Thursday – May 15, 2008
Citizens' Forum On Judicial Accountability

NEGATIVE DEBATE POSITION

***Negation*:** Government processes for judicial oversight in America generally lack adequate procedural protections to vindicate the substantive rights of complainants alleging judicial misconduct.

Argument I:

America's legal system is a divine way of resolving disputes until it seems to malfunction because of judicial misconduct. At that point the real problem for our country is not the reality or unwarranted perception of judicial misconduct. As a country anchored by its constitution and the rule of law, a critical problem in America is that a single group — judges — substantially control or are the gatekeepers for nearly every government process by which their conduct is evaluated. And when we get beyond administrative claims, lawsuits, appeals, petitions, and judicial disciplinary procedures; private citizens are thrust into credibility contests with judges when challenging them before legislators and criminal law enforcers.

The level of self-policing vested in U. S. judges accomplishes an imbalance between America's judiciary and most U. S. citizens. It allows judges to avoid comprehensive scrutiny with ease compared to the energy average people must extend to redress what they believe is judicial misconduct. Those dynamics can foster corruption just as much as they may signal the proper functioning of courts.

It could be that efforts to prove judicial misconduct usually fail because judges rarely exceed there lawful authority, which is considerable. Some would say that judges essentially immunize themselves from discipline and compatible liability through misrepresentations and intimidation. And my opponent's debate resolution must fail because American government, with all of its legal processes, does not guarantee anyone a balanced determination of which is the case. Are we getting it right or has our judicial branch gone wrong?

Ultimately judges recite the facts and define the law that justify or condemn their behavior. Should they distort, omit, or ignore relevant facts or law, the proof is usually enshrined by a record. But a fair consideration of these often voluminous records is not mandated in a practical sense for any government official empowered to respond with corrective action.

Of course legislators and prosecutors have more options in providing lawful relief than do judges. In fact judges need at least the acquiescence of their colleagues to withhold equal protection and proper relief. Nothing regularly contains that kind of scheming other than the

moral character of judges, which makes collusion quite possible for the ethically challenged.

The few people who wanted me disciplined or just attacked my character and ethics as a lawyer and reform advocate were always among those I cared about the most, zealously represented, charged relatively little or nothing, but failed to deliver the relief they sought. And what "they sought" was not always reasonable. Anyone who understands that doing your job does not keep everyone happy should accept that self-interest is not the primary motive when judges insulate themselves from sanctions or liability for doing their jobs. However, deliberate, willful, or reckless violations of rights are not part of judicial discretion. The government processes for proving these transgressions should not be under the exclusive control of judges or people with jobs they directly regulate. The inherent conflict of interest is not adequately checked by the U. S. Supreme Court, media, academia, or the collective vigilance of private citizens.

Some ethical choices that judges should make can be required legislatively such as through stricter recusal or disqualification laws to get potentially biased judges off of cases;

Limiting a court's jurisdiction to contain judicial discretion can be a weapon against, and an instrument of tyranny. So like any double edged sword, that tool should be used cautiously;

An inspector general could accomplish effective judicial oversight no more subject to political manipulation than anything we have now; or the office could chip away at judicial independence;

Obviously where there is power, there can be an abuse of power.

Today we are considering a balancing of power. It can be restored or created gradually, but America needs to fortify and perhaps expand its jury trial system to confidently confirm or refute judicial corruption. The hallmark of that system is its reliance on randomly selected individuals as fact-finders. Juries consider complex anti-trust, pharmaceutical industry, insurance coverage, and medical malpractice claims to name a few. Surely the fate of judges can be entrusted to a jury of their peers who are not other judges or people they directly regulate.

America cannot fairly confirm or refute judicial corruption without fortifying and perhaps expanding its jury trial system. The hallmark of that system is its reliance on randomly selected individuals as fact-finders. Whatever shortcomings juries may bring to evaluating judicial conduct would extend to any legal matter. Yet juries consider complex anti-trust, pharmaceutical industry, insurance coverage, and medical

malpractice claims. Surely the fate of judges can be entrusted to a jury of their peers who are not other judges or government officials whose power is substantially impacted by judges.

Argument II:

Self-policing is not the absence of accountability. It reflects a choice of who sorts between legitimate and improper behavior. Fortunately a broad diversity is brought to bear when U. S. judges, legislators, and prosecutors do the sorting and judicial conduct is at issue.

Our judges, legislators, and prosecutors emerge under various presidential administrations. They have different ethnic, racial, religious, social, and educational backgrounds. They hail from different geographic areas. Their life and work experiences are different.

Public service unifies this group and apparently (more than anything else) endows it with the intellectual discipline to disregard popular sentiment and evaluate judges based on law, as checked by America's separation of powers. [Why is that apparent?] Because there is no judicial accountability that judges, legislators, and prosecutors do not allow in America; they are the gatekeepers. It seems they have some

competence - some ability in this area that private citizens cannot rival. But we occasionally play a part through jury trials.

So can the rule of law ensure due process (without a jury trial system on steroids) when the rule succumbs to judicial misconduct? Notice the parameters: we have the rule of law; an evaluation of whether it has been violated; and a restoration of the rule when breached. As long as U. S. government divides between executive, legislative, and judicial branches — judges will guard and implement our rule of law. And in doing their jobs, they will at times be praised and criticized.

It is when criticism of judges escalates to complaints of deliberate, willful, or reckless misconduct that they should not respond alone for America's judiciary. Restoring the rule of law when breached is an obligation of all Americans. A system for our competent, substantial, and direct involvement in every phase of the process is the only balanced response; it is the strategy for judicial oversight that makes the most sense.

The prospect of judges being tried before run-away juries is sure to spark judicial misconduct complaints in a litigious society. Screening those cases through hospitable fact finding processes is certain to

increase the number deemed viable. In fact viable judicial misconduct complaints may proliferate before this jury-friendly system corrects itself and settles on what should be proscribed. But overall confidence in the judiciary and its independence will survive the shift.

Suppressing pools of judicial misconduct complaints is not a proper end, in and of itself in a free society. Some good comes from attaining that goal; the suppression. Reduced costs; perhaps the appearance of justice; job security among judges. America's founding fathers embraced those outcomes — but the constitutional provision is for the good behavior of judges.

Rebuttal:

A fifth rate fiction writer could contrive motive, opportunity, and means to entangle judges in alleged schemes to defraud the courts. But there are judicial outcomes and behaviors that defy logic and mathematical probability without at least a possibility of coordinated misconduct. These are fact sensitive matters within the prerogative of juries. Supreme Court Justice Byron White tells us "(e)ven when defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely."

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