

The Ninth Circuit Judicial Conference: Reflections on Judicial Independence



By Kenneth C. Mennemeier

In 1996, U.S. District Judge Harold Baer Jr. granted a motion to suppress evidence in a drug trafficking case. The underlying facts were alarming: a car with out-of-state tags, parked in a drug infested neighborhood; four men loading duffel bags into the trunk at 5:00 a.m.; one of men fled upon seeing the police; 80 pounds of cocaine and heroin were seized. The judge's ruling created an uproar. Two hundred members of Congress wrote to President Clinton, inviting him to join their call for the judge's resignation. In response, President Clinton said merely that he would await the judge's ruling on the government's motion for reconsideration before responding. In the mean time, the *New York Times* quoted Senator Bob Dole as saying that the judge "ought to be impeached." These events set off another round in the continuing discussion of judicial independence and, particularly, the threats faced by the judiciary to its independence.

Judicial independence was the theme for this year's Ninth Circuit Judicial Conference, held July 26-28 in Monterey, California. The conference convenes annually to consider the business of the federal courts in the Ninth Circuit and means to improve the administration of justice. All federal judges in the Ninth Circuit may attend, together with lawyer representatives from each district within the Circuit. This year's conference included panel discussions addressing threats to judicial independence, the relationship between the judiciary and the media, and both attorneys' and judges' perceptions regarding judicial isolation. Among the well-known panelists were Supreme Court Justice Stephen Breyer, Judge Abner Mikva (formerly a Congressman, a federal Circuit Court judge, and White House Counsel), USC Law School Professor Erwin Chemerinsky, and Courtroom TV's Fred Graham. Professor Arthur Miller (perhaps best known as a coauthor of Wright and Miller's treatise *Federal Practice and Procedure*) served as moderator for the discussion regarding threats to judicial independence.

Miller started by asking, "Why do we care?" Justice Breyer explained that we care because, in a society built upon the rule of law, only an independent judiciary can adequately protect that which we hold most dear, namely our liberty and our prosperity.

Miller then asked whether the panelists perceived any real threats to judicial independence. This question drew an outpouring of responses. The panelists cited a number of recent examples where attacks on the judiciary reached a disturbing level. For example, some felt that the criticism of Judge Baer following his order suppressing evidence ultimately influenced his decision to change his ruling upon the government's motion for reconsideration. It was also remembered that, in 1996, the Chief Justice of Tennessee's Supreme Court lost a retention election after a nasty political campaign criticizing her for her role in reversing a death sentence (but not the conviction) in a capital case. These events have generated considerable concern regarding the judiciary's ability to preserve its independence. Regarding the effect that these verbal attacks have had, Terry Hatter (Chief Judge of the Central District of California)

observed that, in part because of such episodes, many potential judicial candidates are unwilling to be nominated, and some judges are leaving the court.

Professor Chemerinsky then noted that, in discussing judicial independence, it is important to distinguish between "decisional independence" and "institutional independence." He observed that, for the most part, in their role of judging the cases before them, judges face no real threat to their independence. This is particularly true for federal district judges, who enjoy life tenure. Chemerinsky added, though, that from an institutional standpoint, there are a variety of threats. A lack of resources, for instance, compromises the court's ability to do its job.

Other panelists identified other perceived threats, some subtle and some not so subtle. For instance, recent federal legislation reduces the courts' authority. Cited examples include mandatory minimum sentences and reforms to habeas litigation. Judge Hatter noted that, at the same time, by federalizing crimes that have traditionally been handled in state court (such as child support cases, handgun offenses, car-jacking, etc.), Congress increases the burden on the federal courts without adding resources commensurate with the additional burden. This diminishes the federal courts' ability to devote sufficient time and resources to its many other responsibilities.

It was also noted that, in contrast to the life tenure enjoyed by

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federal judges, many state court judges must submit periodically to retention elections. This creates the possibility that a judge subject to election might be influenced by thoughts as to how a ruling might affect his or her election prospects. Retention elections can also be costly, thus creating a need to raise campaign funds. The question was posed as to whether judges can engage in fund raising and still maintain their independence, at least with respect to those who contribute to the campaign.

Graham and Mikva added some historical and political perspective. Graham suggests that the threat to judicial independence is "an exaggerated threat in the minds of judges." He noted that Judge Baer's suppression order in 1996 provoked extensive criticism by politicians, and that criticism in turn has caused judges to worry about whether there is a new wave of threats to the judiciary. Judge Baer's ruling, though, came about the time that Congressional Republicans were abandoning their "Contract with America" rhetoric, and were looking for new issues. Judge Baer's ruling created an opportunity to engage in judge-bashing, just when some politicians perceived a need for a new political issue. But now, the political climate has changed. The Republicans believe that they have an opportunity to recapture the White House through George W. Bush's candidacy. As a result, Graham predicts, judge-bashing has lost its currency and the political debate has moved on to other issues.

Mikva echoed Graham's observation that the recent attacks on the judiciary are largely political, not endemic. The public perceives judges as, in his words, "arrogant and elitist." There is a perception that judges have too much independence. This arises from a number of recent high-profile decisions in which the courts have invalidated ballot measures approved by the voters or statutes enacted by duly elected legislators. The federal court decision declaring Proposition 187 unconstitutional is one prominent example. Politicians, of course, respond to these perceptions.

Clint Bolick argued that, in order to affect this public perception, judges should use the awesome powers of their office "with a sense of humility." In other words, judges must always be mindful of the need to exercise self-restraint. Federal judges, who enjoy life tenure, must resist any "temptation" to use their powers too broadly.

Chemerinsky took exception to Bolick's statement. One of the courts' most significant roles, he suggests, is to strike down legislative enactments and ballot measures that offend the Constitution.

In closing the discussion, Justice Breyer shared his view that, as a nation, we are blessed by the extent to which the judicial branch of government is truly independent. He observes that our federal judiciary faces no threat to its independence. Our Constitution guarantees federal judges life tenure, without risk of any diminution of salary. He reports that, during his visits to emerging democracies throughout the world, foreign judges and lawyers alike expressed envy for the level of independence that the judiciary in America enjoys. A judiciary is not independent where, as is still true in some parts of the world (including some emerging democracies), judges receive calls from political bosses telling them how to rule, or where litigants have to pay money under the table simply to have their cases heard. Breyer says "this is a time of success for the notion of judicial independence" in America.

But, preserving that independence requires that the public understand the role of the judiciary in our constitutional form of government. Justice Breyer thus challenged the Bar to perpetuate the public's understanding that, for the rule of law to thrive, there needs to be an independent judiciary that interprets and applies the law, free from outside influences. ♦♦♦

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