Tenth Annual NFJE Judicial Symposium

The Art of Judging

Judge Richard A. Posner, Seventh Circuit Court of Appeals, and the moderator for his session, Tristan L. Duncan.

NATIONAL FOUNDATION FOR JUDICIAL EXCELLENCE
CELEBRATING TEN YEARS

By Michelle Parrini

The National Foundation for Judicial Excellence (NFJE) held the tenth annual NFJE Judicial Symposium in Chicago, July 18–19, 2014. Judges from 37 states attended. Among the 140 judges attending, 49 attended for the first time and 19 were chief or presiding judges. The fitting tenth anniversary theme was "The Art of Judging." To enhance the critical skills that judges currently serving in appellate courts require, the symposium topics included the practical challenges facing courts and judges today, such as court funding, inherent psychological biases, and campaign financing; the work involved in, the philosophies that underpin, and the drafting choices that lead to cogent court opinions; and the new dimensions to the First Amendment right to speak that have altered the landscape for judges.

The symposium began with "The Role of the Judiciary" by Professor Barry E. Friedman and "Court Funding: The New Normal" by Robert Baldwin, which also served as the final presentations for the DRI Appellate Advocacy Seminar (July 17–18). After studying 250 years of history, Professor Friedman, the Jacob D. Fuchsberg Professor of Law, New York University School of Law, had concluded that "over time" U.S. Supreme Court "decisions tend to converge with the considered judgment of the American people." He feared that something had changed, though. "There is a world of difference between the claim that the Court and public opinion converge eventually at some point in time and claiming that the Supreme Court should consider public opinion," Professor Friedman proposed.

Presenter Dr. Carol Tavris discusses aspects of how judges decide cases.

Justice Goodwin Liu, Associate Justice, California Supreme Court.

During the session he focused on two questions: (1) Are courts responsive to public opinion, and (2) should they be? After explaining some theories about why public opinion and judicial decisions might "align," he presented "evidence" that troubled him, demonstrating that the Court today may respond to public opinion more directly than in the past. Professor Friedman asked, "Is it the role of the Supreme Court only to rubber stamp public opinion?" In answer, he quoted two past presidents with whom he agreed and elaborated on the quotes. According to Woodrow Wilson, "What we should ask our judges is

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From left, session moderator Christopher A. Kenney with Hon. Wallace B. Jefferson, former chief judge of the Texas Supreme Court, and co-panelist Steven M. Puiszis.

Professor Barry Friedman, New York University School of Law.

Chief Judge Diane P. Woo.d, Seventh Circuit Court of Appeals.

that they prove themselves such men as can discriminate between the opinion of the moment and the opinion of the age," and according to Theodore Roosevelt, "The 'good judge' should follow 'permanent public opinion' not 'popular opinion of the moment.'"

Next, Mr. Baldwin, executive vice president and general counsel of the National Center for State Courts, presented "Court Funding: The New Normal." Explaining that state government revenues would need to increase 8.3 percent until 2019 to recoup the most recent recession losses, Mr. Baldwin suggested ways that courts could gain political and public trust that studies have shown worked better than short-term appeals for funding. In broad terms, he recommended shifting the debate when discussing funding to the harm caused by insufficient funding to taxpayers, businesses, the economy, and public safety; creating taxpayer confidence in the courts as an "investment"; and "embracing austerity" through various strategies that would complement the harm narrative.

Saturday morning, when the symposium reconvened, Christopher A. Kenney, managing shareholder of Kenny & Sams PC, Boston, moderated a discussion between the Honorable Wallace B. Jefferson, former chief justice of the Texas Supreme Court, now with Alexander Dubose Jefferson & Townsend LLP, Austin, and Steven M. Puiszis, DRI Secretary-Treasurer and a partner of Hinshaw & Culbertson LLP, Chicago, "Financial Influences on the Judiciary." They discussed the interplay between campaign financing and the different processes that various states use to select and to retain judges, as well as the drawbacks and benefits to the processes, drawing largely from observations in their residency states. They also considered how to create public perception that courts adjudicate fairly when a state elects judges, how to reduce the financial barriers to the system for ordinary citizens, how to make the case for funding, and how to do more with less.

Justice Jefferson mentioned that in Texas, 90 percent of judicial candidates have adopted voluntary campaign limits. Mr. Puiszis suggested that working for stronger financial disclosure laws might help because disclosure timing currently has "limited value." When explaining some Texas innovations, Justice Jefferson said, "We need to think creatively about the barriers to access to justice, about ways to help unrepresented litigants get through the best that we can" and about making available "meaningful access to justice to people of modest means" who have increasingly found themselves unable to afford representation at a time when the country has more lawyers than ever before.

As for making the case for funding, Mr. Puiszis summarized a newly released DRI report, which, among other things, highlighted studies tying declining court funding to state economic losses, both direct and indirect. Eric J. Magnuson, Steven M. Puiszis, Lisa M. Agrimonti, & Nicole S. Frank, *The Economics of Justice* 12 (DRI 2014).

During "How Judges Decide Cases," Professor Cory Rayburn Yung of the University of Kansas School of Law, Lawrence, and Dr. Carol Tavris of Los Angeles, California, brought the political and psychological sciences to bear on "judging" in "How Judges Decide Cases." Professor Rayburn Yung outlined a study that he conducted using 30,000 judicial votes in 2008 in 11 federal regional courts of appeals and supplemental biographical data, which identified multiple decision-making dimensions and recognized judges as heterogeneous actors functioning within a large, hierarchical system among other judges. According to Professor Rayburn Yung, other existing models studying judicial decision making focused on one dimension of behavior, treated judges as a homogeneous group, and evaluated them in isolation. These models, Dr. Rayburn Yung argued, have excessively limited discussion about judicial decision making, particularly during nomination and confirmation proceedings, by labeling judges in "monolithic" terms such as "conservative" or "liberal."

Then Dr. Carol Tavris explained "why, when we are right, so many of our colleagues refuse to hear us," and "why, even when confronted by evidence," people "have trouble saying that they were wrong," as has happened often with DNA evidence. The reason is "cognitive dissonance," which science has "tracked into the brain" in brain scans and which "happens when two cognitions or a belief and a behavior contradict each other." Due to an inherent cognitive bias, the "confirmation bias," along with some other psychological bents, everyone tends to "see and notice and remember information that is consonant with our ideology, beliefs, and preferences, and to forget, minimize, or ignore any information that is dissonant with our beliefs," Dr. Tavris informed the audience. After describing the research identifying these psychological phenomena and how they universally affect decision-making, she said, "We have seen cognitive dissonance at work in the legal system time and time again" and offered examples. "Fortunately, we gave two systems to help us deal with this: science, which forces us to put our beliefs to the test, and the law. Both aspire to ideals of impartiality. Their practitioners will fail many times. But the solution is more light on the tunnel vision that affects us all," Dr. Tavris remarked.

In the afternoon, Tristan L. Duncan, a partner of Shook Hardy & Bacon LLP, Kansas City, Missouri, moderated "The Art of Crafting Opinions," involving the Honorable Richard A. Posner, a judge of the U.S. Court of Appeals for the Seventh Circuit, and the Honorable Goodwin Liu, an associate justice of the California Supreme Court. It seemed difficult to divorce substance from style, and Justice Liu commented as much: He viewed "style and substance" as going "hand in hand."

Judge Posner thought that judges could and should write decisions without relying on jargon, in a "conversational style," and with some candor about how they came to their decisions. He coined this style "impure" elsewhere. The "pure" style, on the other hand, is legalistic, uses legal jargon, relies on cases and "familiar tools" such as canons of statutory construction, invokes various tests, and distinguishes between various different levels of judicial review. Judge Posner does not revere these conventions, in particular canons of statutory construction. If a judge could decide a case different ways—and Judge Posner thought that in many cases judges could—the judge should consider the practical implications and undertake a "sensible review," grounded in common sense, to achieve a "sensible result" that would not "cause confusion" and would be "consistent with American values and law." Although conceding that judges "can't be totally candid," he thought that they had "room for greater candor in decisions."

Justice Liu expressed some views similar to some positions that Judge Posner took. He did agree, for example, that judges had a "duty of candor in rendering decisions," particularly in the federal system where the "only duty is to give reasons for why they do what they do." The U.S. legal tradition has "many rule of law values that limit" judicial candor, however, to something between the "true view" and the

2014 NFJE Symposium Chair Brooks R. Magratten.

Dean Erwin Chemerinsky of the University of California, Irvine School of Law, Tristan L. Duncan, and NFJE Director Tillman J. Breckenridge.

"outer facing professional views" because judges' jobs never permit them to function "completely unconstrained," he elaborated. Unlike Judge Posner, Justice Liu thought that some canons of statutory construction did serve a purpose: to "help to rationalize a consistent rule of law from case to case." He did divulge that others did not. "The legislature is presumed to know the background law when drafting" is one such canon. "No one believes this," he said.

As for style, Justice Liu thought that judges could not "truly escape" legal formalism, although he admitted that judges' "highhanded jargon" did make decisions seem "more authoritative than the true finding" and suggested that this style sometimes "papered over" differences among judges about a final decision.

The final presentation before a speakers' panel that Ms. Duncan also moderated was by Dean Erwin Chemerinsky of the University of California, Irvine School of Law, called "The Tension Between Freedom from Influence and the Freedom to Speak." First, Dean Chemerinsky explained how the law in practice has treated judicial speech inconsistently, focusing in particular on "the tensions between" *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), and *Caperton v. A.T. Massey*, 129 S. Ct. 2252 (2009). Then he recommended three principles for the U.S. Supreme Court and the lower courts to follow to create consistency.

NFJE Leaders, from left, Director Richard T. Boyette, Board Chair John H. Martin, President Marc E. Williams, and Secretary-Treasurer John R. Kouris.

First, "The fact that a judge has expressed his or her view on an issue does not mean that the judge is biased and should be disqualified from ruling on the issue." Second, "Those things that will likely affect a judge, other than his or her views on law or the facts of a case, that could affect what a judge will do, are grounds for disqualification." Dean Chemerinsky drew a "bright-line" distinction between judges' own views on law and case facts and "other external influences" that could affect what a judge would do. "We accept that judges bring different values and life experiences to judging. But what we can't accept and shouldn't accept is external influences on judges," he stressed. Third, "There is a difference between the right to speak and the desirability of speaking." To recognize that difference, Dean Chemerinsky proposed that we view recusal differently—specifically, "not as a form of punishment." "We recuse a judge to ensure the appearance of propriety," he said, and as "a way to ensure" an impartial judiciary.

Finally, Dean Chemerinsky talked about the conclusions to which he thought these three principles led, namely what judges should and should not be able to do, and what we do and do not ideally want them to do, while acknowledging up-front the controversy that these conclusions would arouse. Among others, Dean Chemerinsky put forth these conclusions: "Judges as candidates for elected office have the right to express their views"; "Nominees for federal judicial office should be required to express their views on disputed issues or the Senate should refuse to confirm them for office"; and on spending in judicial elections, "The usual rules of campaign finance and the First Amendment should not be applied. The Supreme Court should carve different rules for campaign finance in judicial elections." In closing, he asked these questions about his conclusions: "Aren't they all consistent with free speech? Aren't they ways to reconcile our desires for free speech and our desire for an impartial judiciary?"

As one attendee said, summing up the symposium, "The faculty and program were, without doubt, the best since I have been attending (about 4 years). Congratulations on a valuable, helpful experience."