

A Vision for Enhancing Public Confidence in the Judiciary

Commit to Fairness in Court

by KEVIN S. BURKE

“There is a Chinese curse which says, ‘may he live in interesting time.’ Like it or not, we live in interesting times. They are times of danger and uncertainty; but they are also the most creative of any time in the history of mankind. And everyone here will ultimately be judged—will ultimately judge himself—on the effort he has contributed to building a new world society and the extent to which his ideals and goals have shaped that effort.” —Robert F. Kennedy

A century ago, Roscoe Pound gave a speech entitled “The Causes of Popular Dissatisfaction with the Administration of Justice,” in which he spoke of the many factors that contributed to dissatisfaction with the American system of justice. A century later there have been enormous improvements in the structure of the administration of justice, yet we have *still* not met the fundamental challenge of reducing popular dissatisfaction.

Today the dissatisfaction with the administration of justice is at a level that none of us should tolerate or accept. The nation’s dissatisfaction with the administration of justice is *our* issue of homeland security.

In Pound’s speech (See also the article *The Chief Justice as Advocate-*

in-Chief in this issue of JUDICATURE for more on this speech), he spoke first of the popular belief that the administration of justice is an easy task, which he in turn believed fostered public dissatisfaction. Pound incorrectly thought it was wrong to suggest the administration of justice was easy. Pound was right about many things, but this central premise of his now famous speech was wrong. The administration of justice is simple: courts must be fair, effective, and efficient. The judiciary must be committed to building a strong organization, which then and only then can create the environment for courts to be an effective branch of government. The judiciary cannot be an effective branch of government if judges’ vision of sharing power with each other is no better than an office-sharing arrangement of solo practitioner lawyers whose practice specialty is being a judge. Professor Doris Marie Provine put it this way: “The basic problem, crudely put, is that judges don’t want to govern themselves, but they don’t want anyone else to do it either.”¹

A second factor Pound said contributed to public dissatisfaction was the political jealousy, stoked by the other branches of government, who resent the judiciary due to the doctrine that courts have the final say in interpreting the Constitution. Not much has changed in the last century: today,

it is fair to say that too many in the executive and legislative branches have many of the jealousies of their predecessors. Some political leaders are still too easily prone to speak of judicial tyranny when there is mere disagreement with the outcome of a case.

The third cause of dissatisfaction Pound described as the sporting theory of justice. This is the view that the legal process is nothing but two modern gladiators in a pitted war, with the role of the judge simply a referee of the combat. A century later the sporting theory of justice is so rooted in the legal profession in America that many (but certainly not all) accept it as a fundamental tenet. The sporting theory explains why so many lawyers and judges feel that litigant satisfaction—or fairness—is predominantly driven by outcomes, whereas litigants overwhelmingly view satisfaction as deeply rooted in notions of procedural fairness.

Pound argued that the sporting theory of justice disfigures judicial administration. It leads the most conscientious judge to feel that he or she is merely to decide the contest as attorneys present it according to the rules of the game, and not to search independently for truth and justice. The sporting theory also leads attorneys to forget that they are officers of the court and to view the rules of law and procedure like the professional football player deals with rules of football. While seeing how close to holding may be appropriate for a football lineman, the law requires something more than seeing if you can get away with it.

All of us—judges, lawyers and the community at large—pay the

1. “Judicial Government,” in *Law & Contemporary Problems*, Vol. 51 (4), p. 108 (1988).

price for such misunderstandings about the courts. While there is far more trust and satisfaction with the court system than many court critics claim, it is easy to feel a bit under siege at times. Nonetheless, we need perspective. The political rhetoric of our times is discouraging, but the judiciary has always had critics.

Chief Justice Marshall was nearly impeached in an effort fostered by Thomas Jefferson. Marshall, not having the benefit of a court public information officer or a bar association fair response committee, was forced to respond to critics by writing letters to the editor in his own defense, using a pseudonym. In the more modern era, billboards populated the nation demanding the impeachment of Chief Justice Earl Warren. Today, even the most fervent critics of Chief Justice Roberts don't call for his impeachment. Newt Gingrich called for elimination of law clerks for the 9th Circuit and threatened to withhold funds for the electric bill but few really listened. So although courts may feel under siege, the judiciary continues to thrive, and, hopefully, improve.

Additional factors contribute to today's public dissatisfaction with the administration of justice. One is the way political debate is conducted. Too often the method of debate is to take the other side's idea, mischaracterize it, and announce profound disagreement and even outrage. In this year's electoral debate, comparing political leaders to Nazis is, amazingly enough, acceptable in some quarters. Nazi comparisons are the most extreme form of political speech because once one ties a political opponent to the most deplorable chapter in human history, all reasoned debate ceases.

Not only is political rhetoric divisive, our nation is terribly divided in other ways as well. A decade ago the social historian Gertrude Himmelfarb described us as "one nation, two cultures," one more religious, traditional, and patriotic, the other more secular, tolerant, and multicultural. It should be no surprise that a polarized nation is also conflicted when it

comes to a vision for what the justice system should look like. Americans even have polarized views of the Constitution itself: 70% of Republicans think the Constitution should be interpreted literally, and 65% of Democrats think the same document should be interpreted in the context of our times.²

The legitimacy of judicial decision-making is being challenged. There needs to be a direct confrontation of the attacks on the legitimacy of judicial decision making. Legitimacy is achieved in part by building a reservoir of goodwill so that people will stand by courts when a decision is made with which they disagree. Legitimacy is also in part trust of the judges and courts. Trust is earned, not given.

A failure to succeed in enhancing the legitimacy of court decisions imperils the judiciary. 75% of the American public thinks a judge's decision is to a moderate to significant extent influenced by their political or personal philosophy.³ Of course, judges have a range of philosophical views. Judges exercise discretion, so a difference of opinion should be expected. But 75% of the American public also thinks a judge's decision is to a moderate to significant extent influenced by their desire to be appointed to a higher court.⁴

The problem of judicial elections in some places is that after the election there is a victor, but the price is a lot more cynicism about courts. But before anyone ascribes all of the ills upon the mantle of judicial elections, the fact is there are no elections in federal courts and there is a high degree of cynicism about those courts, too. Public confidence in the United States Supreme Court is significantly eroding.⁵ The desire to seek a reform in the election process for judges is perfectly understandable. Even in those states with merit selection and retention elections, the election of judges is odd, especially compared to the traditions of other countries. But it is a fact of life, and despite the fervent desire of many to change the judicial selection and election process, at best the change

that has occurred is very slow. The present need to enhance the legitimacy of courts requires a far more comprehensive response. In the words of the noted philosopher Mae West, "an ounce of performance is worth pounds of promises."

It is time for courts to commit to procedural fairness. A central tenet of procedural fairness is litigants have a right to be listened to. The opportunity to be heard is an essential component of fairness. Litigants also have a right to understand court orders and why they were decided.

Reasonable minds will differ about how cases should be decided or courts managed. But court opinions need to be written with respect for diversity of opinion. Both in opinions and in the management decisions in running courts, task conflict (as opposed to personality conflict) can make courts dynamic and effective. Court orders at any level can create an impression that judicial decision making is about personal or political preference. Well written court orders dispel that impression. Judges should not forget Justice Learned Hand's admonition that the spirit of liberty is the spirit that is not too sure that it is right. In fact, all of us might benefit from the wisdom of Morris Udall who once said, "God give me the grace to make my words gentle and tender, for tomorrow I might have to eat them."

The challenge for courts is made more difficult with the fiscal crisis that confronts too many courts. A lack of money is not an excuse for a lack of ideas. Excuses about lack of funding don't cut it. Courts must be willing to innovate if they are to effectively address the popular dis-

2. Pew Research Center's Political Typology Survey; Ideological Chasm Over Interpreting Constitution, June 20, 2011.

3. Supreme Court Favorability Reaches New Low, available at <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low/?src=prc-headline>.

4. Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center.

5. Supreme Court Favorability Reaches New Low, available at <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low/?src=prc-headline>.

satisfaction with the administration of justice. Trying to convince people that fairness in court was eliminated because of budget troubles only diminishes respect for court leaders.

In the final analysis, today's popular dissatisfaction with the administration of justice is not fueled just by rhetoric, but by performance. Better performance is the key to building public support for the judiciary. For some understandable reasons, courts have differentiated themselves from the private sector and its business practices. Courts neither control the influx of cases nor the laws that create them, and due process can occasionally be inefficient, all of which lends credence to the argument that "courts are different." The unfortunate consequence of this argument is that most courts too often articulate what does not work, but have not designed quality initiatives that do work. That being said, court administration is amenable to modern management practices.

Barbara Jordan once said, "What the people want is simple. They want an America as good as its promise." The same can be said of what this nation wants of its courts. They want a court—they want a judiciary—as good as its promise. A court or a judiciary that is as good as its promise is known not just for speed or efficiency (heaven knows many courts are good at that), but also for other, less quantifiable aspects of justice—things like fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding court orders. Courts cannot be satisfied with being quick. Nor can judges be satisfied with being clever.

The volume of work makes individual attention to justice seem at times to be an unattainable goal and so courts rest on measuring speed. Has the court cleared the docket or met the relevant time standards are pretty typical performance measures. But there is another way court performance should be evaluated: by a court's procedural fairness. Peter Drucker, the famous management consultant, said that what you

measure is what you care about. For courts to build public trust and enhance the legitimacy of judicial decision making, there must be a willingness to commit to measuring procedural fairness. It can be done. Some courts are already doing this. At least at a rudimentary level the measurement tools are largely available in The National Center for State Courts CourtTools #1. In fact, surveys are even available in Spanish.

Judges and supporters of courts too often take it as a foregone conclusion that trust with the people or the legitimacy of our decisions is a given. It is not. Trust is earned. Trust is attained by listening, treating litigants with respect and providing understandable orders with understandable explanation.

It is possible as a result of money unleashed by Citizens United that after this year's elections the nation may be even more polarized than it is today. While those who toil in the vineyards of judicial election reform

deserve respect, in order to address the popular dissatisfaction with the administration of justice, courts need a new common theme—a new message and a renewed commitment to excellence. That simple message should be to adopt a litigant's bill of rights. 100% of the time every litigant has a right to be listened to, treated with respect and to understand why the judge or court ruled the way they did. Courts must aspire to achieve nothing less than 100% performance and measure it effectively. As scary as it may seem, judges need to be willing to be publicly accountable for fairness.

There will be those who say 100% performance is an unattainable goal. Court volume is too great and the complexity of court proceedings make it too difficult. But there are others with similar challenges:

- If air traffic controllers performed at 99.9%, two plane landings daily at O'Hare International Airport in Chicago would be unsafe.



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• If banks performed at 99.9%, 22,000 checks would be deducted from the wrong accounts every hour.

• If pharmacists performed at 99.9%, 20,000 incorrect drug prescriptions would be written in the next 12 months.

Thus, Courts owe litigants no less than 100% performance.

Procedural fairness develops from research showing that how disputes are handled has an important influence upon people's evaluations of their experience in the court system. *How* people and their problems are managed has more influence than case outcome based upon two key issues:

• Whether people accept and continue to abide by the decisions made.

• How people evaluate judges, the court system and the law.

There are cynics in the legal community who persist in misconceptions about justice. Procedural fairness does not suggest that people are happy if they lose, because no one likes to lose. But decades of sound social science research establish not only that people recognize that they cannot always win, but that they accept "losing" more willingly if the procedure used is seen as fair.

A procedural fairness commitment confronts Pound's sporting theory of justice. It minimizes the idea of winning and losing (shifting focus away from outcome) and instead focuses upon delivering gains for both sides. Procedural fairness is what judicial excellence is about. Procedural fairness *works* because one of the effects of enhanced procedural fairness is that it encourages decision acceptance. Procedural fairness can even lead to positive views about judges and the legal system.

There are those that believe that judges cannot deliver undesired outcomes without being unpopular. But decades of studies establish that trust and legitimacy in legal authorities increases when people experience procedural fairness during an experience even when they receive a negative outcome.

Another misconception about procedural fairness is that when

the stakes are high, only outcomes matter. Yet studies find that procedural fairness in fact remains important when the monetary stakes are high, people are very invested in the issues (such as child custody), and important moral or value based questions are at issue.

It's not trite to say that the courts play an indispensable role in preserving democracy. They most definitely do. Any particular case judges hear may not have great historical effect, but each case is crucial. Taken together, the decisions judges make day in and day out have the potential to affirm the public's faith in the strength of democratic institutions—or to shake that faith.

It has been said that the difference between a vision and a hallucination is simply the number of people who see it. If judges commit to talking with colleagues to start the process toward a

greater commitment to procedural fairness, fair courts will be a vision, not a hallucination. If bar leaders talk with judges and colleagues, fair courts will be a vision, not a hallucination. If court administrators show how the measurement process can be accomplished, fair courts will be a vision, not a hallucination.

In the words of Robert Kennedy, each of us will ultimately be judged—and will judge himself—on the effort he or she has contributed to building fairer courts and the extent to which our ideals and goals have shaped that effort. It is time to act. Fair courts are not hallucinations; Fair courts must be part of our vision. ★

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