

State of the Judiciary
Chief Justice E. Norman Veasey, Delaware Supreme Court
Message to the Legislature
April 30, 2000

The purpose of this message is not to catalogue the accomplishments and needs of the Delaware judiciary. Much of that information can be found in our annual reports and in our budget presentations. The purpose of this message is to stress the broad and overarching theme that Delaware's three branches of government are working effectively, independently and cooperatively - in stark contrast to some other states where the three-branch relationship is characterized by tension or worse.

The "Best of Times" and the "Worst of Times"

To borrow a phrase from Charles Dickens, these are the "best of times" and the "worst of times" for state judiciaries. Delaware citizens are fortunate that we have one of the nation's most favorable judicial selection methods and a climate of mutual respect among the three branches of government. As a result, we have a nationally preeminent judiciary - the governor says it's "the best" in the nation - and a superb support staff. We must not take this for granted. Citizens of some other states are experiencing potentially destructive conflicts among the branches - conflicts that undermine trust and confidence in government, generally. In New Hampshire, the legislative and executive branches seem to be at war with the judicial branch. In Florida, some legislators have translated their disagreement with court decisions into clarion calls for the dilution of judicial authority in a manner reminiscent of President Franklin Roosevelt's 1937 unsuccessful attempt to "pack" the Supreme Court by adding enough justices favorable to his agenda to change the balance of power.

In California, Gov. Gray Davis declared after his recent election (although he may later have relented) that he expected sitting judges to reflect his political agenda or resign. The federal judiciary has not been immune from turmoil: witness the unseemly 1996 spectacle of Federal Judge Harold Baer reversing his own decision to suppress as evidence cocaine seized by New York City police officers in the face of election year politics, where President Clinton called for the judge's resignation, and Sen. Dole called for his impeachment because of the initial ruling that the search was illegal.

There's a fundamental problem in those states where the legislative and executive branches are at war with the judiciary because of disagreement with court rulings. These wars undermine the rule of law, which is founded on public trust and confidence in the judiciary. Judges are human, and inappropriate activities of a few judges or some wrong-headed decisions may bring justified criticism from time to time. But efforts to bring down confidence in the role of the judiciary as impartial arbiter are a pernicious threat to a civilized society that has the rule of law as its bedrock. We should not "pull down the temple" because of disagreements or mistakes. I hasten to add that most jurisdictions do not have these kinds of problems. But perhaps few states enjoy the cordial relationship that exists in Delaware.

The Rule of Law

In 1607, King James I of England asserted the primacy of the Crown, but the Lord Chief Justice Coke ruled that even the King isn't above the law. The Declaration of Independence complained of interference by King George III with the judiciary in the American colonies. In 1776, the Delaware Declaration of Rights echoed this concern and stated aspirationally: "That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people." Shortly after independence was achieved and the United States Constitution was adopted, Chief Justice John Marshall, writing in 1803 for the Supreme Court in *Marbury v. Madison*, established the principle that acts of the other two branches of government were subject to judicial review to determine constitutionality.

In Delaware nearly 50 years ago, Chancellor Collins Seitz had the courage and judicial independence to desegregate Delaware schools before the United States Supreme Court 1954 decision in *Brown v. Board of Education*. And when the United States Supreme Court ordered President Nixon to produce the Watergate tapes over 25 years ago, it held - reminiscent of Lord Coke's early 17th century rebuke of the primacy of the Crown asserted by King James I - that the president isn't above the rule of law. Judges across the country are governed by a Code of Judicial Conduct. In Delaware that code is enforced by a vigilant court on the judiciary. The very first canon of that code provides that an "independent and honorable judiciary is indispensable to justice." This is because respect for court decisions "depends upon public confidence in the integrity and independence of judges" which, in turn, depends "upon their acting without fear or favor." This means that judges must follow the rule of law wherever it takes us, regardless of the popularity of a given decision.

As Archibald Cox, former United States solicitor general and Watergate prosecutor said, "A judge whose decisions are influenced by politics is putting the independence of courts at risk." This is also why judges must not mix in the business of the other two branches of government whose business it is to legislate and execute the laws, leaving the interpretation and validity of their acts to the courts.

Independence and Interdependence

There is an implied covenant binding on the judiciary not to abuse its independence by legislating its own policy agenda or by usurping the prerogatives of the legislative or the executive branches. The Delaware Judiciary has honored that covenant, and the other two branches have kept their part of the bargain by not usurping the prerogatives of the judiciary. Hence, the interdependence of the separate powers of the executive, legislative and judicial branches continue to flourish in Delaware.

There are, to be sure, differences of opinion in Delaware on some of the applications of the relative powers of the three branches as they affect the ability of the judiciary to serve our citizens. But these disagreements are mostly theoretical, and they surface only at the margins. The problematic areas are managed well in an atmosphere of mutual respect among the branches. For example, there seems to be no dispute that the judicial branch has the exclusive authority to impose and administer rules of procedure and to regulate the Bar. Likewise, there is no dispute that the legislative branch, with some interaction with the executive branch, controls the purse

strings.

As my colleague Justice Joseph T. Walsh noted in his scholarly article, "Judicial Independence: A Delaware Perspective," published last year in the Delaware Law Review: The "power of the purse" has traditionally been the strongest legislative device for controlling the operations of the judiciary, at both the federal and state levels... [Chief Justice Thomas Moyer of Ohio, a former president of] the Conference of Chief Justices views "the ability of legislatures to determine our budgets" as "one of the greatest threats to judicial independence at the state level." Despite the General Assembly's resolve to guard jealously the power of the purse, the essential functioning of the Delaware Judiciary has not been impaired. Still, the judiciary's lack of discretionary funding is a concern... A judiciary that, in the words of Alexander Hamilton, has neither "the sword [n]or the purse" has achieved its independence through its faithful assertion of constitutional authority.

It will maintain its institutional independence only with the cooperation of the other two branches and the support of an informed public. That support and cooperation cannot be taken for granted but will be earned if the judiciary functions fairly and efficiently in its assigned role. Justice Walsh is correct that the funding authority of the legislative branch is problematic, in that it often results in legislative micromanagement of the judiciary by budget provisions specifying the administrative positions within the judicial branch and allocating with extraordinary precision other management tools of the judiciary, such as technology and security. I have advocated a change in this structure by requesting more flexibility in judicial management within the same overall budget limits, but this has not happened. So far, judicial management has not been significantly impaired, and this is because of the businesslike reasonableness of the other two branches.

Public Trust and Confidence

Nationwide efforts to enhance public trust and confidence in the judiciary have centered on a resolve of the judiciary to overcome the four main problems of court systems that respected studies have identified: cases take too long; they cost too much; the system is seen as unfair to minorities; and the public lacks an adequate understanding of the court system.

In Delaware, we work to solve these problems every day. Indeed, we must strive always to be effective problem-solvers. In our daily efforts to solve the first three of these problems, we've come to recognize that the fourth problem - lack of public understanding - must be addressed aggressively. By demystifying what courts do and illuminating the practical and daily impact of the rule of law, we will advance the ball toward the goal line of solving the other problems. We must do this not only in seeking to implement best practices in judicial management, but also in building a greater understanding of ways to solve many tensions in the greater society as they are played out in the courts, but without legislating by judicial action.

The public must understand these concepts fully. In her State of the Judiciary message this year, Chief Judge Judith Kaye of New York State said, "Robes and gavels don't guarantee much awe or respect." We must ask, she said: "How can we communicate to a skeptical public the value of our work?" Yet, we must - as she notes - "challenge challenges and spread the word about our

strengths." The Code of Judicial Conduct imposes rigorous rules on judges to maintain the dignity of the office, to carry out the efficient performance of their challenging duties and to refrain from political activity except when it comes to measures to improve the law, the legal system, or the administration of justice.

The code expects judges to speak out on those matters that educate the public and advance improvements in the legal system, without expressing any views on pending cases or matters that might undermine the appearance of impartiality. To carry out this objective, the Delaware Judiciary and the Delaware Bar are continuing a concerted effort to advance law-related education in schools, universities, and public meetings throughout the state and beyond. Hence, my State of the Judiciary message is traditionally presented around our national celebration of Law Day (May 1), when Americans rejoice in the fact that we are governed by the rule of law. Public understanding is a core function of our mission, which is to provide for our individual and corporate citizens the most modern court system achievable, complete with old-fashioned values of work ethic, integrity, efficiency, competence, and promptness. Only in this way can we continue to build public trust and confidence in the judiciary.

In conclusion

The judiciary must deliver on its implied covenant with the people to fulfill their expectations of the judiciary in exchange for judicial independence. That covenant binds Delaware judges in an affirmative way to decide cases fairly, competently, impartially, and promptly, based on the rule of law, without regard to the popularity of the decision or consideration of any judge's political, economic, or social agenda. It's not only in judicial decision-making in individual cases that this covenant must be honored. It also applies to the way the judicial branch manages the people's judicial business. The Delaware Judiciary is committed to: racial, ethnic and gender fairness; a diverse workplace; equal access to court processes; timeliness; fairness; strong work ethic; efficiency and cost-effectiveness; improved facilities and user-friendliness; and the best feasible security and technology. We cannot fulfill this commitment alone.

We must have the cooperation of the executive and legislative branches. And we have received that support. We trust that in the closing days of this General Assembly and during the remainder of the Carper administration, the three-branch cooperation that has led Delaware to enjoy the best of times will continue.