

# Governing the State Judiciaries: Exercising Leadership and Other Challenges

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*State courts in 2011 continued to face acute problems associated with contention over judicial selection, unrealistic budget allocations and attacks on the legitimacy of the state court's role as arbiter of the constitutionality of state laws. Sound leadership is a key ingredient to overcoming these and other pressing challenges. Steps taken to strengthen and reinvigorate judicial leadership were among the more newsworthy developments of 2011. Those steps included efforts to enlist new understandings of what compels people to obey the law in order to better guide court management and court reform.*

## Supporting Judicial Leadership

However selected, as a category, judicial leaders face fundamental challenges inherent in their positions. Chief justices of state supreme courts, for example, serve terms and are selected by methods that differ dramatically among the states. At one extreme, 13 states appoint chief justices for life, until age 70, or to indefinite terms. At the other extreme, seven states require the chief justice seat to rotate annually or biannually such that no chief justice holds successive terms of office. In the remaining states, chief justices serve fixed terms ranging from three to 14 years.<sup>2</sup> A lack of continuity in leaders is even more pronounced at the trial court level, where short, nonconsecutive terms for presiding judges prevail.

The manner in which chief justices are selected varies almost as greatly as the length of their terms. Some are elected to the position by the state's voters, some by choice of their peers on the supreme court, others by gubernatorial appointment or seniority, and, as previously noted, some rotate into the position. Each method of selection carries implications for the status of a chief justice as a leader.

Whatever the term length and selection method, nearly all chief justices stand at the apex of a loosely organized hierarchy for policymaking and administration. The authority to have the final say on cases is clearly delineated through the appellate process. Whether a chief justice has authority to decide administrative matters or set policy for the court system is less clear cut. Moreover, core court functions are often responsibilities shared by state and local court leaders. Consequently, state-level judicial leaders may have limited ability to move forcefully on many policy and management issues.

Short terms of office for judicial leaders and limited authority to make management decisions

for trial courts have not always been problematic. Judicial leadership, however, has undergone a qualitative change in recent decades. Judicial leaders traditionally held limited responsibilities. For the most part, as chief justices they presided as the first among equals in deciding cases on appeal. Most decisions affecting the administration of justice occurred locally. In recent decades state court systems have centralized, making state supreme courts, in the words of the longest-serving chief justice, Randall Shepard of Indiana, "the boards of directors of state court systems." Leadership demands grew during the 1980s and 1990s as judicial leaders were sought as important contributors to programs responding to social and economic problems, such as domestic violence, mortgage foreclosure, child welfare, and substance abuse. As a result, the leadership challenges at both the state and local levels expanded for judges. A gap opened between what chief justices were expected to do and what they had the capacity to accomplish.<sup>3</sup>

To identify ways to overcome these challenges, the Harvard Kennedy School of Government collaborated with the National Center for State Courts in convening an "Executive Session on Court Leadership in the 21st Century." Executive Sessions bring together individuals of independent standing who take joint responsibility for rethinking and improving society's response to an issue. After three years of meetings, the Executive Session concluded its work in 2011. More than a dozen papers will be published throughout 2012 to transmit fresh ideas on how judicial leadership can be more effective for courts and other parts of the justice system. The first two papers in the "Perspectives on State Court Leadership" series were published in early 2012.

## STATE COURTS

In the first paper, “A Case for Court Governance Principles,”<sup>4</sup> Chief Justice Christine Durham of the Utah Supreme Court and Utah State Court Administrator Dan Becker propose a new approach to court governance that focuses on 11 unifying principles. The first eight principles reference necessary elements for preserving a well-managed court system:

- A well-defined governance structure for policy decision-making and administration for the entire court system;
- Meaningful input from all court levels into the decision-making process;
- Selection of judicial leadership based on competency, not seniority or rotation;
- Commitment to transparency and accountability;
- A focus on policy level issues, delegation with clarity to administrative staff, and a commitment to evaluation;
- Open communication on decisions and how they are reached;
- Clear, well-understood and well-respected roles and responsibilities among the governing entity, presiding judges, court administrators, boards of judges, and court committees; and
- A system that speaks with a single voice.

The remaining principles govern how the court system relates to the rest of state government:

- Authority to allocate resources and spend appropriated funds independent of the legislative and executive branches;
- Positive institutional relationships that foster trust among other branches and constituencies; and
- The judicial branch should govern and administer operations that are core to the process of adjudication.<sup>5</sup>

The second paper, “Herding Lions: Shared Leadership of State Trial Courts,”<sup>6</sup> focuses on the positive aspects of the inherent tensions present in most contemporary state court systems.<sup>7</sup> Retired Phoenix trial judge Barbara Mundell and Texas Chief Justice Wallace Jefferson note how standardization and centralization of court governance result in significant tensions between local courts and the statewide court administration. Instead of principles, Mundell and Jefferson propose a new approach to court governance based on recognition of the collective responsibility of all courts within a state for the quality of justice administered. They urge that leadership be shared across the different levels of court structure and that local innovation be encouraged

and, where effective, replicated statewide. Recognizing the benefits of a healthy tension between the local and state levels, they propose specific initiatives that “stand to create a more cohesive sense of court mission and shared leadership on the part of the chief justice, the state administrative office, presiding judges, trial judges, and court personnel.”

### **Judicial Evaluation Programs**

Most judges—nearly 90 percent—run in a popular election to obtain or retain their office. Unlike other elected officials, judges frequently participate in performance evaluation programs. In nearly half of the states—20 in 2011—formal, ongoing judicial performance evaluation programs exist for some or all trial judges. Similar programs at the appellate level are being planned. The evaluation results are used for purposes that range from judicial self-improvement, internal court administrative decisions on retention and advancement in office, planning judicial education programs and, in seven states, as information for voters when deciding on election day whether a judge should be retained in office. The latter use is part of the Missouri Plan, in which a nominating commission selects three candidates for an open judgeship, the governor selects one of the three for the post, and the judge subsequently runs against their own record when voters are asked if “Judge X should be retained in office.”

The primary method for evaluation in all uses is the distribution of evaluation surveys to attorneys, court personnel, litigants, and others who have appeared before a judge in a case. Research published in 2011 raises questions about the integrity of surveys now being used in Judicial Performance Evaluation programs. Specifically, at least some existing surveys appear to hold a potential for biases based on gender, ethnicity, and race that places female and minority group judges at a disadvantage.<sup>8</sup> A new survey explicitly designed to minimize the potential for bias was used for the first time in 2011 in Illinois, where the purpose of the Judicial Performance Evaluation is purely self-improvement. This was done, in part, by devising questions that focus respondents on specific behavior on the part of a judge in the courtroom. Five performance areas are covered in the survey: *Legal Ability, Impartiality, Professionalism, Communications Skills, and Management Skills*.

The initial round of performance evaluations using the new Illinois survey provides reassurance that the survey is unbiased. Even if the potential for bias can be contained, state judicial performance evaluation programs can be criticized for being over-

reliant on survey-based assessments, and should be complemented with data collected using other methods. A number of states already supplement their survey results with interviews of the judge being evaluated, review of statistics on workload and timeliness, and a review of the clarity of written opinions and orders.

A step taken in Utah during 2011 promises a new non-survey-based option for building a multi-method approach to evaluating judicial performance. The Utah Judicial Performance Commission developed a pilot program to be launched in the 2012 elections that will provide additional information to guide decisions on whether a judge will be recommended for retention. Trained volunteer observers are assigned to various judges' courtrooms to use the principles of procedural fairness to record the behaviors they observe and their personal reactions to those behaviors.<sup>9</sup> The three key principles being evaluated are neutrality (neutral, principled decision-making), respect (treating people with courtesy and politeness and respecting their rights), and voice (providing an opportunity for litigants and others to tell their side of the story in their own words).

The Utah Legislature mandated that the Utah Judicial Performance Evaluation Commission must provide observers with "a list of principles and standards used to evaluate the behavior observed."<sup>10</sup> In implementing that requirement, the commission relied on an article on "Procedural Justice and the Courts," by Yale law professor and social psychologist Tom Tyler, originally published in the official periodical of the American Judges Association.

### ***Procedural Fairness***

Utah's courtroom observation initiative is only one instance in which court leaders have looked to the academic field of procedural fairness for guidance. Procedural fairness, sometimes referred to as procedural justice, is a field of social psychology that is increasingly relevant for application in the criminal justice system as an evidence-based practice. The core idea of procedural fairness is that, in assessing the fairness of a decision by an authority figure, people care more about the fairness of the process they experience than they do about the favorability of the outcome.

People are more likely to be satisfied, and comply, with court decisions if they perceive procedural fairness characterized their experience in court. This may seem counterintuitive in light of what we believe we know about human nature, but decades of compelling research findings attest to its veracity.

Defendants and litigants perceive procedural fairness when they experience respect (being treated with dignity and having their rights respected), neutrality (an honest and impartial decision-maker who bases decisions on facts), participation (the opportunity to express their viewpoint to the decision-maker in their own words), and trustworthiness (decision-makers who are sincerely concerned about people and are benevolent). There is a broad movement in United States criminal justice policy toward a focus on what evidence shows courts, police, and correctional authorities can do to promote voluntary compliance with the law.<sup>11</sup>

The implications of the procedural fairness perspective for the courts are immense. David B. Rottman, a researcher at the National Center for State Courts, referred to procedural fairness as "the organizing theory for which 21st century court reform has been waiting."<sup>12</sup> Previous periods of court reform also were guided by then-prevailing theories on what made organizations succeed. For the most part, the policy implications of those theories led court leaders to make courts more efficient. While welcome, no clear evidence suggests that such reforms have resonated with the public in a manner that increases support for the courts. Procedural fairness differs in that its expression in court policies and procedures has a demonstrable ability both to build public support for the courts and promote law-abiding behavior.

Procedural fairness also suggests methods for helping judges to improve their performance on the bench. Programs that videotape judges are using procedural fairness as the standard for how a judge should behave on the bench. When viewing the tape, the judge compares his/her own behavior, either on his/her own or with a facilitator, to litigant expectations of procedural fairness. In doing so, judges can see where their behavior on the bench conveys a lack of respect, neutrality, participation or trustworthiness. They can then take corrective action.<sup>13</sup>

A website launched in early 2012 offers the state court community a comprehensive resource on the application of procedural fairness—or procedural justice—in the courts. That website and blog, [www.proceduralfairness.org](http://www.proceduralfairness.org), is a collaborative effort by judges, researchers, and university professors who share a belief that an emphasis on procedural fairness can make judges and court managers more effective decision-makers, improve compliance with court orders, and increase public satisfaction with the court system. The site provides resources to judges and court administrators on issues of procedural fairness.

### *The Continuing Debate on How Judges Should be Selected*

Lawsuits in federal court and legislative initiatives continued contention over the question of how judges should be selected. Nearly all states elect their judges in even years. Wisconsin is an exception. The hotly contested 2011 Wisconsin Supreme Court election, which is nonpartisan in nature, offers possible insight into what might happen in November 2012. Few, if any, recent judicial elections attracted the level of national interest prompted by Wisconsin's 2011 Supreme Court election. Sitting Supreme Court Justice David T. Prosser ran for re-election against three challengers. This was the first election in which the state's judicial candidates had the option of receiving public financing under the terms of the 2009 Impartial Justice bill, which replaced an earlier system that had been unable to generate realistic levels of funding. Interest in the result was considerable because the provision of public financing has been touted as one way to stem the dominance some see in campaign expenditures by special interests.

Justice Prosser and general election challenger JoAnne Kloppenburg both chose to receive public financing. Although both candidates accepted public funding in the general election, their stated motivations appeared to be slightly different. For Kloppenburg, the move allowed voters to "be confident that the justice they elect is truly independent and impartial."<sup>14</sup> Prosser, perhaps more realistically, admitted "if [he] had not accepted the public financing scheme [he] would have been roasted alive."<sup>15</sup> The new law did not curtail interest group spending in the primary or general election. Special interest spending was close to \$3.6 million in the general election.<sup>16</sup> The race quickly became a referendum on the union battle that placed Wisconsin in the national spotlight because the state's Supreme Court will likely have the last word on the constitutionality of the legislation enacted earlier in the year. The final tally of a statewide recount certified Prosser's narrow defeat of Kloppenburg by approximately 7,000 votes. Interest in the result was considerable because the often-challenged provisions of public financing have been touted as one way to stem the dominance some see in campaign expenditures by special interests. Indeed, two federal lawsuits were filed challenging the constitutionality of Wisconsin's public financing program soon after the passage of the 2009 bill.<sup>17</sup>

North Carolina also experienced challenges to its public campaign financing provisions. Two Greensboro-based political action committees run by North

Carolina Right to Life President Barbara Holt filed suit to enjoin the North Carolina Board of Elections from enforcing the state's public financing law for judicial elections.<sup>18</sup> The suit, filed in September, 2011, claims that the matching funds provision of the North Carolina system has chilled plaintiffs' willingness to engage in protected political speech.<sup>19</sup> This is not the first time North Carolina Right to Life has sought to overturn the public financing statute.<sup>20</sup> In 2006, it filed a similar lawsuit but saw that suit dismissed by the District Court, and the Fourth Circuit affirmed.<sup>21</sup> The most recent case is still active in the U.S. District Court for the Eastern District of North Carolina.

The fate of public financing in judicial elections rests, in all likelihood, on the fate of court challenges to the constitutionality of public financing provisions. In *McComish v. Bennett*, which invalidated the Arizona Clean Elections Act, the U.S. Supreme Court reversed the Ninth Circuit's unanimous holding that the law was constitutional. By promoting public financing, the Act endeavored to discourage the manipulation of candidates and electoral outcomes by private interests. The Supreme Court justified its decision by ruling the Act placed a substantial burden on the political speech of independent groups wishing to provide monetary support to a candidate, and that the state's interest in controlling corruption is not sufficiently compelling to justify the restriction under First Amendment scrutiny.<sup>22</sup> On the one hand, the *McComish* ruling is relatively narrow and recognizes public financing as a vital element of elections. The decision, however, overturned provisions that would provide additional funding for candidates who accepted the preset amount of money from the public funding pool and were outspent by their opponents or interest groups.<sup>23</sup>

It remains to be seen to what extent judicial elections will be treated differently with regard to public financing. Justice Anthony Kennedy brought out in his separate opinion in *Nevada Commission on Ethics v. Carrigan*, "The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that can be imposed upon them."<sup>24</sup>

Litigation over what judicial candidates can say and do continues to evolve. In May, 2011, the U.S. Supreme Court denied certiorari for two petitions seeking to overturn decisions that supported restric-

tions on how judges could campaign for office. In *Siefert v. Alexander*, the Seventh Circuit upheld Wisconsin's public endorsement and personal solicitation bans and struck down its party affiliation ban. In *Bauer v. Shepard*, the Seventh Circuit found a challenge to prior provisions of the Indiana Code of Judicial Conduct unripe and upheld the lower court's finding that commits, recusal, partisan activities, and solicitation clauses were constitutional. Recently, the string of victories for supporters of the Canons continued when in March 2012 the Eighth Circuit Court of Appeals, sitting *en banc*, upheld the constitutionality of the endorsement and personal solicitation provisions of Minnesota's Code of Judicial Conduct in *Wersal v. Sexton*. The ruling came fourteen months after oral arguments were heard and also declared the challenge to the "solicitation for a political organization" unripe.

### Prospects for 2012 and Beyond

Sound leadership is a precious commodity at any time, but especially so during a time of inadequate budgets and efforts in some states and nationally by politicians to diminish public support for the legitimacy of court decisions. Judicial leaders face constraints that are not found in the other branches. The completion of the Harvard Kennedy School of Government Executive Session on State Court Leaders in the 21st Century may prove to be an important milestone for the state courts. The Executive Session represented a rare moment when judges, court administrators, representatives of other branches of government, and university faculty devoted significant sustained attention to the manner in which the state courts are governed and on that basis, proposed new directions. Very little is written about the leadership role of judges and much of what is known on the topic is part of an oral tradition. The Executive Session paper series, along with advances in the area of procedural fairness, provide an avenue to sustain and enhance the leadership of the judiciary as well as public support of the judiciary. These developments are crucial at a time when the judiciary faces so many challenges on various fronts.

### Notes

<sup>1</sup>The authors are grateful for the research and editorial assistance provided by Natch Greyes.

<sup>2</sup>National Center for State Courts, *State Court Organization 2004*, Williamsburg, Virginia: National Center for State Courts, 2006. (Table 4).

<sup>3</sup>*The Role of State Court Leaders in Supporting Public Policy that Affects the Administration of Justice: A Conference Report and Profiles of State Inter-Branch Initiatives*. Philadelphia, PA: The Pew Center on the States and the National Center for State Courts, 2008. (Available in the NCSC Library.)

<sup>4</sup>See Christine M. Durham & Daniel J. Becker, "A Case for Court Governance Principles," in *Executive Session for State Court Leaders in the 21st Century* (2012).

<sup>5</sup>*Id.*

<sup>6</sup>See Barbara Rodriguez Mundell & Wallace B. Jefferson, "Herding Lions: Shared Leadership of State Trial Courts," in *Executive Session for State Court Leaders in the 21st Century* (2012).

<sup>7</sup>*Id.*

<sup>8</sup>Rebecca Gill et al., "Are judicial performance evaluations fair to women and minorities?," *45 L. & Soc. Rev.* 731, (2011).

<sup>9</sup>This makes Utah the third state holding retention elections (the others are Alaska and Colorado) to incorporate the results of courtroom observations into the decision on whether to recommend that a serving judge be retained in office for another term.

<sup>10</sup>Utah Code Ann. 78A-12-203(3).

<sup>11</sup>Tom R. Tyler, *Why People Cooperate: The Role of Social Motivations*. Princeton University Press, 2011.

<sup>12</sup>David B. Rottman, "Procedural Fairness as a Court Reform Agenda," *44 Court Review* 32 (2009).

<sup>13</sup>See Steve Leben, "Considering Procedural Fairness Concepts in the Courts of Utah" 30-32 (2011), available at <http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Utah%20Courts%20and%20Procedural%20Fairness%202009-2011.ashx>.

<sup>14</sup>Steven Elbow, "Supreme Court Race Could See Deluge of Special Interest Spending," *The Capital Times* (Feb. 16, 2011, 6:30 A.M.), [http://host.madison.com/ct/news/local/govt-and-politics/elections/article\\_ad10b24c-8339-5fc1-a29c-0b7aae956207.html](http://host.madison.com/ct/news/local/govt-and-politics/elections/article_ad10b24c-8339-5fc1-a29c-0b7aae956207.html).

<sup>15</sup>*Id.*

<sup>16</sup>Press Release, Brennan Center for Justice, "Final Numbers: Special Interest Spending Near \$3.6 Million in Wisconsin" (Apr. 6, 2011), [http://www.brennancenter.org/content/resource/final\\_numbers\\_special\\_interest\\_spending\\_near\\_3.6\\_million\\_in\\_wisconsin/](http://www.brennancenter.org/content/resource/final_numbers_special_interest_spending_near_3.6_million_in_wisconsin/).

<sup>17</sup>In a lawsuit brought in 2009, Wisconsin Right to Life argues that the law violates the First Amendment because it has a chilling effect on speech. In another suit brought in 2009, Jefferson County Circuit Judge Randy Koschnick, who unsuccessfully ran for a Supreme Court vacancy, and the Washington, D.C.-based Center for Competitive Politics claim that the law unconstitutionally favors candidates who receive public funding over those who do not, and therefore violates free speech and equal protection guarantees.

<sup>18</sup> *North Carolina Right to Life v. Leake*, No. 5:11-cv-00 472-FL (E.D.N.C. filed Sept. 9, 2011). Chris Bagley, Group wants N.C. judicial funding ended, *Triangle Bus. J.* (September 13, 2011), <http://www.bizjournals.com/triangle/news/2011/09/12/group-wants-nc-judicial-funding-ended.html>; Tom Breen, "Groups seek to overturn NC campaign spending law," Associated Press, September 13, 2011, available at <http://www.chron.com/news/article/Groups-seek-to-overturn-NC-campaign-spending-law-2168288.php>.

<sup>19</sup> Bagley, *supra* note xix; Breen, *supra* note xix.

<sup>20</sup> Bagley, *supra* note xix; Breen, *supra* note xix.

<sup>21</sup> Bagley, *supra* note xix; Breen, *supra* note xix.

<sup>22</sup> *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) (Kagan, J. dissenting at 2830).

<sup>23</sup> Court Cases: *Arizona Free Enterprise Club v. Bennett*, Brennan Center for Justice (June 27, 2011), [http://www.brennancenter.org/content/resource/mccomish\\_v\\_bennett/](http://www.brennancenter.org/content/resource/mccomish_v_bennett/) (quoting McComish at 29).

<sup>24</sup> *Nev. Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343, 2353 (2011).

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