and litigation involving blood products and blood banks.

(06R) $20

NOTE: *Roscoe Pound Fellows receive a copy of each publication of The Roscoe Pound Foundation as a benefit of Fellowship.*

Papers of the Roscoe Pound Foundation (cont.):

Injury Prevention in America
Report on 1990 Roundtables, written by Anne Grant, lawyer and former editor of *Everyday Law* and *Trial* magazines. Topics: "Farm Safety in America", "Industrial Safety: Preventing Injuries in the Workplace", and "Industrial Diseases in America".

(05R) $20

Health Care and the Law
Report on Spring 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics: "Hospitals and AIDS: The Legal Issues", "Medicine, Liability and the Law: Expanding the Dialogue", "Developing Flexible Dispute Resolution Mechanisms for Health Care Field".

(37B) $20

Health Care and the Law II - Pound Fellows Forum
Report on 1988 Pound Fellows Forum, "Patients, Doctors, Lawyers and Juries," written by John Guinther, award-winning author of *The Jury in America.* The forum was held at ATLA's Annual Convention in Kansas City, and was moderated by Professor Arthur Miller of Harvard Law School.

(35B) $20

Health Care and the Law III
Report on 1988-1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics: "Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue", "Health Care Providers and the New Questions of Life and Death", "Medical Providers and the New Era of Assessment and Accountability".

(02R) $20

Demystifying Punitive Damages in Products Liability Cases:
A Survey of a Quarter Century of Trial Verdicts. This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from The Roscoe Pound Foundation, traces the pattern of punitive damage awards in US products cases. It tracks all traceable punitive damage verdicts in products liability litigation for the past quarter century, providing empirical data on the relationship between amounts awarded and those actually received.

(07R) $22

The Jury in America
Award-winning author John Guinther presents a comprehensive history and analysis of the American jury system, confronting criticism of the present system with facts and statistics from a variety of sources. The book provides strong evidence for the viability of the American civil jury. 25% off the retail price.

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