

The State Courts in 2005: A Year of Living Dangerously

By David Rottman

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Court security proved to be a danger that could bring the branches of government together. A series of summits brought together officials from all three branches of government at the local, state and federal levels. The result was A National Strategic Plan for Judicial Branch Security. Other dangers were not adequately addressed, especially those resulting from efforts for politicize the judiciary in ways that pose fundamental threats to longstanding checks and balances among the branches of state government.

Introduction

For the nation's courts, 2005 was a year of living dangerously. High profile national news stories tell part of the story. February: In Chicago, a federal judge, recently the target of an assassination plot by a white supremacist, returned home to find her husband and mother murdered by a litigant whose medical malpractice claim had been dismissed.¹ March: In an Atlanta courthouse, a defendant on trial for rape and other violent felonies grabbed the gun of a sheriff's deputy while being escorted to the courtroom, and then killed the judge and court reporter. April: A Florida trial judge was "vilified, bombarded with harassing letters and e-mails, and even threatened with death by people who disagree with his rulings in the (Terri) Schiavo case."²

The other part of the story emerges from efforts in many states to politicize the judiciary as a way to leverage political party advantage or to promote the agendas of specific social or economic interests. State legislators in 2005 sought to remove court jurisdiction over entire categories of cases, to make judicial selection more political, and to assume authority over court rules. Federal courthouses also proved to be dangerous places for the state courts, especially the 39 states that elect some or all of their judges. Litigation in several U.S. circuits and individual states (notably Alaska, Kentucky, North Dakota, and, still pending, in Indiana) eliminated basic steps states have taken for decades to keep judicial elections different from those for political office. As a result, judicial candidates in many states now can personally solicit campaign funds from lawyers or litigants and can engage in partisan political activities—and also render fair and impartial justice in actuality and appearance.³

The consequences of such politicized arrangements emerged in another national news story. Texas: The indictment of former House Majority Leader Tom Delay led to a scramble to find a trial judge acceptable to both the defense and the prosecu-

tion in a state where judges are elected on a partisan ticket and often personally contribute to the funding of partisan causes.⁴

Checks and Balances

Court security proved to be a danger that could bring the branches of government together. One response to the year of living dangerously was a series of summits—one in April and a follow-up in November—that brought together officials from all three branches of government at the local, state and federal levels. The result was *A National Strategic Plan for Judicial Branch Security*, containing eight recommended strategies.⁵

For the most part, however, 2005 posed some fundamental threats to preserving the checks and balances among the branches of government. Politicizing the judiciary puts in jeopardy the checks and balances so carefully inserted into the federal and state constitutions.

"Court stripping" is one way those checks and balances can become misaligned. It is also "one of the words we will not be able to live without next year in 2006," according to those who compiled the *Oxford American Dictionary*. "Court stripping is when legislatures try to remove powers from the courts, usually federal but often state, so that the courts can't rule on laws they've passed."⁶ In the *Schiavo* case, Congress sought to strip the Florida state courts of their final jurisdiction over a state court matter by superimposing federal court jurisdiction, and by ordering the federal courts to consider the claims of Schiavo's parents, contrary to fundamental constitutional principles. The state court decision ultimately stood.

At the state level, bills were introduced to eliminate the jurisdiction of any state court to hear and decide school funding challenges (e.g., Kansas, Missouri), and shift the power to write court rules from the state supreme court to the legislature (e.g., Arizona, Florida).⁷ The Delaware legislature, fully informed

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of the dubious constitutionality of its action, in January passed legislation overturning the state Supreme Court's 2004 ruling interpreting the meaning of "life imprisonment with the possibility of parole." The state Supreme Court subsequently granted the state attorney general's motion for re-argument of the case, an action that, to one commentator, "demonstrates respect for the other branches of government."⁸

Respect for the judicial branch was not evident in a number of states where legislatures and executive branch officials put traditional checks and balances in jeopardy. Some of the more striking examples are described in the next section, which deals with trends in judicial selection.

Judicial Elections

The fate of judges at election time increasingly is caught up in state politics, even where the court is on the sidelines of the controversy. In Pennsylvania, the immediate target of public anger was the legislature because of a pay raise they granted themselves, buried in an amendment to an unrelated bill passed at 2 a.m. The state Supreme Court upheld the legislature's action. Solely because of that, vigorous campaigns were mounted against the two Supreme Court justices up for retention election, in which the public is asked whether a sitting judge shall be retained in office. Both justices received atypically low "yes" votes; Justice Russell Nigro, with 49 percent of the vote, lost his seat. A political analyst commented: "This election has been a proxy for the reformers to send a message to Harrisburg."⁹

Federal courts in 2005 increased the likelihood state courts would be driven deeper into state politics. The Supreme Court on Jan. 23, 2006, refused to grant a writ of certiorari to review the 8th Circuit Court of Appeal's decision in *Dimick v. Republican Party of Minnesota* (previously known as the *White* case) that struck down significant portions of the state's code of judicial conduct. Rules limiting judges' and judicial candidates' participation in partisan political activities and banning certain direct solicitation of campaign contributions were deemed unconstitutional. The attorney who litigated the challenge to the Minnesota rules concluded, "It's becoming clear the First Amendment has a broad application to judicial elections and that the original foundation for the regulation of judicial elections has been pretty well destroyed."¹⁰

North Dakota offers an example of the consequences of such federal court decisions. The state's canons of judicial conduct were challenged in U.S. District Court two years ago and ruled unconstitu-

tional in 2005. Under the existing canons, judicial candidates were permitted to discuss their backgrounds and qualifications, but were barred from making statements "that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."¹¹ The new rules, released in January, 2006, allow candidates to respond "with caution" to questions about their opinion on issues and to make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views.

In a number of states, considerable legislative effort was also expended on making judicial elections more partisan. Arizona is a prime example. About 35 bills were introduced to alter the long-standing relationship between the legislature and the courts, and the courts and the public. Many proposed pieces of legislation targeted the states' tradition of merit selection of judges, replacing them with contested elections. None of these bills became law, but the onslaught has been unrelenting, leading retired U.S. Supreme Court Justice Sandra Day O'Connor to urge a group of female lawyers in her native state to fight "attacks on an independent judiciary." "If you don't know about it, find out about it because it's real, it is very serious and, unless all of us take it seriously and do what we can to make the public understand, then an activist judge is a judge who gets up in the morning and goes to work."¹²

Kansas and Missouri also offer examples. In Kansas, two controversial state Supreme Court rulings—one striking down the death penalty and the other ruling that implementation of school funding was not proceeding according to the law—led to proposed constitutional amendments. One amendment would substitute contested elections for the current (since 1958) merit selection of Supreme Court justices. The other amendment would add senate confirmation to the current selection process for all appellate judges (nominations from a nonpartisan committee, gubernatorial appointment, and then retention elections).

In Missouri, legislation was introduced to amend the state constitution to require the advice and consent of the Senate for appellate judgeships, reduce the term of office from 12 to five years for Supreme Court justices, and shift the standard for retention elections from a simple majority to two-thirds of the vote.

Relationships among the three branches of government will always be undergoing change. In 2005, the mostly unsuccessful legislative efforts in a number of states sought to revolutionize those relations. States need to return to what is sometimes termed the "flexible model" of separation of powers, one

in which there is separateness but interdependence; autonomy but reciprocity. “In the flexible model, there can be a greater amount of give and take between the branches, but there are limits. First, no branch can arrogate to itself the core functions of a coordinate branch of government. Second no branch may deprive another branch of the powers and resources necessary to perform its core function.”¹³

Courts and the Public

The ultimate implications of these efforts to politicize the judiciary rest with the public’s response. On the one hand, once granted, the public resolutely refuses to give up its right to elect its judges.¹⁴ On the other hand, an informed and vigilant public is the best available bulwark against efforts to politicize the judiciary.

One reading of the public mood was recorded in response to one of the most controversial court cases of 2005. In the *Schiavo* case, the public was emphatic in opposing Congressional tampering with court jurisdiction: 74 percent of Americans believed that Congress should not have involved itself in the matter. That preference was across the board: large majorities (more than two-thirds) of white evangelicals, conservatives and Republicans believed that Congress should have stayed out of the case.¹⁵

Several public opinion surveys in 2005 were particularly revealing about the public’s image of the judicial branch of government and its relations to the other branches. Overall, when it comes to the role of the judiciary, the public is poor on details, but more solid on principles. In mid-year, the American Bar Association sponsored an opinion survey on civic education, concluding that the “majority of Americans could use a civics refresher course.”

Among the findings, just over half (55 percent) of American adults can identify the three branches of government, and a more substantial two-thirds (64 percent) identify the principle of checks and balances.¹⁶ Once explained, the public overwhelmingly believes the principle of checks and balances is very important (69 percent), and another 17 percent say it is important. The more people know about our political system, the more likely they are to feel checks and balances are important.

The public’s views on checks and balances were further elaborated in another national survey conducted in July.¹⁷ The researchers concluded that certain core American values underlie the opinions people hold about the judiciary across the nation: fairness, responsibility and preservation of one’s rights. These core values were expressed in:

- A strong belief in the courts’ role in protecting individual rights by upholding the Constitution;
- A priority given to guaranteeing access to justice for all Americans;
- A desire for the courts to be fair and impartial, which was defined in the survey as being free from political influence or pressure once a judge is on the bench; and
- The need for accountability to ensure that judges follow the law and Constitution, and not their own personal beliefs.

Even on a controversial topic such as gay marriage, the public’s preference is that the courts be left to adjudicate disputes: 61 percent of Americans believe that “politicians should not prevent the courts from hearing (these) cases, because the purpose of the courts is to provide access to justice to everyone, even those with unpopular beliefs (See Table A).

Table A:
Public Views on the Role of the Courts in Controversial Cases

Key: With whom do you agree with more, those who say: (a) When judges make decisions that are outside the mainstream of American belief, such as legalizing gay marriage, Congress should stop the courts from hearing the cases, or (b) Politicians should not prevent the courts from hearing cases, because the purpose of the courts is to provide access to justice to everyone, even those with unpopular beliefs.

<i>Congress should stop courts (a)</i>		<i>Congress should not stop courts (b)</i>		
<i>Strongly agree</i>	<i>Somewhat agree</i>	<i>Strongly agree</i>	<i>Somewhat agree</i>	<i>Don't know</i>
23%	10%	43%	19%	6%

Source: Belden, Russonello and Stewart, *Speak to American Values*, Washington, D.C.: Justice at Stake, 2006 (unpublished data provided to the author).

Table B: Public Views on the Need for Checks on the Courts

We need more congressional checks on the courts to reduce the power of the courts and individual judges

<i>Strongly agree</i>	<i>Somewhat agree</i>	<i>Somewhat disagree</i>	<i>Strongly disagree</i>	<i>Don't know</i>
23%	26%	22%	23%	5%

Source: Belden, Russonello and Stewart, *Speak to American Values*, Washington, D.C.: Justice at Stake, 2006 (unpublished data provided to the author).

As noted above, however, the American public also believes the courts must be accountable. Respondents in the “Speak to Values” survey were split evenly on whether more congressional checks on the courts are needed (Table B).

Accountability also was on the mind of the California public in another major opinion survey about the courts conducted in 2005.¹⁸ Nearly one-half of the adults interviewed reported their expectation that the courts should report on their job performance to the public was not being met. That was the greatest unmet expectation to emerge from the survey, ahead of ensuring public safety and concluding cases in a timely manner.

These and other findings from the California 2005 survey are being explored in greater depth through a second round of opinion research. Focus groups of 10 to 12 citizens are being held around the state to hear what people have to say about judicial accountability and other topics. Nationally, the state court community has engaged in extensive discussion and preliminary testing of *CourTools*, a set of 10 performance measures for trial courts. Measures are offered in such areas as access and fairness, effective use of jurors, and cost per case.¹⁹

Ultimately, however, individual judges are accountable to the Constitution and to the law. As one chief justice put it in 2005:

“Judges are accountable to uphold the rule of law through their decisions. This means that, just as juries are asked to set aside their personal beliefs and decide a case based on the law and the evidence, judges also must set aside their personal feelings, beliefs and attitudes and decide each case according to the facts and law in that case. Accountability to the law sometimes comes at a high price—a judge must follow the law even when doing so would be extremely unpopular.”²⁰

Such a formulation seems broadly consistent with the public’s view of how judges should be held accountable.

In every state, appellate court review and independent judicial discipline bodies are the primary mechanism for ensuring that judges are accountable to the law. And in 39 states, some or all judges are accountable directly to the electorate.

Checks in Balance

Fair and impartial courts require that judges be treated differently from officials in the political branches of government. Legislators and governors, as well as other executive branch officials, represent the public and can take sides in disputes at any stage. Judges represent the law. Efforts to further politicize the judiciary threaten the checks and balances that underpin our system of government. In 2006 state judiciaries must work with legislators to rebuild a relationship of mutual respect, increase efforts to educate the public about the role of the judicial branch, both through renewed and innovative efforts to promote civics education and in their written decisions.

The state judiciaries have pledged to do their part. In July, the Conference of (State) Chief Justices and the Conference of State Court Administrators jointly resolved “to promote judicial governance and accountable state Judicial Branch institutions that provide the highest quality of service to the public” and noted that “judicial accountability can foster an environment where other branches of government and the public understand the judiciary’s role and are less likely to interfere with the judiciary’s ability to govern itself.”²¹

Author’s Note:

The views expressed in this article are those of the author and do not represent the views of the National Center for State Courts or any other organization.

Notes

¹Dan Baldwin, “Police: DNA from Lefkow Killings Matches Man who Committed Suicide,” Associated Press, March 11, 2005.

²Jeffrey Rosen, "It's the Law, Not the Judge; But These Days the Bench is the Hot Seat," *Washington Post*, March 27, 2005, Outlook, B01. As the Florida Supreme Court noted in an earlier phase of the *Schiavo* proceedings, "As we recently explained, '[w]hat is in the Constitution always must prevail over emotion. Our oaths as judges require that this principle is our polestar, and it alone.'" *Bush v. Schiavo*, 885 So. 2d 321, 336 (Fla. 2004).

³*Republican Party v. White* (a/k/a/ *White II*) 416 F.3d 738, (2005) petition for cert denied 1/23/06; *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 1021 (2005); *Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp. 2d 1080 (2005).

⁴The resolution, for now, is the selection of a Democrat to preside over the case, but one whose own political contributions amounted to only \$450. Kelly Shannon, "DeLay Case Finally Gets Judge—A Democrat," Associated Press, November 4, 2005.

⁵The summits were funded by the Bureau of Justice Assistance, U.S. Department of Justice and co-sponsored by the National Center for State Courts and the National Sheriff Association.

⁶Erin McKean, editor of the *Oxford American Dictionary*, quoted in an interview by Steve Inskeep on NPR's Morning Edition, "New Words of 2005 and Beyond," December 30, 2005.

⁷Such legislation was often retaliation for court decisions that challenged popular pieces of legislation, as in Florida where the proposed legislative takeover of court rule-making came in response to a decision that allowed convicted more time to seek DNA testing.

⁸The Supreme Court ultimately reversed its decision but also ruled the law as unconstitutional since the legislature was assuming powers reserved for the courts. Esteban Parra, "Top Court to Revisit Sentencing," *News Journal* (New Castle), February 5, 2005.

⁹Tom Barnes, "Voters Reject Supreme Court Justice Nigro," *Pittsburgh Post Gazette*, November 9, 2005.

¹⁰David G. Savage, "Supreme Court Ruling Could Spur Partisan Judicial Campaigns," *L.A. Times*, January 24, 2006. The quote is by James Bopp Jr. after the U.S. Supreme Court denied Minnesota's petition to review the 8th Circuit's decision. The case was originally *White v. the Republican Party of Minnesota*; by 2005 it had become the *Dimick* case.

¹¹Canon 5A(3)(d)(ii).

¹²C.J. Karamargin, "O'Connor, in Tucson, Blasts Moves to Alter how Ariz. Judges are Picked," *Arizona Daily Star*, February 3, 2006.

¹³J. Clark Kelso, *A Manual for Judges and Court Managers about Judicial Involvement in Legislative Processes*, Capital Center for Government Law and Policy, University

of the Pacific, McGeorge School of Law, 2002. See also the National Center for State Courts Web-resource on the topic at http://www.ncsconline.org/projects_Initiatives/PTC/PublicTrust7Wtr05.htm.

¹⁴D. Rottman and R. Schotland, "2004 Judicial Elections," *Spectrum: The Journal of State Government* 78, 17–19 (Winter 2005).

¹⁵Findings reported are from surveys of 2,000 adults conducted by the Pew Research Center for the People and the Press, "Abortion and Rights of Terror Suspects Top Court Issues," August 3, 2005. Other surveys conducted at the time of Congressional action report very similar findings. See the summary provided in "Americans on the Terri Schiavo Situation in Review," available at <http://www.heartheissues.com/americanson-terrischiavoireview-g.html>.

¹⁶Telephone interviews were completed with 1,000 randomly selected adults in late July 2005. "Civics Education," prepared for the American Bar Association, July 2005 by Harris Interactive.

¹⁷Some 1,300 American adults were interviewed. Belden, Russonello & Stewart, *Speak to American Values*, Washington, D.C.: Justice at Stake, 2006, available at <http://www.justiceatstake.org/files/SpeakttoAmericasValues2.pdf>.

¹⁸David Rottman, "Trust and Confidence in the California Courts," 2005 (Part I: Findings and Recommendations, San Francisco, Judicial Council of California, 2005) available at http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf.

¹⁹*CourTools* was developed by the National Center for State Courts and builds on the previous work of the Commission on Trial Court Performance Standards, which set out 20 standards that all trial courts should meet. See: http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm.

²⁰Chief Justice Michael A. Wolff, "Missouri Judges are Accountable ... to the Law." Supreme Court of Missouri, December 15, 2005.

²¹Resolution 14 (of 2005) in Support of Measuring Court Performance. <http://ccj.ncsc.dni.us/CourtAdminResolutions/resol14MeasuringCourtPerformance.html>.

About the Author

David Rottman is principal court research consultant at the National Center for State Courts, where he has worked since 1987. His current interests include judicial selection, public opinion on the courts, the evolution of court structure, and the pros and cons of problem-solving courts. He is the author of books on modern Ireland, social class, and community courts. Rottman has a Ph.D. in sociology from the University of Illinois at Urbana, and previously worked at the Economic and Social Institute in Dublin, Ireland.