

State of the Judiciary

Chief Justice Thomas E. McHugh, West Virginia Supreme Court

Message to the State Bar Annual Meeting

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This past January I began my sixteenth year as a Justice on the Supreme Court and in April of last year I began my fourth term as Chief Justice. As I reflect on my tenure, I am concerned about the public perception of the courts and the potential threats to judicial independence.

Preserving the independence of the judiciary is a matter of critical importance to our Constitutional form of government. Courts are often called upon to resolve difficult disputes involving fundamental rights of life, liberty, and property. The resolution of these bitter disagreements occasionally exposes the judiciary to public criticism. Today, blaming the courts or judges is a game played by many politicians.

Judges must frequently decide contentious cases through the interpretation of often ambiguous and sometimes conflicting constitutional, statutory, and regulatory provisions or case law. This precedent, however, is the proper role of courts. As an example, would anyone argue that it is for the executive or legislative branches, rather than the courts, to balance the conflict between the freedom of speech provisions of the first amendment and the defendant's right to an impartial trial under the sixth amendment?

The public's perception of the proper role of courts, however, shaped by what they see on television and what they read in print, is becoming increasingly distorted. Shorthand expressions like "judicial activism," "judge-made law," and "applying, not interpreting the law," or designating judges as "liberal" or "conservative," have become code words for those who seek to impose their political ideologies on an independent judiciary. Even the legitimate term "judicial restraint" has been cheapened by misuse. It is quite unfortunate that judicial campaigns have largely disintegrated into selling candidates like commercial products. Madison Avenue type slogans and packaging a product in a manner that has been market tested are used in judicial campaigns. Code words like those I have referred to are market tested. Let us refocus and stress the qualities demanded of a Judge, such as legal ability, intelligence, dedication, courtesy, integrity, moral courage, impartiality, and decisiveness-qualities, I might note, sought to be measured by the recent State Bar poll. If those qualities are lacking, a person should not be given the honor of holding the office.

Most of our law is made by judges either through the centuries of decision-making that has formed the basis for the "common law," or through the interpretation of phrases like "Congress shall make no law respecting an establishment of religion," "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and "(N)or shall any state deprive any person of life, liberty, or property, without due process of law." What is meant by "establishment," "unreasonable," or "due process" in each of these constitutional provisions? Only judges, in the course of deciding individual controversies, can ultimately decide the meaning of these words.

Whatever one thinks of the judge's recent ruling on the admissibility of evidence in a now infamous New York drug case in federal court, we should be concerned regarding the perception that judges can be threatened with impeachment or other political retaliation whenever a decision is rendered with which someone disagrees. Since I became a Justice on January 1, 1981, through December 31, 1995, the Supreme Court of Appeals of West Virginia issued 3,699 published

opinions. How many of those opinions are controversial? Media attention is only given to a minuscule number. Yet, the appearance may be that all opinions are controversial. Often the critics have not read the opinions. Certainly, there are times when a judge or a court may not have made the same decision if given another opportunity with the same facts. But, political pressures alone should not be the reason for rethinking an opinion. Circuit judges face the same dilemma as supreme court justices. A judge may be measured by only the most controversial opinions, yet he or she may have rendered hundreds and hundreds of opinions. Across our country we hear wailing about "frivolous lawsuits." In West Virginia, little attention is given to the authority, indeed the obligation, of a circuit judge to dismiss such actions and impose monetary sanctions, if appropriate.

In our own state, during the past legislative session, our court was threatened with the seizure of over one million dollars in reappropriated funds. Was that threat in retaliation for a court decision? Another statute was enacted dictating the method by which the justices of our court were to decide disqualification motions. Was that statute enacted in retaliation for a decision?

Unlike the United States Constitution, where there is no specific "separation of powers" language, W. Va. Const. Art. V, I, expressly provides, "the legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others "more importantly, pursuant to the Judicial Reorganization Amendment of 1974, which consolidated the supervision of the judiciary under the Supreme Court of Appeals, W. Va. Const. Art. VIII, 8, specifically provides, "Under its inherent rule-making power, which is hereby declared, the Supreme Court of Appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics "and further that, "when rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict."

Fortunately, Governor Caperton was convinced that the provisions of the bill dictating judicial disqualification procedures were in conflict with the Supreme Court's specific constitutional authority, and with the separation of powers, and vetoed the bill twice, preventing it from becoming law. We are extremely grateful to Governor Caperton for his sensitivity to the importance of judicial independence and the separation of powers. Unfortunately, because of the disqualification provisions added to the bill at the last minute, other provisions in the bill eliminating outdated language relating to appeals, which statutory language is needed, were lost when the bill was vetoed. Perhaps during a future session of the legislature, those provisions may be enacted without other, clearly unconstitutional, provisions.

The challenges that we face now and the challenges we will face over the next five or so years will test our abilities as both judges and managers of the court system. As lawyers it is so important for you to examine the forces that are causing the dramatic shifts in court activity so that we may respond to the public's needs. Certainly we must plan for even greater changes that must be made to allow us in the legal profession to address the challenges of the 21st century.

Let me briefly review some important issues with you. You have witnessed and experienced the issues I want to review. The problems we face in West Virginia are the same problems faced by every court system in the country.

Pro Se Litigation

The number of litigants coming to court without attorneys in domestic cases is rising at an alarming rate. The tremendous increase in pro se litigants has imposed additional demands on judges, the family law masters, and the staff in the circuit clerk's offices. The stressful environment often found in domestic relations cases necessitates that judges and family law masters exert greater influence and control over courtroom proceedings. Accommodating the needs of pro se litigants in domestic relations cases without losing control of proceedings or creating the appearance of favoritism is very challenging.

The issue we face is meaningful access to justice, which is often hampered by a lack of citizen understanding of the justice system and by the difficulty that litigants have obtaining effective legal assistance. The increase in pro se litigants is directly related to the cutbacks in civil legal aid for the poor in West Virginia.

Legal Aid For Those Without Adequate Income

There is an immediate problem of providing legal aid for those without adequate income because of the decline in federal support of programs for those persons. There are a number of short-term steps that can be taken to fill some of the gaps in service. Some of the legal aid offices may be combined to eliminate duplication in support staff. Certainly we should strive to increase the participation of lawyers in the pro bono program. These short-term or interim steps will not solve the problem. This is an issue that will require a long-term solution and a lot of work by all of us. The State Bar and President Tom Flaherty are to be complimented for their leadership on this mailer.

Juvenile Issues

As all of you are aware, there is a growing problem with the juvenile justice system. In 1994 the National Conference of State Legislatures conducted a survey on the concerns of lawmakers. Two-thirds of the respondents reported that redesigning their states' juvenile justice systems would be a priority for 1995. More than half expected to consider legislation that would make it easier to transfer juveniles to criminal court and ease confidentiality requirements regarding juvenile arrests and conviction records. Legislators also expressed interest in increasing punishment and retribution for the most violent offenders, and providing treatment for non-violent and status offenders.

These are the same issues that our legislature has addressed for the past two years. In addition to these issues we must address the community services available to the courts and assess the facilities available to house our most difficult juveniles. We must ask ourselves what is the appropriate mix of community services and detention beds? How are we going to address the increasing number and cost of out-of-state placement of juveniles? How are we going to develop the in-state facilities to address the increasing demand for secure detention?

I do not envy the dilemma circuit judges face on a daily basis in trying to deal with these very difficult cases. The resources necessary to both protect the community and provide treatment to juveniles are simply not available or are inadequate.

Family Issues

We are rapidly reaching the point where the current court structure will not be able to adequately deal with all the issues that face families in West Virginia. Considering that divorce, domestic

violence, juvenile, mental hygiene, guardianship, and abuse and neglect cases constitute almost fifty percent of the docket in many circuits, the magnitude of the problem becomes evident.

I am sure many circuit judges feel more like social workers on certain days than judges. Many of the cases involve multiple parties with multiple lawyers. Scheduling is difficult and moving the case to a final disposition is very difficult. As we look to the future, we must address the current court structure to determine if it can continue to handle these cases in an effective manner in the next century.

Court Security

For the past three years the number one issue identified at our annual Judicial Summit Meeting has been the need to increase security in our court system. The Legislature has now addressed this issue. The creation of a Court Security Board and the funding that will be provided by the increase in filing fees and court costs is a significant step forward in solving this critical problem. One of the key provisions of this legislation is the requirement that every county develop a security plan and file that plan with the Board for review. This requirement, along with the requirement that each county undergo a security audit, should help identify and resolve many of the security problems court staffs face on a day-to-day basis.

Intergovernmental Relations

If we in the legal profession are to be effective and address the issues I have outlined, it is important for us to have the support and cooperation of the Legislature and county government. In regard to this issue, the last legislative session was not one of our belier sessions. There was a harsh approach to the judiciary that has not been present for the past five years. We have to rely on the Legislature to assist us with the passage of appropriate and workable statutory changes. We have to rely on the county commissions to provide the support services necessary to operate the circuit courts.

These are areas that we need recollection on during the next few months as we seek better approaches. If we do not adequately address these concerns, we will waste a lot of energy defending the judiciary instead of moving forward with a positive agenda.

Local Rules

In recent years, there have been a number of local rules adopted in the various circuit courts. Many of these rules have dramatically improved the quality of justice. Obviously, it is beyond the ability of the Supreme Court to promulgate rules to govern all of the diverse administrative matters that arise at the local level. One of the problems with the piecemeal promulgation of local rules, however, has been their lack of accessibility. Both attorneys practicing within and outside of particular counties often have difficulty in ascertaining whether local rules exist governing particular matters. Accordingly, in 1994, the Supreme Court decided to conduct a comprehensive survey of the circuit courts to collect all of the local rules in effect and to publish those rules on an annual basis.

This month, a draft compilation of the local rules submitted to the Court is being mailed to the circuit judges for their final review and approval. Publication of the 1997 West Virginia Local Rules Volume is planned for November of this year. These rules will then govern local practice in the various circuits during calendar year 1997. If a local rule does not appear in this

publication, it cannot be enforced during calendar year 1997. Thereafter, any local rule to be included in the West Virginia Local Rules Volume must be submitted to the Supreme Court no later than July 1 for review. We believe this will do a great deal to promote uniformity and accessibility with regard to local rules and will enhance the fairness and efficiency of our system of justice.

Professionalism

Over the past decade, almost every state has undertaken a study of the problem of a lack of professionalism among lawyers. These studies have largely been in response to a growing perception among judges and lawyers that professionalism and civility in the practice of law are on the decline.

Recent surveys of lawyers indicate that, as a consequence of this decline, the enjoyment and personal satisfaction derived from the practice of law is diminishing. The adversarial system is being distorted in a manner that brings out the worst in people, often transforming many decent lawyers, before they realize it, into the type of lawyer they most detest—one who "cuts corners" to achieve a result.

In addition, the public perception of the legal profession has declined considerably. More than ever, lawyers are seen as "hired guns," selling their services to the highest bidder, readily placing the narrow interests of their clients above the broader interests of the society which the law was designed to protect.

Many factors have contributed to the lack of civility and professionalism in the practice of law.

- Lawyers accuse judges of forgetting what it is like to be a lawyer.
- Judges accuse lawyers of failing to fully appreciate the role of judges.
- Both lawyers and judges accuse one another of dilatoriness and lack of preparation.
- Lawyers observe that hard-nosed tactics are often rewarded, not punished. They see that "bully" lawyers occasionally gain an edge for their clients, encouraging the other side to resolve the dispute at any cost. Lawyers whose tactics are described as "hardball," "scorched earth," "take no prisoners," or "giving no quarter" are nothing more than "legal terrorists" and "barbarians of the bar," and should be vilified, not revered.
- The decline in courtesy and morality in lawyers also reflects similar societal trends. Increasingly, it seems that the ends are used to justify the means and that the only dishonor is getting caught. Moreover, as the number of lawyers has increased, the importance of good interpersonal relationships has decreased. When one is opposed by a different lawyer every time one appears in court, there may seem to be little incentive to cultivate a good working relationship.
- Clients sometimes try to interfere with the exercise of the lawyer's professional judgment. The demand that a lawyer do whatever is necessary to win and take pleasure in observing the lawyer "do battle," challenges a lawyer's resolve to adhere to the ethical principles which define the legal profession.

Several years ago, the West Virginia State Bar created a Professionalism Commission. In January, State Bar President Tom Flaherty asked retired Justice Thomas Miller to assume chairmanship of the Commission. On February 29, a meeting of the thirty-member Commission

was conducted and subcommittees were formed to draft reports on standards of professionalism, a client's bill of rights, teaching professionalism, and punishing unprofessional conduct. Drafts of the subcommittee reports are scheduled to be circulated among the members by mid-May and the Commission's next meeting is scheduled for June 13. Once the Commission's final report is prepared, it will be submitted to the Supreme Court for review.

One of my goals for this year as Chief Justice is the adoption of standards of professionalism. It is a subject on which many of you know I have expressed great interest for a number of years. I want to publicly thank President Flaherty and in-coming President Ford, as well as Justice Miller and the other members of the Commission, which include Chief Judges Haden and Stamp, and Circuit Judges Hatcher, Madden, and Steptoe, for their commitment to helping me realize this goal. It is our solemn obligation to rededicate ourselves to our great profession; to reinvigorate our shared sense of public service; and to ensure common courtesy, respect, and fair dealing for one another. John W. Davis described the lawyer's mission in these terms:

True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures. There is little of all that we do which the eye of man can see. But we smooth our difficulties: we relieve stress: we correct mistakes: we take up other men's and women's burdens and by our efforts we make possible the peaceful life of men and women in a peaceful state.

I hope that the work of the Supreme Court, the Commission, and the State Bar will cause all of us as lawyers to revisit our roots, to rethink who we are, and to regenerate within ourselves a spirit of humility, civility, dignity, integrity, and professionalism.

Leadership

You are the key to addressing the issues I have outlined. If we are to have any success in both the short-term and the long-term in resolving the issues and problems facing the legal profession, it will depend on the leadership of the circuit judges and members of the bar.

During my tenure as both a justice and during my term as chief justice, the members of the Supreme Court, Justices Workman, Cleckley, Recht and Albright, and the circuit judges and the bar, have given me both support and cooperation. It is essential that we continue to work together for the improvement of the court system for the public. We must seek solutions-not create problems.

Let me close with the words of George Washington:

I have always been persuaded that the stability and success of the national government, and consequently the happiness of the people of the United States, would depend on a considerable degree on the interpretation and execution of its laws. In my opinion, therefore, it is important that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation.