

# Issues of Democracy

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*Independence  
of the  
Judiciary*

# Issues of Democracy

## *Independence of the Judiciary*



There can be a vast difference between a democratically elected government and a democratic government.

After an election, the hard work of governing under the rule of law begins. The task of ensuring fair application of specific laws and compliance with them falls to a team of legal professionals: prosecutors, attorneys and judges. Of these, the many roles a judge can play in a democratic system are under constant debate.

What powers do judges have to scrutinize and overturn decisions made by other branches of the government? Can judges be independent if their positions and budgets are solely controlled by an executive branch entity? In deciding a case, how can judges be shielded from political interference? Who determines whether a legal decision is in keeping with either a written constitution or previous judgments?

These questions are not academic. Judges in a democracy assume responsibilities not only for denying a person liberty—or even life—but also for determining a



society's position on fundamental issues. Recent Supreme Court decisions in the United States, for instance, have dealt with abortion, discrimination and affirmative action, commercial and labor laws and intellectual property considerations. Like the thousands of judicial decisions made daily by courts large and small in the United States, these rulings touch the lives of all citizens.

This journal examines safeguards that establish and maintain a judge's independence in and out of the courtroom, and looks at some of the roles played by judges in the American legal system. Stephen A. Breyer, Associate Justice of the Supreme Court, surveys the legal protections underpinning judicial independence and the ways the American system attempts to assure the integrity of this office. Judge Cynthia Hall, in an interview with contributing editor David Pitts, describes some of the challenges faced by American and

foreign judges in doing their jobs effectively. And three reports examine innovations in areas affecting the American judge of today: juvenile justice, sentencing reform and streamlining court procedures.

Though our focus is of necessity on the technical aspects of making justice work in the United States, the article on Judge Luis Perez of the Worcester (Massachusetts) Juvenile Court reminds us that behind the impersonality of legal decision-making is the individual character of the judge and the personal traits he or she brings to this sensitive work. A judge in the United States is, at the same time, a scholarly interpreter of law, a personnel manager, director of a trial's process, often an arbiter of leading social issues, always in the public eye. With this multitude of duties, the American judge—at the local, state or federal level—helps to ensure that a citizen's experience of democracy is not theoretical, but real.

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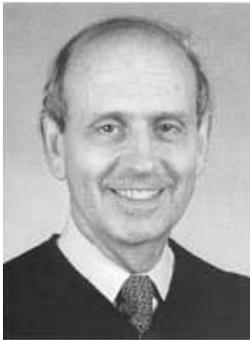
# Judicial Independence in the U.S.

*by*

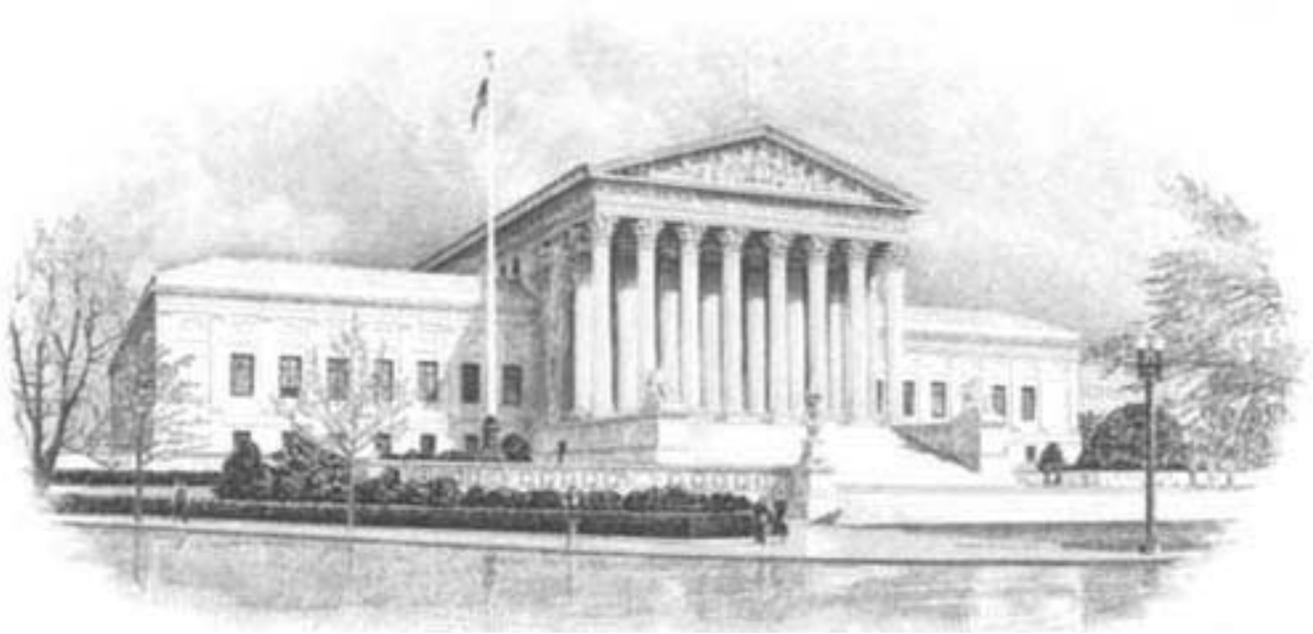
*Stephen G. Breyer*

*Associate Justice,*

*U.S. Supreme Court*



In the United States, judicial independence has developed into a set of institutions that assure that judges decide according to law, rather than according to their own whims or to the will of others. The five components of judicial independence are: the constitutional protections that judges in the United States have, the independent administration of the judiciary by the judiciary, judicial disciplinary authority over the misconduct of judges, the manner in which conflicts of interest are addressed, and the assurance of effective judicial decisions. These components combine to assure an independent judiciary that is the basis for a society governed by the rule of law. Following is an abridgment of Justice Breyer's remarks, originally delivered at the Conference of the Supreme Courts of the Americas held in Washington, D.C. in October 1995.



**T**he primary basis of judicial independence in the United States is the protection guaranteed to judges under Article III of the Constitution, which creates the federal judiciary. Article III provides that federal judges will “hold their Offices during good Behavior,” and that they will “receive for their Services, a Compensation, which shall not be diminished during continuance in Office.” These provisions assure that Congress or the president cannot directly affect the outcome of judicial proceedings by threatening removal of judges or reduction of their salaries.

The protection against removal is constrained by the phrase “during good Behavior,” and that mechanism also applies to other office holders in the federal government. Article II of the Constitution provides that “civil Officers of the United States”—and judges are considered to be among these—can “be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or

other high Crimes and Misdemeanors.” Impeachment is a formal process of adjudication by the Congress, that requires agreement by both houses. The House of Representatives must present a charge to the Senate. The Senate then tries the impeachment, and may only convict the impeached officer, including a judge, acting by a majority of two-thirds.

The impeachment power has been used sparsely since the creation of the judiciary, and used solely to remove judges for various forms of personal misconduct. In a landmark impeachment case in 1805, Congress came close to impeaching Samuel Chase, a politically outspoken Supreme Court justice, on the basis of allegations that his substantive decisions were politically biased. The impeachment failed, and established the tradition that Congress cannot use its impeachment power to check the substantive exercise of judicial power. More recently, the impetus for the few instances in which judges have been impeached arose out of and followed

criminal prosecutions of judges. Less dramatic instances of misconduct are addressed within the judicial disciplinary system, which is administered by the judiciary itself.

### **Control Over Procedure and Administrative Independence**

The institutions that allow the judiciary to control the environment in which judges do their work are a second factor of judicial independence. This aspect is not always at the center of considerations of judicial independence, but if one thinks about how a working environment affects one's work, then one understands that the question of who controls the context in which judges decide cases matters a great deal to the idea of the independence of the judiciary.

There are three primary institutional pillars on which U.S. judicial administration is based. The first is the Judicial Conference of the United States, which was created in 1922 as the Conference of Senior Circuit Judges. It is composed of the Chief Justice of the Supreme Court, the 13 chief judges of the circuits, 12 district court judges and the chief judge of the Court of International Trade. The Judicial Conference is the national policymaking body for the judiciary, and supervises the Administrative Office of the U.S. Courts. Most important is the role that the Judicial Conference plays in the rulemaking process.

The first and most central power that the Constitution leaves to Congress, but whose administration Congress transferred to a significant extent to the courts, is the power to set the rules of procedure in court cases. In the Rules Enabling Act,

Congress empowered the judiciary to set its own rules of criminal and civil procedure, and since the promulgation of the Federal Rules of Civil Procedure in 1938, the Supreme Court (and lower courts in the case of local rules) has controlled the majority of procedural rules in federal courts. The rulemaking process, although independent of Congress, is not a cloistered affair sheltered from public responsibility. The rules are developed by advisory committees that specialize in civil, criminal, bankruptcy, appellate and evidence rules. These committees, composed of a broad cross-section of the participants in the legal process—judges, the Department of Justice, law professors, and members of the criminal and civil bar who represent both plaintiffs and defendants—propose rules, subject them to public comment, and submit them to the Standing Committee on Rules of Practice and Procedure, which in turn submits them to the Judicial Conference, which recommends them to the Supreme Court for approval. Once the Supreme Court promulgates a rule, it is sent to Congress and becomes effective unless Congress affirmatively rejects it within a statutorily prescribed time. (Rules of Evidence, however, which are considered substantive rather than procedural, are proposed by the judiciary but must be passed as acts of Congress.) The power over the procedural environment in which cases are heard and decisions are rendered is probably the power that is nearest the core of institutional judicial independence.

In addition to the Judicial Conference, there are two additional institutional components of judicial independence that were created by Congress in 1939: the Administrative Office of the U.S. Courts

and the Circuit Judicial Councils. The first of these addresses the need for centralization of judicial administration; the second, the need for local control by judges over the environment in which they work. The Administrative Office of the U.S. Courts is a body of professional administrators subject to the direction of the Judicial Conference, which administers the federal court budget, personnel management, procurement and other housekeeping and support functions. The 13 Circuit Judicial Councils are composed of the chief judges and an equal number of circuit and district judges. The Councils have two major duties. First, they provide the administrative oversight body for the circuit by overseeing the promulgation and efficacy of local rules, reviewing and supporting requests by the districts for new judgeships, and approving district court plans for the administration of juries and trials. Second, the Judicial Councils have the primary responsibility in the judiciary's disciplinary system.

Another independent but centralized institution of the judiciary is the Federal Judicial Center, created by Congress in 1967. The Federal Judicial Center is headed by the Chief Justice and is composed of six judges selected by the Judicial Conference and the director of the Administrative Office. The Federal Judicial Center has the responsibility to conduct research into judicial administration and issues relevant to the administration of justice, as well as to propose and prepare educational programs for federal judges.

### **Judicial Discipline**

Because judges have life-tenure protection, and because the only power of removal open to Congress is the impeachment

process, the authority to discipline judges for transgressions that do not arise from personal misconduct warranting impeachment was for a very long time unclear. For many years, the limited use Congress made of the impeachment power left a gap in the institutional fabric overseeing judicial misconduct. During these years, peer pressure among judges was the primary source of control, and generally the small size and relative cohesiveness of the federal judiciary was sufficient. When Congress created the Circuit Judicial Councils in 1939, it was not at all clear that they had actual disciplinary power. In 1973, the judiciary passed the Code of Conduct for U.S. Judges, but a disciplinary system was officially instituted and rationalized only later, by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, in which Congress gave the federal judiciary a charter to devise its own self-disciplinary framework.

Under the act, any person may file a complaint that a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or...is unable to discharge all the duties of office by reason of mental or physical disability.” Since 1990, the chief judge may also act without formal filing of a complaint upon obtaining information that suggests that action is appropriate. After considering a complaint, the chief judge may dismiss it by a written order stating reasons, if it does not comply with the act's requirements, if it is directly related to the merits or substantive decision in a case, or if it is frivolous. The chief judge may also conclude a proceeding if intervening facts—either with respect to the misconduct or with respect to appropriate corrective action—have

resolved the subject matter of the complaint.

If the chief judge does not dismiss the complaint, he or she must appoint a special committee to investigate the complaint and file a written report with the Circuit Judicial Council, and the council itself may conduct additional investigation. For example, the Judicial Council may request that a judge retire, impose a freeze on assignment of cases to the judge, or issue a private or public reprimand. The act explicitly does not allow the Judicial Council to remove a judge from office, however. Removal remains possible only upon impeachment.

### **Conflicts of Interest**

The fourth aspect of judicial independence is the importance of self-control and avoidance of prejudice. Each individual judge, more than any council or committee, is in the best position to assure that he or she does not decide a case in which he or she may be influenced by considerations other than the law.

Congress has imposed on judges a statutory duty to disqualify themselves from sitting in a case in which their impartiality may be questioned. Judges have an affirmative duty to investigate and find out whether they or their family members have a financial interest in the case before them. A judge must recuse if he or she has been involved in a case either by having private knowledge of the facts, by having acted as a private attorney or in any capacity for the government in the case, or by having worked with a material witness in the case.

To help in this process of self-reflection and recusal, as well as to provide some basis for oversight of the decisions

judges make, Congress has imposed rules that regulate and require financial disclosure of any outside employment, earned income, activities, gifts, and honoraria that judges may receive. These requirements facilitate both awareness and accountability. The rules of recusal, and the degree to which judges conscientiously follow them to avoid conflicts of interest and prejudice, are central to assuring the independence of judgment, as well as to assuring the perception of the integrity of the judiciary in the eyes of the public.

### **Assuring the Efficacy of Judicial Decisions**

The most independent of judges, reaching the most impartial of conclusions, will nevertheless be irrelevant to assuring a government of laws if government agencies that courts order to act in a particular manner refuse to do so, or if people do not pay the damages they are instructed to pay. An orderly society, enforcement mechanisms, and a habit of obedience to courts are essential elements of a system in which judicial independence is effective.

The most vexing questions with respect to compliance do not usually arise where the parties in front of a judge are private individuals. When a judge issues an order to an individual, the power of the state is cohesive behind the judgment, and an individual who resists likely will be facing police officers who enforce the court order.

A more complex problem arises when the addressee of an order is the government, and the government refuses to comply. Refusal to comply would be more likely if court orders were general, and were directed at institutions rather than individuals. The tradition in the

United States, however, is that orders are issued to individuals. Thus, for example, if a court finds that a person did not receive a fair trial and must be released from prison, a court order on a petition for *habeas corpus* usually will not be issued against the state, or against the state's prison system. Rather, it will be issued against an individual, usually the prison warden or the director of a state's correctional system. This places the individual who has power to act in the name of the state in the uncomfortable position of having a court order directed at himself or herself, and creates the potential that, should the official fail to comply, the court will issue a contempt order, imposing a personal fine or even incarceration pending compliance. It is much more difficult for an individual to risk resistance to a court order than for the state to do so.

The most extreme cases of organized opposition on the part of state officials to orders from federal judges occurred in the late 1950s and early 1960s, when some states refused to obey orders from federal judges to desegregate educational institutions, buses, and restaurants. For example, when the state of Arkansas refused to desegregate its primary schools, the Supreme Court decision in the case, *Cooper v. Aaron*, reiterated that courts must be obeyed and that the desegregation order must be enforced. Following the decision, President Eisenhower sent the National Guard to Little Rock, Arkansas, to enforce the Court's ruling. The threat, no matter how remote and rare, that the federal executive will use force to support the federal judiciary remains a powerful background when federal judges order states to act in a particular way. It is not quite as pronounced, of course, when the

orders are directed to federal officials, although the threat that federal marshals will knock on the door of any individual official specifically identified in a court order remains quite real.

Beyond all of the institutional assurances of compliance, however, the most important reason to think that a judge's decision will be efficacious is cultural, rather than institutional. An orderly society, in which people follow the rulings of courts as a matter of course, and in which resistance to a valid court order is considered unacceptable, is the core assurance that if cases are heard by impartial judges, who are free from the influences of politics, and who decide independently according to law, then the people subject to court orders will also behave according to law.

George Washington claimed that "the true administration of justice is the firmest pillar of good government," while Alexander Hamilton, in *Federalist Paper* No. 17, maintained that "the ordinary administration of criminal and civil justice...contributes, more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence toward the government." The good that proper adjudication can do for the justice and stability of a country is only attainable, however, if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors. Judicial independence provides the organizing concept within which we think about and develop those institutional assurances that allow judges to fulfill this important social role.

# Protecting Judicial Independence

## *A Global Effort*

*An interview with  
Judge Cynthia Hall,  
U.S. Court of Appeals,  
Ninth Circuit*

*Judge Cynthia Hall, U.S. Court of Appeals, Ninth Circuit, Pasadena, California, is chair of the Committee on International Judicial Relations, established by U.S. Supreme Court Chief Justice William H. Rehnquist to encourage international judicial exchange. In an interview with contributing editor David Pitts, Hall says that although there are universal aspects of judicial independence, maintaining and strengthening it is a process unique to each society.*

**Question.** What is the Committee on International Judicial Relations and what is its purpose?

*Judge Hall.* The Committee on International Judicial Relations was established to respond to requests for assistance from judiciaries in foreign lands. Its principal objective is to help develop independent judiciaries around the world. To this end, it facilitates overseas visits by U.S. federal judges and visits to this country by foreign judges. It provides training and also gathers information about judiciaries in as many countries as possible and makes that



*Judge Cynthia Hall*

information available to interested parties, including U.S. judges. The committee was established five years ago. Its membership includes federal judges from all over the United States.

**Q. How effective is it?**

A. It's still new, but I believe it is very effective. For example, the committee sponsored the first conference of the supreme courts of the Americas. Five U.S. Supreme Court justices participated. The committee has been sharing information and improving relations with the judiciaries in the emerging democracies of Central and Eastern Europe, and in the Russian Federation. The committee also has been active in Asia and Africa. In South Africa, for example, it is going to help train black judges so that the legal system there becomes more representative of all the people.

**Q. Are there typical assistance needs?**

A. In many developing countries, the lawyers need help; the bar associations need help; and the law schools need help. But we have concentrated on assisting in the development of independent judiciaries. We ask, "How can we help you? Tell us what you want us to do for you." We plan a program around the needs as seen in the particular country concerned, not as we see them. Each program is tailored to a

particular country and the status of its judiciary at the time. The program may be conducted in the country concerned or in Washington, D.C.

**Q. Naturally, the judicial system in every country is unique because the history, political development, and culture of every country are unique. But are there some attributes that are essential to an independent judiciary in every country?**

A. We don't try to get any other country to use our system for those very reasons. We go in to help them establish an independent judiciary under their system. But we can tell them what has worked in the United States. Many foreign judiciaries are under the domination of the ministries of justice, which often control the appointments process and salary structure. We have found that judicial independence can be better safeguarded if the courts are a separate branch of government and have control of their own budget and staff. We have achieved that in the U.S., but it took many years to fully realize it. Also important are key constitutional safeguards, such as tenure for judges with removal only through impeachment, assurance that salaries are adequate and will not be reduced while on the bench, and protection for judges against political interference. Naturally, there are limits to the independence of the judiciary. In the United States, for example, the budget for the judiciary depends on Congress, which also determines our jurisdiction. No part of the government is totally independent of the other branches. But in this country no politician can tell a judge how to decide his case. That is very important.

**Q. How significant is judicial review of constitutional questions to the concept of judicial independence?**

A. I don't think it's essential, but certainly it's important. It provides a means to protect the individual from an over-reaching government. But it is a powerful tool and must be used wisely. In our system, judges do not decide

constitutional questions unless necessary to the decision of the case. If there are any other grounds for deciding the case, you decide on that ground before you go to a constitutional ground. Furthermore, you can raise a constitutional issue in the judiciary only within the context of a live, active case. The judiciary in the United States does not issue any advisory opinion. This helps us keep a balance in how we use this extraordinary power. It is used seldom and, I believe, wisely.

**Q. Should judges be elected or appointed, and should they serve for life? Can judges be really independent unless their tenure is for life?**

A. It is hard to have an independent judiciary if judges have to stand for election. We have diversity in this country in the manner that judges are selected. Some states require that judges run for election. That is not the case in the federal system. Federal judges are nominated by the president and confirmed by the U.S. Senate. This is an open and public process in which the pros and cons of confirming particular individuals are fully aired. But once they are confirmed, it is not possible to remove them unless they are impeached, which results usually from the judge having been guilty of committing a felony.

**Q. How important are qualifications for judges?**

A. Interestingly, in the United States, we don't have any written requirements for the qualifications of federal judges, although most states do for the state courts. But I think the federal appointments process, requiring a public confirmation proceeding, encourages the president to seek highly-qualified lawyers.

**Q. There are great pressures on American courts because of the increase in litigation and the backlog of cases. Presumably, these pressures are even greater in countries where the judiciaries cannot be funded as generously as they are in**

**American courts. How compromising is this to the maintenance of the rule of law and to the smooth, efficient functioning of an independent judiciary?**

A. All courts share this problem: the increase in cases and a more crowded docket. First, it is important to have continuous trials, which we do in the United States. Once you start, you must continue until the trial is concluded. In many countries, they have discontinuous trials; one aspect of the case can be tried at one point and it may be months before the next aspect is tried. In addition, in the U.S., the judge controls the speed of the docket and often pushes to move cases forward. That helps as well. But still we have a problem with judicial backlog. In recent years, we have worked very hard on what we call case management. Reforms designed to speed the process have included required settlement conferences, mandatory mediation and arbitration, and plea bargaining in criminal cases. These measures have cut down on the number of time-consuming trials. Modern technology, particularly computers, also has been of help in streamlining the process. This whole issue of case management is very important and we have sought to make foreign judiciaries aware of some of our successes in this regard. But we still face the problem, which is exacerbated to some degree by Congress expanding our jurisdiction without increasing our resources to handle the increased load. That is a problem in many other countries, also.

**Q. For a country's judiciary to be independent and fair, it must be seen. How open to the public and to the media should courts be? How open are they in the United States?**

A. In this country, you are entitled to a public trial. This means the public is allowed to come into the courtroom and witness a trial, and courts are only closed in the rarest of cases. In recent years, however, we have wrestled with the question to what extent the courts should

be open to the wider public through television, by allowing cameras in the courtroom. Does television promote openness or does it skew the process by affecting the way lawyers and judges act and witnesses testify? In the federal system, we now have a policy that no cameras are allowed in criminal trials. Federal judges have an option, however, in civil cases. On the state level, some states have adopted open courtrooms, which includes allowing television, although after the highly publicized murder trial of athlete O.J. Simpson, a number of the judges in California, where the trial was held, have decided to opt out of television coverage. Having open courtrooms in some form is what's important. Now the question also is, "Is everyone in the United States entitled to sit in the courtroom via television?" We're still studying what the effects are.

**Q. How important is judicial enforcement to judicial independence?**

A. Enforcement of judgments is very important and a very different problem worldwide. We have become quite effective in the United States, but it has taken us 200 years to become so. Consider a famous case during the 1830s. It involved a judgment that the U.S. Supreme Court made in favor of the Cherokee Nation, which had been granted some land in perpetuity in the state of Georgia, on which gold was later discovered. President Andrew Jackson declined to enforce the Supreme Court's ruling, saying: "Chief Justice John Marshall has made his decision, now let him enforce it!"

But in 1957, President Dwight D. Eisenhower took a different attitude toward the 1954 Supreme Court decision in *Brown v. Board of Education*, which ruled that segregated schools were unconstitutional. Eisenhower sent troops to Little Rock, Arkansas, to enforce the Supreme Court decision.

So the willingness of the chief executive to enforce court decisions is very important, particularly in a case of that magnitude where the Supreme Court had, in effect, declared the

Southern states' education-segregation laws to be unconstitutional.

Most judgments, it should be said, are much easier to carry out because they are against individuals. We have marshals to enforce our judgments against individuals. Plus, we have the power of contempt. People can be jailed in contempt for failing to abide by a court decision. Any individual, however, can seek a writ of *habeas corpus* and demand to go before a judge so that it can be determined whether or not he should be held in jail. We have become fairly effective in this country in enforcing decisions, but it is still difficult in many countries. It takes a long time for courts to obtain a smooth enforcement of judgments.

**Q. How would you sum up the experience of the judiciary in the United States?**

A. The judiciary in this country is in the very fortunate position of being both powerful and highly respected. Politicians interfere with the process at their peril. It is very important that no one, no matter how powerful, be able to tell a judge how to decide a case. Unfortunately, in some countries around the world, "telephone justice," in which politicians or other powerful figures try to interfere with judicial decision-making, is all too common. It will take a lot of work, and a lot of courage, to maintain independent judiciaries, particularly in societies where the experience of democracy is relatively recent. But I think that in the emerging democracies particularly, people see the benefit and the need for an independent judiciary not only for their own citizens, but also to encourage foreign investment.

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# His Honor and the Kids

*by*

*Kristin Helmore*

Judge Luis G. Perez of the Worcester, Massachusetts, Juvenile Court, often must act as parent and friend as well as judge as he decides the fate of troubled youths in the courtroom. Journalist Kristin Helmore looks at Judge Perez's emphasis on correction rather than punishment in dealing with juvenile offenders.

**J**udge Luis G. Perez likes to tell a story to illustrate the wrong way to handle juvenile offenders. Not long after he became First Justice of the Juvenile Court of Worcester County, Massachusetts, in 1987, a probation officer took him aside to urge particularly tough treatment of a young probationer who had been arrested for disturbing the peace. The boy had been absent from school for about a month, in violation of the terms of his probation. The officer said that the boy was an especially hard case and needed to be frightened into compliance with the law.

Judge Perez took the advice and harangued the young man unmercifully, threatening him with escalating punishments that could culminate in his incarceration until he reached age 21, if he did not mend his evil ways. The boy stood in the dock, his shoulders shaking with sobs. Finally Judge Perez bellowed, "Where do you go when you don't go to school?"

“To the cemetery,” the boy whimpered.

To the judge’s horror, he found that no one had bothered to discover that the boy’s father had died about a month before, and that the devastated youngster had been spending every day at the gravesite, grieving.

Judge Perez learned two important lessons from this incident. First, make sure that every member of his staff of 85 does their homework and learns as much as possible about the lives of the young people whom they serve. Second, treat each juvenile in the court system with kindness, “like a human being.”

### **An Easy Rapport**

The courtroom of Judge Luis G. Perez in this second largest city in New England (the population of metropolitan Worcester is about 170,000) is a modest, unpretentious place, and Judge Perez is a modest man. The black-robed judge sits alone on the bench, at the top of a low, three-tiered pyramid of unpainted wood. Below him at floor level are attorneys, prosecutors and probation officers, and two clerks peering into a computer screen.

Nowadays, he speaks in a soft voice, in a relaxed manner. He asks young defendants a lot of personal questions, and is not above mediating between a juvenile and his or her parents on matters pertaining to behavior at home. An easy rapport is evident between the judge and his staff as well. All rise to their feet whenever they address him and they call him “Your Honor,” but the atmosphere is collegial rather than hierarchical. Between cases, friendly banter is the norm.

The walls of the courtroom are painted a pale, institutional pink. In the corner

behind the judge is an American flag, and next to it, taped to the wall, are large drawings children have made for him containing exhortations against violence, drug use, gangs, and similar ills of modern society. These walls are so thin that the judge occasionally asks a court officer to request quiet in the crowded, noisy waiting room outside.

### **A Typical Day**

Each time Judge Perez walks through the waiting room, he stops briefly to greet one or two of the teenagers whom he has come to know personally after they have run afoul of the law. Some he greets in his native Spanish, some in fluent English with a distinctly Massachusetts accent. There are several doors leading from this waiting-room, but all of them have had the cheap metal nameplates on them removed, making it hard to find one’s way. “Kids do it,” says Perez with an easy-going chuckle. “It must be kids. Who else would take all the signs?”

On a typical day, Judge Perez hears as many as 40 cases. On a recent morning, the list includes a 15-year-old girl who has been arrested for assault and battery with a dangerous weapon; a couple of boys who have been driving without a license; a 16-year-old-boy accused of raping a 16-year-old girl; a 15-year-old girl arrested for possession of 10 vials of crack cocaine; and a 15-year-old girl charged with attacking her mother with a knife. One defendant is Vietnamese and one is white. Most, however, are Hispanic. In Worcester, Latinos constitute the largest minority, with about 20,000 people, 80 percent of whom are Puerto Rican. Asians and

African-Americans number about 5,000 each.

The rape case is dismissed because the alleged victim refused to appear in court. The youths who drove without a license are ordered to obtain one and report to the judge by a certain date. All the other defendants are put on probation. In Judge Perez's court, this can involve a number of conditions, including house arrest, "stay-away" orders designed to separate enemies, regular school attendance, a 6:00 p.m. curfew, scheduled meetings with probation officers, attendance at one or more of ten special educational programs offered to probationers by the court, and alternative sentencing—the performance of a specified number of hours of community service. Detention is avoided whenever possible. For Judge Perez, who grew up in conditions similar to many of these youngsters, incarceration of juveniles only compounds the problem.

### Helping Kids in Trouble

"When you start locking kids up, there's a much greater risk that you'll be locking up those same kids again and again," says Perez. "By getting tougher on kids and treating them as adults, you're not going to correct the problem. You're going to make it worse. We'll just have a younger population going to jail and an older population staying in jail. When you start putting people in jail, they become worse people, not better people."

Helping kids in trouble to become "better people" is Judge Perez's goal. After all, he identifies strongly with them. He came to Worcester from Puerto Rico in 1960 at age ten, speaking no English. As a result, he was put back in school two grades because of his language difficulties.

His father was already retired, and his mother, who had left school in the third grade to help support her family, was a laborer. When he was in high school he saw a friend stabbed to death. "I know what these kids go through," he says. "I could easily have gone the same way."

### A Major Impact

One would hardly know it to look at him today. Tall, well-dressed, with wavy, slightly thinning dark hair, a thick dark mustache and wire-rimmed glasses, he could be a businessman or a lawyer. He returns to Puerto Rico whenever he can, and hopes to retire there.

"I've always been involved with my community," says Perez over half a sandwich and soup at Lucky's Cafe, a friendly little diner across the street from the courthouse. Lucky's, where the judge is a regular, is in a converted factory building, as is the juvenile court—a huge, square brick building where trolley-car switches were once made. "I've always been a person who has tried to make justice available for everybody," he continues, "to open the doors of discrimination to people—trying to make this world a better place for all of us to live in."

As a student and young attorney he was a leader in various campaigns to improve the lot of minorities, ensuring that the schools implemented bilingual education laws. He also oversaw efforts to reconfigure Worcester's voting districts in a way that better represented the diversity of the population. He had great visions of all he would accomplish, but he never bargained on juvenile court.

"It was a good friend of mine, a priest, who convinced me," he says. "I had been offered the position of Juvenile Court

Justice and I had turned it down. So he called me and we had breakfast and he said, “Where else do you think you’re going to play such a big role in the future of this city? You want to have a major impact? Have a major impact with our children. They’re the future.’ Well,” says Perez with a grin, “after ten years on the bench I can tell you that he was absolutely right.”

### **Working With the Community**

This is a man who loves his work. He may be dealing with a thick web of apparently intractable social problems and a seemingly endless stream of human tragedy, but he retains his relaxed sense of humor because he has seen the effectiveness of his approach: work with the community, from within the community. Apply strict rules for young people at an early age, demand responsibility and accountability from them, and give them the information that will help them make the right decisions for their lives. Put them in settings that will give them a sense of self-worth and accomplishment rather than frustration and aggression.

When he speaks of working within the community, Judge Perez means that his probation officers do not just sit at their desks eight hours a day receiving scheduled visits from clients, as they did under his predecessor. It has been a hard struggle, but he has finally convinced them of the value of being on the street: visiting youngsters in their homes, their schools, their places of work and recreation, their foster homes. The frequent presence of these officers is having a stabilizing effect in the neighborhoods of Worcester, and the

task of monitoring probationers’ behavior is getting much easier.

“Just recently we placed a full-time probation officer at a school,” says Perez. “He has the responsibility to work with parents in a preventive way, instead of waiting until their kids come into the court system. They (probation officers) also educate the students about what type of behavior we expect from them. They’re available to the staff at the school in crisis situations. And they have more hands-on supervision of the kids who are on probation and who go to that school.”

Then, for the really tough cases, there’s the bracelet: an electronic monitoring device worn on the wrist that enables probation officers to keep track of a juvenile’s whereabouts at all times. Ten of these bracelets were purchased by the Massachusetts Department of Youth Services at Perez’s request. So far, some 200 youngsters under house arrest have used the bracelet, saving the state about \$100,000 over the cost of detention.

### **Art, Not Graffiti**

Collaboration such as this with a key social institution is another hallmark of Judge Perez’s community-based approach. Traditionally, he says, the courts, the state agencies, the police, the schools, and the city government all operated in isolation from one another, experiencing considerable tension when their various fiefdoms collided. “If we all work together,” he adds, “if we sit down at the table and discuss our common problems, we can all work much more effectively.” Perez himself has worked closely with the police on the issue of gangs, for example, conducting research into the identity and activities of

gangs, and devising strategies to minimize gang violence and prevent new gangs from forming.

He also has worked with the police and with local businesses on the problem of graffiti, following a very simple rule: whoever produces graffiti will clean it up. Many hours of community service have been spent cleaning the walls of Worcester as a result. The town is now largely free of graffiti, and a number of the youngsters involved have been awarded scholarships by the Worcester Art Museum, "Because they had the talent," says Judge Perez. "It just had to be channeled in a better way. Now they're going to art classes, but first they did their hours of community service cleaning the walls!"

### **A Philosophy of Intervention**

Correction rather than punishment. Prevention rather than reaction. This is why, for example, Perez did not punish the young Vietnamese boy for driving at 2:00 a.m. through the streets of Worcester without a license. "If I had found him delinquent, he wouldn't have had a chance to get his license until he was 21," the judge explains. "Then what would he do? Here's a young man, he's 16, he can't go to work. We have public transportation, but on most routes it's once an hour. So what does he do? He gets frustrated. He can't get a job. What does he turn to? When the fast money is on the table, how does he say no?"

This is the philosophy of early intervention. At an early age, keep them in line over the small things, give them opportunities to do the right thing, and they won't get in trouble over the big things later on.

Take truancy. Judge Perez will not tolerate it. In Worcester, a police officer has the right to arrest any youngster who is on the street when school is in session. The child is assigned three days of community service, such as cleaning the bathrooms at his or her school. "One aspect of it that I like is that there's a consequence for the child's behavior," says Perez. "For the next three days that child will do community service and get credit for it. All the parties come together in our truancy center upstairs—the parents, the school personnel, a probation officer—to talk about why (the child) wasn't in school."

### **Turning Young Lives Around**

Perez is so concerned, in fact, with solving young people's problems at an early age, that he cited the Worcester Department of Education for contempt of court for failing to comply with his order to investigate why a certain teenage girl had been absent for a total of almost three years of school. It turned out that she had been referred to a special education program in the second grade, but had never been placed in the program. "This was someone's responsibility, and they had failed to meet it," he says indignantly. But it was his confrontation with the Education Department that changed the pattern of isolation and lack of cooperation in which each institution had worked in the past.

"As a result of that, we came to an agreement with the public schools that they would make sure that if a child needs special education programs, or needs evaluation, they would immediately take care of it," he adds. "Since then my door started being opened to the school department. I said, 'Let's see how we can work

together.' We got into truancies, we got into special education, we got into the issue of violence in the schools." This is what Perez means by community in action.

But then there was the issue of weapons in the schools, a seemingly irreconcilable difference in this newfound partnership. The schools of Worcester had a strict rule that any child caught with a weapon in school would be suspended for one year, no exceptions. Perez ruled that it was unconstitutional to deprive these children of education. The school department took the case to the Massachusetts Superior Court—and Perez's decision was overturned. Then he tried another tack. He agreed with the superintendent of schools to start a special school for problem children such as these right in the courthouse building—just upstairs from where Perez sits on the bench every day. "We wanted our probation officers to be available for consultation and to work with these kids, before they're on probation," he says. "Most of the troublemakers in the public school population are upstairs, more than 200 of them. It's an alternative school. Small classrooms. It seems to be working. I go upstairs, speak to the kids. I say, "I was like you, but I turned my life around. This is my life today.'"

# The Federal Judiciary and Sentencing Policy

*by*

*Richard P. Conaboy*

*Chairman,*

*U.S. Sentencing*

*Commission*

In the quest for equal justice for all, the judicial system has imposed upon itself new guidelines for judges in determining sentences. The Chairman of the U.S. Sentencing Commission describes how federal sentencing guidelines encourage fairness and what alternative sentencing options a judge may now consider:

**S**entencing is one of a judge's most difficult jobs. The power to take away a person's money, liberty, or even life, is an awesome responsibility. Sentences must be fair and impartial and based only on relevant considerations. No favoritism can be shown to persons based on their race, religion, creed, or political party. Thus, judicial independence—freedom from public passions or partisan pressure—is very important in the sentencing process.

At the same time, judges cannot be given unfettered discretion to impose whatever sentences they please. Over the entrance to the U.S. Supreme Court is emblazoned the ideal of the American legal system: "Equal Justice Under Law." Since the sentencing judge often will be from a different ethnic group, or of a different gender or religion than the defendant who is being sentenced, in a pluralistic society like the United States, citizens must have confidence that anyone who

breaks the law will be treated like any other person who commits the same crime.

### Law Without Order

In the past, scholars and politicians became concerned that judges' decisions might be skewed by their natural ability to understand persons like themselves better than persons who were different, which could lead to some defendants being treated differently than others.

In *Criminal Sentences: Law Without Order*, published in 1972, former federal judge Marvin Frankel described the sentencing system as "law without order." At the time, the criminal statutes gave judges broad ranges of sentences from which to choose. Judges were given no guidance about what sentences were most typically handed down by other judges, or what sentences would be most effective. As a result, judges with different philosophies imposed different sentences on similar offenders.

In addition, a judge's sentence did not determine the time that an offender actually spent in prison. Criminals could be released early by a parole commission. Most offenders served only one-third or one-half of the sentence imposed by the judge. Many people believed that this eroded respect for both the court and the law.

The Sentencing Reform Act of 1984 changed all this by abolishing parole and creating the U.S. Sentencing Commission, which established a system of guidelines for judges to use when imposing sentence. Today, we have "truth in sentencing" and offenders serve the sentence that is imposed by the judge (minus a maximum of 15 percent if they show good behavior

while in prison). Most importantly, judges have guidance to help them determine what sentence is appropriate, which assures their peers and the public that different judges using the same rules will arrive at the same conclusion.

### Judges Help to Shape Sentencing Policy

By law, at least three of the seven voting members of the Sentencing Commission must be federal judges. In addition, the Commission is obliged by statute to consult with the governing body of the federal judiciary—the Judicial Conference of the United States—concerning possible improvements in the guidelines. Thus, while the guidelines may restrict a judge's power when sentencing a particular case, judicial input to the Commission provides judges with a new avenue for influencing the sentencing rules that are applicable to all cases.

This aspect of the Sentencing Reform Act was controversial at first. Some people thought that the guidelines should be developed entirely by judges. Others thought that sentencing rules should be established by Congress. The compromise represented by creation of the Sentencing Commission, and its placement within the judicial branch of government, was intended to insulate sentencing policy to some extent from the political passions of the day. The Commission would serve as an independent, expert agency that could establish sentencing policy on the basis of research and reason.

At the same time, sentencing policy had to be politically accountable. Commissioners are appointed by the president and confirmed by the Senate. And the

Commission is bound by directives from Congress that may require it to increase punishments or change the sentencing rules in various ways. The result is a “quasi-legislative” agency within the judicial branch, which was initially challenged in 1989 as a violation of the U.S. Constitution’s principle of “separation of powers.” The U.S. Supreme Court rejected this challenge in *Mistretta v. United States*, and upheld the constitutionality of the Commission and its rulemaking judges.

### **Emphasis Placed on Relevant Factors**

The sentencing guidelines describe exactly what facts are important for determining a sentence. The defendant’s race, sex, national origin, religion, and socio-economic status are prohibited from consideration. Instead, the sentence is based largely on the seriousness of the crime and on the defendant’s past criminal record.

For example, one of the most common types of crimes in U.S. federal courts is drug trafficking. The sentence in these cases is based largely on the amount of drugs produced, smuggled, or sold by the defendant. The sentence is increased if the defendant possessed a gun during the offense, or if he or she was convicted of selling drugs near a school, or to a child or pregnant woman. Leaders of criminal organizations get longer sentences. Offenders who admit their crime and accept responsibility get shorter sentences than those who deny committing the crime. Finally, the sentence is increased if the defendant has committed other crimes.

Under rules like these, everyone can see how a sentence is determined. Not everyone agrees with every rule the Sentencing Commission has established,

but everyone knows that the same rules apply in every courthouse in the United States. The rules help guarantee that similar defendants are treated in a like manner.

### **The Role of the Judge**

Judges have an important job in the sentencing guidelines system. They must determine the facts of the case and the defendant’s past criminal record. In U.S. federal courts, judges make their decision at a sentencing hearing, at which prosecutors and defendants can present evidence and address the court. Court staff prepare a “pre-sentencing report” that includes a description of the crime and its impact on victims. The report also describes the criminal history of the defendant and information about the defendant’s background, family, education, employment, and other factors.

In forming the guidelines, Congress and the Commission recognized that no set of rules—no matter how detailed—could anticipate every possible situation. Thus, in the words of the Sentencing Reform Act, “[if] the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines,” a judge can “depart” from the rules and impose an appropriate sentence under the circumstances.

Judges must state on the record, however, what facts in a particular case justify a departure from the guidelines. These facts might then be reviewed by an appellate court if either the prosecutor or the defendant chooses to appeal the case, which they have a right to do if a departure goes against them. The Sentencing Reform

Act has involved appeals courts in the sentencing process to a much greater degree than before the guidelines were implemented, by empowering appeals courts to review sentences, thus ensuring that the guidelines are properly applied.

### **Sentencing Options**

As a result of the guidelines, a sentencing judge must decide whether to send a defendant to prison or to use one of the sentencing options that are provided. Defendants convicted of the least serious crimes may be sentenced to simple probation, that is, supervision in the community under the direction of a probation officer. For somewhat more serious crimes, a judge may choose from three intermediate sanctions—community confinement, intermittent confinement, and home detention. For even more serious crimes, judges may impose a “split sentence,” in which the defendant spends a short time in prison and the remainder of the sentence in one of the intermediate sanctions.

Community confinement means residence in a treatment center outside the prison walls, such as a “half-way house” or drug rehabilitation center. Community confinement may be imposed instead of prison time, or as a means of easing transition back into the community after time spent in prison. Intermittent confinement means the defendant is free to go to work or live at home for part of the week, but must spend time in jail on weekends.

Home confinement is the newest of the intermediate sanctions, and its use has grown dramatically in U.S. federal courts in the past decade. As of 1996, over 18,000 federal prisoners spent some time in home confinement. Originally called “house arrest” (and unfortunately associ-

ated in some countries with political opposition and police detention) the federal home-confinement program is a judicially managed system of punishment and control for offenders deemed safe enough to live in their own homes, but requiring a high degree of supervision.

### **New Technology Makes Enhanced Surveillance Possible**

In the U.S. federal judicial system, technology in the form of electronic monitors helps make home confinement a tough and safe sentencing alternative. Electronic monitors are not necessary to begin a home-confinement program: in some cities, probation officers simply call or drop by offenders’ homes periodically to ensure that they are there. But electronic monitoring gives judges added confidence to use home confinement with more serious offenders whose whereabouts they wish to follow closely.

During home confinement, an offender wears an electronic bracelet that communicates by radio signal with receivers attached to the phone lines in his or her home. If the offender moves more than 55 meters away from the receivers, they automatically will call computers that monitor them. The computers check records to determine if the offender was authorized to leave home at that particular time. If not, the offender’s probation officer is notified and efforts to locate the offender begin. Electronic-monitoring equipment also detects attempts to remove or tamper with the transmitter-bracelet worn by the defendant, or loss of phone service to the offender’s house. Criminologist James M. Byrne has noted: “The evidence to date indicates that home

confinement may be a viable intermediate sanction, and electronically monitoring compliance with home confinement orders appears to work at least as well as manual methods of monitoring.” In fact, many offenders feel that home confinement is as punitive as prison. Some have even refused placement in home confinement, preferring to spend their time in jail with greater social interaction and recreational facilities.

As of 1996, among probationers sentenced to home confinement in the federal system, 93.5 percent successfully complete their sentence. About six percent violate program rules by repeatedly leaving home, testing positive for drug use, or tampering with electronic equipment.

### **The Future of Federal Sentencing**

Political pressure is great whenever crime is a top public concern and when sentencing is seen as a solution to the crime problem. Congress continually mandates new minimum sentences for certain types of offenses, instead of allowing the guidelines to determine which sentences are appropriate. And such statutes often make it more difficult for the Commission to establish rules that ensure fairness and proportionality among the many types of crimes sentenced in the federal courts. But as the Commission enters its second decade, it is working to find new and better ways to accomplish the twin goals of controlling crime while treating fairly those persons who break the law.

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# Case Management in American Courts

*by*

*James G. Apple*

Case-management techniques have greatly assisted judges in the United States during the past 20 years in coping with large and complex case loads, controlling pre-trial discovery, and reducing costs and delays in the courts. In an abridgment of an article first published in *The Litigator* (1995, pp. 373-376), James G. Apple, chief of the Interjudicial Affairs Office at the U.S. Federal Judicial Center in Washington, D.C., discusses the advantages of using case management to alleviate the pressures on an often overburdened court system.

**W**hen I first began practicing law in the early 1960s in a state in the Midwestern United States, case management was unknown in both the federal and state courts. Lawyers generally controlled the course of civil litigation. They determined when and how pre-trial discovery was to be conducted, when a case would be tried, and, for the most part, how a case would be tried. The lawyers would decide whether and when written interrogatories would be served on opposing counsel, when pre-trial depositions would be taken, and when a case was ready for trial. At the completion of all pre-trial activities one or both of the lawyers would file a motion to assign the case for trial, and only then would the judge become involved by placing the case on the trial calendar.

Times have changed dramatically in U.S. courts. In most courts—both federal and state—especially in urban areas, almost all judges now use one or more

techniques of case management. The term signifies the active intervention by the judge in the pre-trial process to help move the case through the system. A judge adopting a complete case-management approach to civil trial practice takes control of the case after the initial pleadings have been filed, determines the course of pre-trial proceedings and activities, decides when the case will be assigned for trial, and sets a firm trial date.

### **Reasons for Using Case Management**

Authorization for practicing case management actually existed in the U.S. Federal Rules of Civil Procedure when they were first adopted for the federal courts in 1938. The techniques authorized were, however, rarely used. Federal and state judges first began to embrace case-management principles and practices on a regular basis only in the late 1970s, and such practices became widespread only in the 1980s and early 1990s.

In 1977, the U.S. Federal Judicial Center prepared a report on case and court management in which the worth of the practice was briefly outlined:

“Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pre-trial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.”

There are several significant reasons why more and more judges in the United States are using case management techniques:

#### **► Increasing case loads in both federal and state courts.**

Case filings have increased dramatically in the past 20 years, and have increased more rapidly than the ability of the federal government and state governments to create additional judgeships to handle the increasing workload. For example, in the federal courts between 1970 and 1990, the number of civil case filings increased from 87,231 to 217,879. The number of judgeships during the same period rose only from 401 to 575. The civil caseload per federal judge per year in 1970 was 217. By 1990 it was 379.

#### **► Increasing complexity of cases.**

More and more cases, both at federal and state level, involve multiple parties represented by multiple lawyers or law firms, multiple claims, complex legal issues, and the presentation of technical evidence, all of which require coordination and control of the pre-trial process. Typical of these kinds of cases are airline and hotel disaster cases and toxic tort cases, such as asbestos litigation.

#### **► Increasing use of the pre-trial discovery process.**

Before the 1970s, pre-trial discovery in most routine cases involved the serving of a simple set of written interrogatories and the taking of one or two depositions. Currently, even in the most routine civil cases, pre-trial activity on both sides regularly involves several sets of written interrogatories; extensive (both in number and length) depositions; requests for production of documents or objects; numerous pre-trial motions, all of which consume large amounts of time; and, inevitably, administrative and legal issues that must be resolved by the judge.

Active intervention by the judge to control and coordinate the pre-trial process has therefore become a necessity if any efficiency in the progress of the case through the court and the expeditious resolution of issues is to be achieved.

Space limitations prevent a full account of all case-management techniques that are available to a federal judge under the Federal Rules of Civil Procedure and by modern administrative practices. Federal judges often use individual (as opposed to master) calendars for docket control, alternative dispute resolution techniques, and the use of law clerks and computers to assist them in handling the increased case loads.

### **Federal Rule 16**

The basic case-management practices in the federal courts for civil cases derive from rule 16 of the Federal Rules of Civil Procedure. Rule 16 provides for the issuance of a “scheduling order” relating to pre-trial activities following a scheduling conference, and a series of pre-trial conferences between the lawyers and the judge. Some of the procedures are mandatory, e.g., the initial scheduling order, and some are discretionary, e.g., the final pre-trial conference.

Pre-trial orders and conferences are designed to resolve issues relating to jurisdiction; additional pleadings; the significant legal and factual issues of a case; attorneys’ fees; settlement of the dispute; time for and limitations on all discovery, including interrogatories, depositions, and requests for production of documents; hearings on motions; evidentiary matters, including issues of admissibility at trial; damages; and assignment of the case to the trial calendar. These matters can be

raised and addressed in:

- ▶ the initial scheduling conference and resulting scheduling order
- ▶ a preliminary pre-trial conference
- ▶ a discovery conference
- ▶ a settlement conference
- ▶ a final pre-trial conference.

For example, in the modern management of an airline or hotel disaster case involving multiple plaintiffs and defendants and multiple claims, the judge would hold a scheduling conference immediately after the initial pleadings are filed, during which specific times and time limits would be discussed and set for amending pleadings, filing pre-trial motions, completing discovery, exchanging expert witness information, holding additional conferences, and setting a tentative or firm trial date. After the scheduling conference, the judge would issue a scheduling order containing all of the times and time limits and other limitations on pre-trial processes established at the scheduling conference.

The judge might subsequently hold a preliminary pre-trial conference to determine progress on such matters as discovery and settlement, and to narrow the legal and factual issues to be tried. The judge might decide that the complexity and extent of discovery make a discovery conference necessary, to set out the parameters of discovery for each party, including limitations on the number and extent of depositions, rules for the exchange of information regarding the substance of expert witness testimony, and rules and limitations for the production of documents, as well as to establish a document depository. At some point in the pre-trial process, the judge would want to ascertain the possibilities of settlement and order a settlement conference, conducted by the

judge, a magistrate judge, or special master, and attended by not only the lawyers in the case, but also their clients or representatives of the clients who would have settlement authority.

Finally, the judge, faced with the prospect of a long and complicated trial, would hold a final pre-trial conference, to narrow and make final the issues to be tried, establish the order of proof, delineate the manner of presentation of evidence and the conduct of examination and cross-examination of witnesses, and enter orders on other matters relating to the conduct of the trial. By all of these mechanisms the judge would maintain control of the case, be kept advised of its progress, provide for its orderly conduct, and keep the time and expenses of the case as low as possible.

### “Rocket Docket”

One of the more extreme case-management techniques in the federal courts exists in the U.S. District Court for the Eastern District of Virginia. The judges in that court maintain what is popularly known as the “rocket docket,” to provide for the expeditious handling of all civil cases. The judges routinely order, early in the case, a short scheduling conference at which specific dates are set for completion of discovery, and the case is at that time assigned a firm trial date. Once the case is assigned for trial, the date is “written in stone,” meaning that it cannot be changed under any circumstances. The use of these procedures has resulted in many settlements and a docket situation where a case which is not settled usually goes to trial within six to eight months from the time of the filing of the complaint.

Case management also applies to the conduct of the trial itself. While judges cannot take over the case and assume the role of the lawyers, they can assist in the conduct of just and speedy trials by personally conducting *voir dire*: assisting the jury in understanding a case by permitting jurors to take notes and ask questions; reducing the number of bench conferences and other trial interruptions; encouraging the use of visual aids, such as projectors with transparencies or slides for better jury understanding of the evidence; instructing the jury before the beginning of the introduction of evidence and possibly also at the conclusion of the presentation of all the evidence; and preparing and presenting instructions to the jury in clear and understandable language.

### Magistrate Judges

The use of magistrate judges for a variety of pre-trial activities and the appointment of special masters for certain types of litigation also need to be mentioned.

Magistrate judges in the U.S. federal judicial system were created by Congress in Chapter 43 of Title 28 of the U.S. Code. Magistrate judges exist at the district court level, and assist the district judge in his or her work. The use of magistrate judges varies considerably from court to court. For example, a busy district judge can dispense with many routine and complex pre-trial matters relating to the conduct of a specific case by referring them to a magistrate judge. Among the activities in which magistrate judges are authorized to engage are:

- conducting hearings on case-dispositive motions, e.g., motions for judgment on the pleadings or motions for summary judgment

- ▶ conducting hearings on non-case dispositive motions, such as motions for the production of certain kinds of evidence
- ▶ supervising pre-trial discovery
- ▶ conducting various kinds of pre-trial conferences
- ▶ overseeing or conducting alternative dispute resolution procedures
- ▶ serving as a special master.

### Special Masters

The use of special masters in the United States derived from their use in the United Kingdom in chancery cases to assist the chancery court on issues of evidence and accounting matters before, during and after trials.

The appointment of special masters in the U.S. federal system is authorized by rule 53 of the Federal Rules of Civil Procedure. Under that rule, the word “master” includes “a referee, an auditor, an examiner, and an assessor.” Appointments of masters are the exception rather than the rule and are authorized in actions to be tried before a jury “only when the issues are complicated.” For non-jury trials the appointment of a master may be made “only upon a showing that some exceptional condition requires it.”

In the context of modern court dockets, many civil cases meet the rule’s requirement of “complication” for jury trials and “exceptional conditions” for non-jury trials. Special masters are allowed under the rule to conduct hearings, order the production of evidence, hear testimony, and prepare reports for the court and proposed findings of fact and conclusions of law.

The use of a special master by the district judge has the same advantages as

the use of a magistrate judge for purposes of case management: the reference of parts of the case to another authorized professional for the conduct of non-dispositive activities and procedures, to free the time of the district judge for essential and dispositive activities and actions in a particular case and the management of other cases.

### A Small Amount of Time

Judge William W. Schwarzer, immediate past director of the Federal Judicial Center, emphasizes the need for the use of case-management techniques in his instructional pamphlet, *The Elements of Case Management*, published in 1991.

“Faced with crowded dockets, federal judges may worry that they cannot keep up except by working oppressive hours. In fact, the heavy burdens of the job make it imperative that they pace themselves and keep reasonable hours to prevent burnout. This places all the more emphasis on handling cases with the maximum efficiency consistent with justice. A small amount of a judge’s time devoted to case management early in a case can save vast mounts of time later on. Judges who think they are too busy to manage cases are really too busy not to. Indeed, the busiest judges with the heaviest dockets are often the ones most in need of sound case management practices.”

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Issues of Democracy, USIA Electronic Journals, Vol. 1, No. 18, Dec. 1996

# Judicial Training Institutions

Following are three profiles of judicial training institutions in the United States.

**The National Judicial College**  
**University of Nevada, Reno/358**  
**Reno, NV 89557**  
**USA**

The National Judicial College (NJC) was established in 1963 by the American Bar Association as a private, non-profit educational institution, offering a variety of courses to more than 2,000 judges and other court officials each year, at both the campus in Reno and other sites across the United States. Participants include state trial judges; special court judges and magistrates; federal and appellate judges; and administrative law, military, and Native American tribal court judges.

The NJC curriculum concentrates on the art and skill of judging, and on new trends in the law. Some of the current topics for discussion include judicial ethics, relationships with communities and the media, good caseload management, alternate-dispute resolution techniques, and management skills. Courses are taught by individual experts, primarily

active judges and law professors, who conduct a specific seminar.

The National Judicial College welcomes participants and observers from around the world. Some English-speaking jurists have elected to participate in regular course activities, while others have come principally to observe the NJC classroom techniques and methods. There are one- and two-week intensive courses for non-English speaking judges, which include specific issues of comparative law, as well as the universal aspects of being a good judge. Jurists from Russia, South and Central America, and Southern Africa have attended NJC courses.

For information on NJC international programs, contact:  
Ms. Peggy Vidal, Academic Coordinator,  
fax 703-784-1253  
e-mail: [vidal@equinox.unr.edu](mailto:vidal@equinox.unr.edu)

The NJC homepage is: <http://www.judges.org> and contains basic information about NJC and its curriculum.

Federal Judicial Center  
Thurgood Marshall Federal  
Judiciary Building  
One Columbus Circle, NE  
Washington, DC 20002  
USA

Four years after the founding of the National Judicial College, the U.S. Congress in 1967 enacted legislation to create the Federal Judicial Center (FJC), an independent education and research agency within the judicial branch of the U.S. government. The FJC receives government funding to conduct education and training programs for federal judges and federal court employees; to conduct research on issues of court administration; and to explore new technology for the federal court system.

The FJC conducts over 50 seminars and conferences for some 2,000 federal judges, and 2,000 officers of the court. In order to reach as many of the nation's 27,000 federal court employees as possible, the FJC augments its seminar series with special educational programs designed to "train the trainers." These officers carry their FJC training back to their district court and develop local programs for their colleagues.

The FJC also administers a Visiting Foreign Judicial Fellows Program, in which an international judge or legal scholar may be in residence at the Center for up to six months to study some aspect of the American legal system. Applicants from countries with which the U.S. maintains diplomatic relations are eligible.

For information, contact:  
Mr. James Apple, Chief,  
Interjudicial Affairs Office,  
fax 202/273-4019  
e-mail: [japple@earth.fjc.gov](mailto:japple@earth.fjc.gov)

The FJC homepage is: <http://www.fjc.gov/>  
and contains more basic information about the FJC and its publications, and links to other websites.

National Center for State Courts  
300 Newport Avenue  
P.O. Box 8798  
Williamsburg, VA 23187-8798  
USA

The National Center for State Courts (NCSC) was established in 1971 as a central resource to improve the ability of U.S. state courts to dispense justice in a fair and efficient manner. This is accomplished primarily through direct expert assistance, national conferences, education and training courses, and information exchange. The NCSC library in Williamsburg, Virginia, is the largest international lending library on court administration in the world.

Among the training courses offered through the NCSC's Institute for Court Management are: caseload, jury and management; records management; planning and budgeting; court security; and computer automation. Participants include judges, court administrators, and other judicial employees. Foreign judges and court officials can participate in the core NCSC education programs. The NCSC also has developed a 3-week extended study tour for international jurists, which first establishes the framework for analyzing judicial administration, and then provides participants with first-hand experience of the U.S. court system.

For information, contact:  
Ms. Karen Heroy, Director  
International Visitors Training Program,  
fax 757-220-0449  
e-mail: "[kheroy@ncsc.dni.us](mailto:kheroy@ncsc.dni.us)"

The NCSC homepage is: <http://www.ncsc.dni.us/>  
and contains more information about the NCSC and on special topics like court technology, as well as links to other websites.

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# Article Alert

## *Recent Articles*

### *on Issues of*

### *Democracy*

**Dionne, E.J., Jr. "Back from the Dead: Neoprogessivism in the '90s"** (*The American Prospect*, no. 28, September/October 1996, pp. 24–32)

This article, while ultimately promoting the political postulate that "it's reasonable to go into debt for long-term purposes," also provides a very readable analysis of why the strength of the American conservative movement, which so dominated political debate in 1995, has abated. It gives contemporary examples of the underlying debate over fundamental issues of U.S. government—separation of powers, the roles of federal and local government, and public confidence.

**Hendrie, Edward M. "Creating Exigent Circumstances"** (*FBI Law Enforcement Bulletin*, vol. 65, no. 9, September 1996, pp. 25–32)

Hendrie, a legal instructor at the training academy for agents of the Federal Bureau of Investigation, U.S. Department of Justice, examines the very limited conditions under which American law enforcement officials can enter into premises or conduct searches without having obtained a warrant—illustrating the legal nuances with real life examples. In most circumstances, a warrant must be obtained, to protect against "unreasonable" search and seizure guaranteed to U.S. citizens by the Constitution.

**Kahn, Phyllis. "Women and Political Roles: New Group Standards"** (*Spectrum*, vol. 69, no. 2, Spring 1996, pp. 15-22)

Phyllis Kahn, serving her 12th term in the Minnesota House of Representatives, broadly analyzes the effect of women's full participation in government. She counters some of the anthropological arguments on why women cannot assume leadership roles, citing studies indicating the tangible effect of increasing numbers of women in legislatures. She concludes with a first-hand look at the changes in attitude and practice that have accompanied the growing number of women serving in elected and appointed office as professional staff and political lobbyists, noting that women's access to full participation has been in effect for only two or three generations of American life.

**Lowe, Alexandra Dylan. "The Price of Speaking Out"** (*ABA Journal*, vol. 82, September 1996, pp. 48–53)

Lowe, a lawyer and legal affairs writer, talks about the rise of law suits that involve private citizens pitted against companies in a debate over public policy. Citing the book, *Slapps: Getting Sued for Speaking Out* by law professor George W. Pring and sociologist Penelope Canan, Lowe presents several cases, including that of Nancy Hsu Fleming, who, in speaking out about her concerns, got sued

by the landfill company whom Fleming suspected of polluting the drinking-water supply in her hometown.

**Newberry, John.** “Out-of-Office Experiences” (*ABA Journal*, vol. 82, September 1996, pp. 54–57)

Four practical examples are discussed on how the Internet can enhance productivity of private law firms, from the one-man at-home office to larger international concerns.

**Rosen, Jeffrey.** “Annals of Law; The Agonizer” (*The New Yorker*, November 11, 1996, pp. 82–90.)

This comprehensive article analyzes Supreme Court Justice Anthony Kennedy’s opinions regarding judicial interpretation of legal and moral issues, and his role in the decision-making process of the Court. As the Court’s decisive voice, his personal and professional views on a variety of issues are analyzed. His opinions on abortion, (*Planned Parenthood v. Casey*) gay rights, (*Romer v. Evans*) and First Amendment issues are explained and critiqued. Kennedy’s past and future ambitions are also discussed.

**Stewart, David O.** “One More Legacy of Rodney King” (*ABA Journal*, vol. 82, September 1996, pp. 44–46)

This article examines a recent decision by the U.S. Supreme Court which will permit greater sentencing discretion for federal trial judges, without undermining the intent of the 1984 Sentencing Reform Act. The act sets sentencing guidelines to reduce disparities in sentences imposed on defendants in similar cases, but has been criticized for stripping judges of the ability to tailor sentences to the circumstances of the individual defendants.

**Stirling, Patricia.** “The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization” (*American University Journal of International Law and Policy*, vol. 11, no. 1, 1996, pp. 1–46)

The author, whose research was supported by a Ford Foundation grant, argues the need for a multilateral approach in the form of trade sanctions for the enforcement of human rights. In examining the traditional impediments to enforcement, the author focuses on the need to define “core” human rights and analyzes the weakness of both the U.N.-model multilateral approach and the unilateral U.S. actions to remedy violations. This is a good companion piece to the U.S. Information Agency-produced *Introduction to Human Rights*.

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Issues of Democracy, USIA Electronic Journals, Vol. 1, No. 18, Dec. 1996

# Internet Sites

## *On Democracy and Human Rights Themes*

Please note that USIA assumes no responsibility for the content and availability of those non-USIA resources listed below which reside solely with the providers:

### FUNDAMENTAL U.S. DOCUMENTS

#### **U.S. Constitution**

<http://www.usia.gov/HTML/consteng.html>

##### **Français**

<http://www.usia.gov/HTML/constfr.html>

##### **Español**

<http://www.usia.gov/HTML/constes.html>

#### **Bill of Rights**

<http://www.usia.gov/usa/aboutusa/billeng.htm>

##### **Français**

<http://www.usia.gov/usa/aboutusa/billfr.htm>

##### **Español**

<http://www.usia.gov/usa/aboutusa/billes.htm>

#### **Declaration of Independence**

<http://www.usia.gov/usa/aboutusa/deceng.htm>

##### **Français**

<http://www.usia.gov/usa/aboutusa/decfr.htm>

##### **Español**

<http://www.usia.gov/usa/aboutusa/dec.es.htm>

#### **The Federalist Papers**

<gopher://spinaltap.micro.umn.edu/11/Ebooks/By%20Title/Fedpap>

### U.S. GOVERNMENT

#### **Executive Branch**

<http://www.vote-smart.org/executive/>

#### **Legislative Branch**

<http://www.vote-smart.org/congress/>

##### **U.S. Senate**

<gopher://ftp.senate.gov>

##### **U.S. House of Representatives**

<http://www.house.gov>

## Judicial Branch

An in-depth site on the U.S. judiciary, from the court system to legal terms.

<http://www.vote-smart.org/judiciary/>

## The Cabinet

<gopher://198.80.36.82/11s/usa/politics/cabinet>

## RELATED SITES ON THE INDEPENDENT JUDICIARY

### Federal Judicial Center

The federal courts' agency for research and education, this FJC website links to other legal institutions, including the Supreme Court and the U.S. Courts of Appeal.

<http://www.fjc.gov/govlinks.html>

### Supreme Court

A comprehensive link to the Supreme Court, including the creation of the Court, its authority, decisions and the individual justices.

<http://www.vote-smart.org/judiciary/supct/supctdir.htm>

### U.S. Federal Courts Homepage

A clearinghouse for information from and about the judicial branch of the U.S. government.

<http://www.uscourts.gov>

### Legal Information Institute— Cornell Law School

Publications of the Legal Information Institute with links to other relevant law-related websites.

<http://www.law.cornell.edu/lii.table.html>

## Chicago-Kent College of Law (Illinois Institute of Technology)

Comprehensive list of legal institutions, special areas of law, legal resources and other law-related websites.

<http://www.kentlaw.edu/lawlinks/index.html>

## University of Chicago Law Library

A must-see site for the legal professional. Contains the "Law Lists," a three-part series providing background information and the use of law-related electronic mailing lists and Usenet newsgroups in general.

<http://www.lib.uchicago.edu/~llou/lawlists/info.html>

## 'Lectric Law Library

Take a tour in cyberspace of what's out there, legally speaking. Sites you can link to here include: the News Room, the Legal Professional's Lounge, the Periodical Reading Room, the Laypeople's Law Lounge and the Bookstore.

<http://www.lectlaw.com/rotu.html>

## Lawcrawler

A search engine for federal and state laws, and a resource for other links, with an emphasis on international sites.

<http://www.lawcrawler.com>

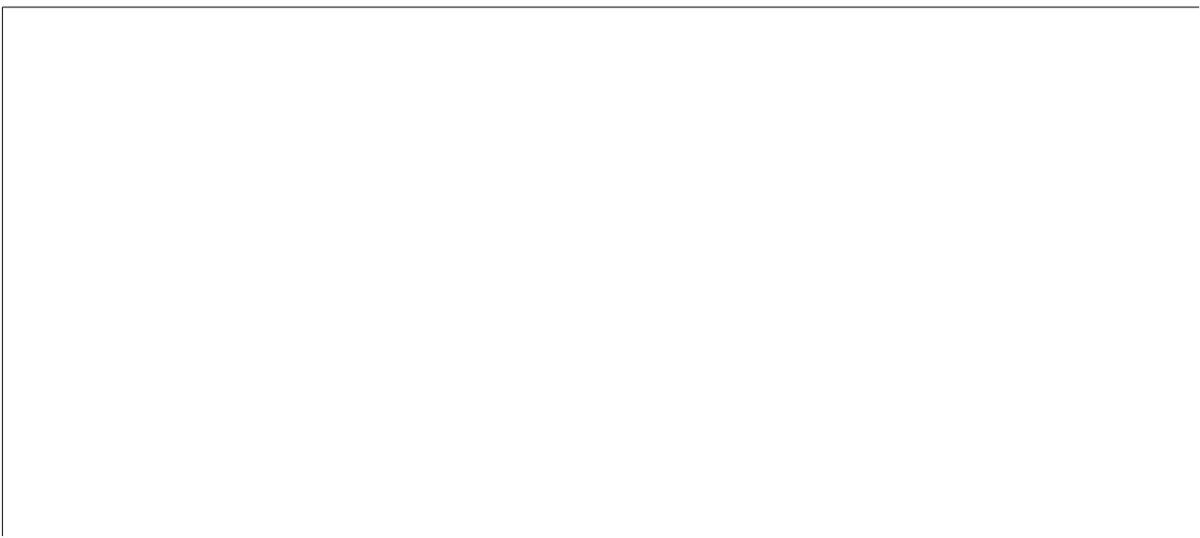
## Lawnet

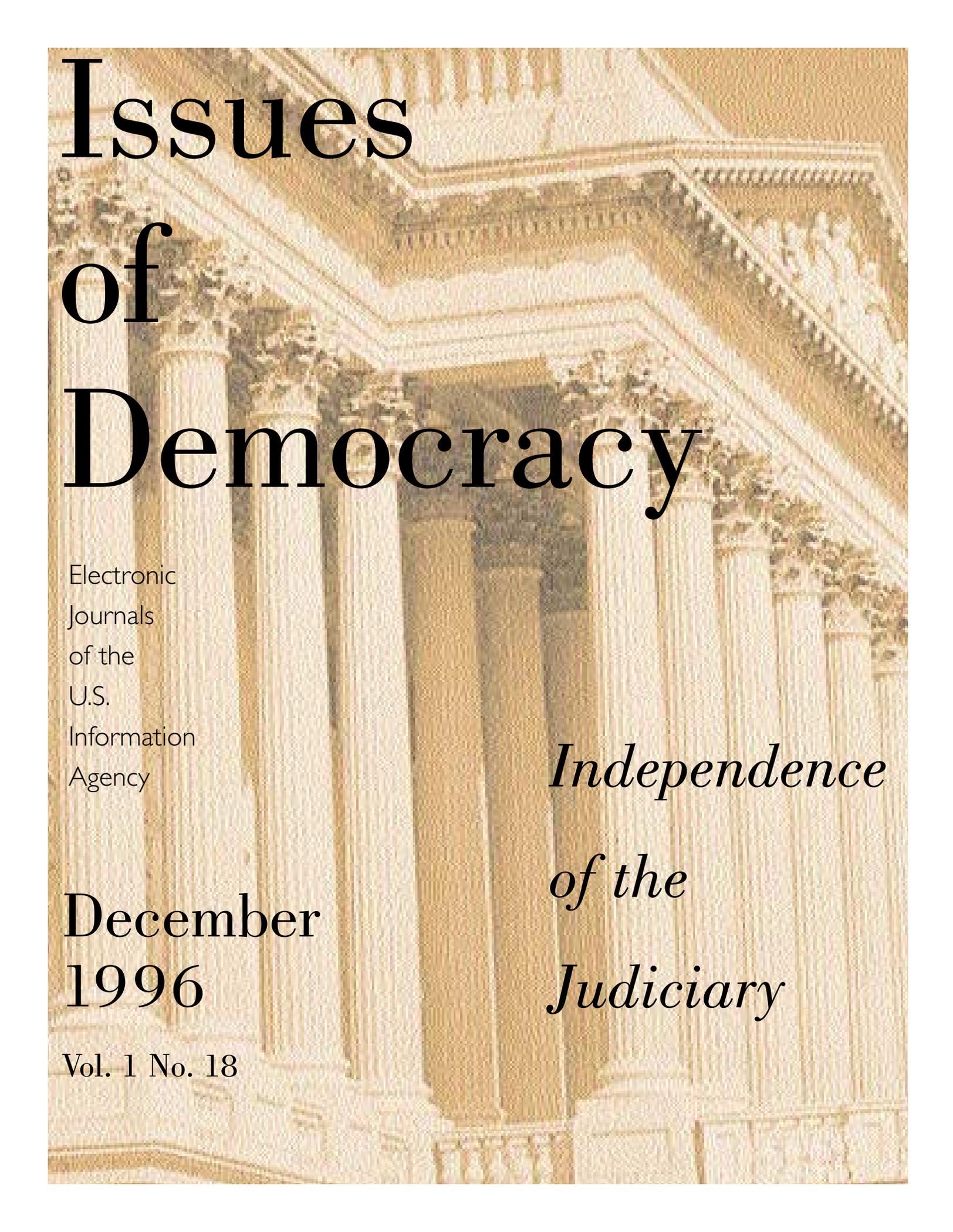
Links to a variety of law-related areas, as well as to international sites.

<http://www.lawnet.net/general.html>

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