

FEDERAL BAR ASSOCIATION

of the Western District of Washington

NEWS NEWS NEWS NEWS

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THE JUDICIARY'S BUDGET BATTLE

PRESIDENT'S MESSAGE

As all of you know, another annual CLE and dinner is almost upon us. The CLE program this year—in something of a departure from years past—examines “big picture” issues rather than nuts-and-bolts practice topics: federal practice in an era of corporate scandals and perspectives on September 11th. We will again be fortunate to have nationally-recognized speakers at this event, as well as a full complement of federal judges and local attorneys. The dinner, of course, is the highlight of our year. Ninth Circuit Judge M. Margaret McKeown will be the featured speaker. We will recognize Judge Thomas Zilly, who recently moved to senior status, and we will present our annual Service Award. I hope most if not all of you who receive this publication have registered for both the CLE and the dinner.

This has been an eventful year for the Western District with the seating of two new district court judges, appointment of a new magistrate judge, a change in Chief Judges from Judge John Coughenour to Judge Robert Lasnik, and, of course, the opening of a new federal courthouse. Our Association has participated in these events in many ways. Our Federal Appointments Committee made recommendations to the Court advisory committee that screened applicants for the magistrate judge position. Over the years, our Court Services Committee has worked with the Court on numerous issues related to construction of the new courthouse (including an attorney lounge on the tenth floor). In September we co-hosted with the Court a reception at the new courthouse for several hundred visiting federal judges. And we recently hosted an informal reception to thank Judge Coughenour for his extraordinary service as Chief Judge of the Western District and to welcome Judge Lasnik as our new Chief Judge.

Of course, these are just the highlights. Throughout the year our committee volunteers have been engaged as usual

in various efforts to make practice in the Western District more efficient and more responsive to the needs of the Court and practitioners. These efforts have ranged from improving access to pro bono counsel, to recommending changes in our local rules, to hosting brown bag lunch and breakfast events for specialty practice areas—to say nothing of the time-consuming work that our Website/Communications and CLE Committees perform to put together this publication twice a year and plan our annual CLE. One notable effort that has begun this year but has not yet been completed is the re-institution of a ceremony to admit to practice in the Western District attorneys recently admitted to practice in Washington State. Our Membership Committee is working with the Court to schedule that event in January 2005.

Looking back at similar newsletter notes from past Association presidents over the years, I find that, like each of them, I am struck by the remarkable extent of worthwhile and effective work that all the attorneys who volunteer time for our Association manage to accomplish. As a strictly volunteer organization, we could literally do nothing without the



generosity of these attorneys. Some have volunteered their time for many years; others have started to pitch in only recently. Either way, we thrive on their effort. If you know one or more of them—a committee chair or co-chair or other volunteer—take a minute at the CLE or dinner to thank them. Better yet, find out what projects they are working on for the Association and volunteer to help.

Todd True

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On the cover: The U.S. Capitol. Photograph courtesy of the U.S. Army Corps of Engineers.

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Duncan Manville
Riddell Williams P.S.
1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154-1065
(206) 624-3600

FEDERAL JUDICIARY FACES FUNDING CRISIS

By Duncan Manville

On October 14, 2004, the U.S. Treasury Department announced a record budget deficit for fiscal year 2004.¹ Government spending in FY 04 rose 6.2% from FY 03 to \$2.29 trillion, while income climbed only 5.5% to \$1.88 trillion. As a result, the deficit grew by 9.5% to \$413 billion—equal to 3.6% of U.S. gross domestic product. It was the third consecutive year of budget deficits after four years of surpluses under the Clinton administration.

The federal judiciary's budget for FY 04 was \$5.16 billion—less than its appropriations request, less than one tenth of the amount received by the Office of Personnel Management, less than the amount of the September 11 Victims Compensation Fund, and slightly more than the U.S. government spent on foreign military financing.¹ By contrast, the government spent \$437 billion on national defense, \$543 billion on health and human services (including Medicare and Medicaid), \$27 billion on homeland security, \$530 billion on social security, and \$322 billion to pay interest on the national debt.² The FY 04 appropriation for the third branch was less than one quarter of one percent of total federal budget.

Not only has the federal judiciary been substantially underfunded in recent years, it has been forced to lobby Congress tirelessly to avoid even more crippling reductions in its budget. Inadequate appropriations for FY 03 and 04 have forced the judiciary to cut its operating expenses by 32% below requirements.³ Yet many of those expenses are driven by factors beyond

the judiciary's control—including the number of cases that are filed, the number of felons who are released from prison and must be supervised, the number of indigent defendants who need legal representation, and rent that the judiciary must pay to the General Services Administration.⁴ In statistics released last March, the Administrative Office of the U.S. Courts announced that the number of federal appeals grew by 6% in 2003, reaching an historic high.⁵ The number of criminal and bankruptcy cases rose by 5% and 7%, respectively. Total civil filings fell by 8%, but excluding personal injury cases civil filings fell by only 1%. The number of persons under post-conviction supervision and the number of defendants in cases opened in the pretrial services system hit record highs. Overall, caseloads in the district courts and courts of appeal were 13% and 26% higher than caseloads in 1994, and the bankruptcy caseload was 98% higher than in 1994. Yet funding levels have stagnated, failing to keep pace with the courts' burgeoning workload.

The federal judiciary presented its FY

05 budget request to Congress on March 11, 2004.⁶ The Honorable John G. Heyburn II, Chief Judge of the U.S. District Court for the Western District of Kentucky and Chairman of the Committee on the Budget of the Judicial Conference of the United States, testified before a committee of the U.S. House of Representatives in support of the judiciary's budget request. Judge Heyburn's comments were made in the context of a budget proposal by President Bush for FY 05 calling for a 0.5% growth rate for all functions not related to defense or homeland security.⁷ According to the Administrative Office of the U.S. Courts, if that growth rate had been applied to the federal courts, the judiciary would have had to cut its operating expenses by 50% and let go about 3,800 court employees, including nearly 20% of the workforce in probation and the clerks' offices.⁸ This on top of prior cuts in court staffing levels that were accomplished largely by not filling positions that became vacant, and through buyouts, early retirements and furloughs.⁹

"The federal judiciary is at a crisis point," Judge Heyburn advised the committee. "Unless the Congress makes the Third Branch as high a priority as Defense and Homeland Security, we run the risk of creating a second class system of justice."

As our nation shifts its focus to protecting the homeland and bringing terrorist and other criminal and immigration cases to trial, these efforts can be successful only if our federal judiciary remains strong and is adequately funded. . . . Because

workload continues to increase and resources have, in fact, been declining, a crisis is emerging in the courts that soon will place the judiciary in jeopardy of not being able to perform its core services and functions.

Judge Heyburn testified in support of a request for \$5.70 billion in funding for the federal judiciary for FY 05.¹⁰ The request reflected the judiciary's implementation of cost containment initiatives that had yielded savings of \$150 million.¹¹ About 71% of the requested increase in the judiciary's FY 05 budget—\$421 million—was needed to maintain services at their FY 04 levels.¹² The remaining increase—\$168 million—would have allowed the judiciary to keep pace with escalating workloads.

On July 1, 2004, Rep. Frank Wolf (R-VA) introduced the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005 (H.R. 4754).¹³ The House passed the bill, as amended, on July 8, 2004. The bill would have provided the judiciary with \$5.55 billion in funding for FY 05, including \$4.18 billion for its Salaries and Expenses account. Although these amounts were below the judiciary's budget request, they would have allowed the judiciary to maintain the level of services that it had provided in 2004.¹⁴

On August 18, 2004, the Judicial Conference of the United States unanimously adopted a resolution calling for Congress to exempt the judiciary from a continuing resolution that would have frozen the judiciary's

funding at the 2004 level, and to provide funding for FY 05 at least at the level reflected in H.R. 4754.¹⁵ Chief Justice William Rehnquist echoed that plea in a September 13, 2004 letter to Senate Majority Leader Bill Frist and Senate Minority Leader Thomas Daschle.¹⁶ “[T]he judicial branch,” Chief Justice Rehnquist wrote, “is not only essential to the federal justice system in general, but it plays a vital role in our nation's law enforcement and homeland security. The courts must have an adequate level of resources at the beginning of the fiscal year if they are to meet these responsibilities.”

In mid-September the Senate Appropriations Committee reported out its version of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005 (S. 2809).¹⁷ The Senate version of the bill would have provided \$5.36 billion in funding for the judiciary in FY 05, including \$4.13 billion for the Salaries and Expenses account. The judiciary estimated that those funding levels would have resulted in the loss of 570 probation-officer and clerk's-office positions.¹⁸ On September 21, 2004, the Judicial Conference decided to implement a number of significant cost-containment measures, including a two-year moratorium on 42 federal courthouse construction projects.¹⁹

Congress adjourned for the fall elections without having voted on S. 2809.²⁰ It reconvened on November 16, 2004, primarily to consider a large number of pending appropriations bills. Nine of those bills were eventually rolled into a single omnibus bill, the

Consolidated Appropriations Act, 2005 (H.R. 4818).²¹ Over the objections of several Members of Congress (Senator Robert Byrd (D-WVA) called the omnibus bill “a monstrosity” that should have been dubbed the “Lame Appropriations Act, 2005”²²), the House and Senate passed the Consolidated Appropriations Act on November 20, 2004. The act provides the federal judiciary with \$5.42 billion in funding for FY 05.²³ This is about \$260 million more than the judiciary received in FY 2004, but \$280 million less than its appropriations request.²⁴

At this level of funding, the judiciary does not anticipate that it will need to make further reductions in staffing or existing services.²⁵ According to the Administrative Office of the U.S. Courts, however, “it is also unlikely that the courts will be able to keep pace with their increasing caseload, especially in high growth areas like the Southwest Border.”²⁶ “Our focus,” says the office's director, Leonidas Ralph Mecham

now turns to how best to proceed with extremely limited funding when caseloads are growing, while also keeping an eye on the budgetary storm clouds that already are gathering for Fiscal Year 06. The judiciary cannot continue to effectively operate with such small funding increases. This is the third consecutive fiscal year in which courts will be funded well below their current services needs. Regrettably, this is beginning to adversely impact not just the courts, but the litigants and the public.²⁷

Continued on page 13

PROFILE OF JUDGE ROBERT S. LASNIK

by *Jeremy Roller*

In his chambers in Seattle’s new federal courthouse, the Honorable Robert S. Lasnik, Chief United States District Judge for the Western District of Washington, keeps two old shoeboxes full of baseball cards. Included in his trove are the stars of his youth—Mays, Mantle, Aaron—and hundreds of lesser-known players. But unlike the cards in most collections, these cards are not preserved in plastic sheets. They have obviously been handled, and many look like they’ve spent time in someone’s back pocket. In settlement conferences Judge Lasnik often places the boxes on the table. “Sports tug at peoples’ hearts, connect generations,” Judge Lasnik explains. “Sometimes the cards allow people to make a connection, returning them to their youth, and putting them in a kinder mood. They also show I don’t take myself too seriously.”

That Judge Lasnik occasionally uses sports to connect with litigants would not surprise his former boss, King County Prosecuting Attorney Norm Maleng. “He has this ability to relate to, connect with a whole range of people,” Maleng comments. “Bob Lasnik would have been a brilliant success in any field. I could see him just as easily covering sports for a newspaper or writing editorials for the *New York Times*.” Judge Lasnik’s ability to connect with people on a wide range of topics certainly has contributed to his success as a lawyer and judge. “Whether he ends up going with us or against us, I know he’s considered the issues carefully. We got a fair shot,” a lawyer in an admiralty dispute recently remarked.

The son of a teacher and a New York City social services director, Judge

Lasnik grew up on Staten Island. He graduated from Brandeis University with a degree in psychology and sociology. He later enrolled at Northwestern University and earned master’s degrees in journalism and counseling. He also met his wife, Seda, herself a New Yorker, at Northwestern. Together on a cross-country road trip they stumbled upon Seattle in 1974, at a time when the city was known more for airplanes than software and coffee. “It just seemed like a place to be free, where everything was possible,” the judge recalls. The two drove back to Illinois, sold many of their possessions, and flew to Seattle with “thirteen suitcases and a cat.”

Judge Lasnik took a job as a public information officer for the Seattle Parks Department. He then applied to both the Ph.D in Psychology Program and



the School of Law at the University of Washington. He planned to enroll in the program that admitted him. When “yes” letters arrived from both schools, he was faced with a choice. “Seda told me to take law. She made the right call.”

Judge Lasnik and William Downing, now a King County Superior Court Judge, met during their first year of law school and together constituted the middle infield of an intramural softball team. They began a friendship that has spanned their entire careers. The two participated in the Criminal Justice Program and worked as Rule 9 interns at the King County Prosecuting Attorney’s Office in the summer of 1977. After graduating from law school one year later, Lasnik and Downing began working for the King County Prosecutor. Both rose quickly in that office. As a deputy prosecutor Lasnik was an original member of the Special Assault Unit, a new and, at the time, unique program that coordinated the efforts of the prosecutor’s office, police, and social services to address child abuse and domestic violence crimes. Similar programs, modeled on

King County's innovative program, now exist in most prosecutors' offices throughout the country.

In 1981 Lasnik became King County Prosecuting Attorney Norm Maleng's Chief of Staff. Maleng has nothing but praise for his former colleague: "Bob Lasnik was a brilliant Chief of Staff. That brilliance enabled him to do so much." One of Lasnik's major accomplishments involved working with the state legislature to craft the Sentencing Reform Act of 1981. But Lasnik was not destined to spend his career in administration and policymaking. In the mid-1980s he teamed up with his old friend Bill Downing to prosecute two of the most horrific crimes in Seattle's history—the 1983 Wah Mee Massacre and the 1985 Christmas Eve slaying of the Goldmark family.

On February 18, 1983, Willie Mak, Benjamin Ng, and Tony Ng (no relation) entered the Wah Mee gambling club in Seattle's International District. They hog-tied and robbed fourteen victims before opening fire; only one survived. At the outset of the Wah Mee investigation and trials, Lasnik and Downing agreed "never to do anything that would leave the other in an embarrassing position," Lasnik recalls. The two proved to be a formidable team. Downing handled the guilt phases of the trials; Lasnik focused on jury selection and the trials' penalty phases. In August 1983 Benjamin Ng was convicted of murder and sentenced to life in prison. In October 1983 Mak was convicted of murder and sentenced to death. Tony Ng, who was arrested in Canada a year and a half after the slayings, was acquitted of murder in

1985 but convicted on thirteen counts of first-degree robbery. He is now serving seven consecutive life terms. In 1991 U.S. District Judge William Dwyer overturned Mak's death sentence in a federal habeas proceeding, finding that Mak's attorneys had failed to present evidence regarding Mak's background that might have caused the jury to spare his life. After another decade of legal wrangling, in 2002 Mak was sentenced to life in prison without the possibility of release.

Lasnik and Downing teamed up again in the prosecution that arose from the appalling murder of the Goldmark family. On December 24, 1985, David Lewis Rice went to the home of Seattle attorney Charles Goldmark, pretending to be a cab driver delivering a package. After entering the home, Rice brandished a fake gun, applied chloroform to Goldmark, his wife, and their two children, then brutally bludgeoned and stabbed the four family members. Rice had targeted Goldmark because he believed he was Jewish and a communist. Lasnik and Downing secured a conviction and the jury sentenced Rice to death. In November 1997 U.S. District Judge Jack Tanner overturned Rice's conviction on the basis of ineffective assistance of counsel and ordered a new trial. While the Ninth Circuit Court of Appeals was reviewing Judge Tanner's rulings, Rice pleaded guilty to four counts of first-degree aggravated murder, in exchange for which the prosecution dropped the death penalty. For Lasnik and Downing, themselves lawyers with children, the case was emotionally draining. "There was such a great sense of sadness in this case," Judge Lasnik recalls.

In 1989, Governor Booth Gardner appointed Lasnik to the King County Superior Court bench. In that capacity Judge Lasnik chaired the State Sentencing Guidelines Commission from 1992 to 1995, and was Chair of the State Bench-Bar-Press Liaison Committee from 1994 to 1998. President Clinton nominated Judge Lasnik for appointment to the federal bench in December 1997. The Senate confirmed his appointment in October 1998.

Judge Lasnik relishes his job. When asked about his favorite aspect of being a judge, he observes that "ninety-nine percent of the time you can really do what is right." Even in that rare circumstance when the law requires a judge to reach an outcome other than the "right" result, sometimes it works out. For example, Judge Lasnik presided over an insurance coverage dispute in which the insured sought to recover on her homeowner's policy after her house burned down. Unfortunately, the arsonist who had torched the home was the plaintiff's estranged husband, himself an insured under the policy, who had been determined to prevent her from taking the home in divorce proceedings. Predictably, the insurance policy did not cover fire damage intentionally caused by a named insured. Judge Lasnik enforced the policy according to its terms, but in granting the insurance company's motion for summary judgment he observed that if the company would pay the plaintiff's claim it would garner good publicity (and mitigate the risk of bad publicity) at a fraction of the cost of its frequent advertisements during Husky football games. Despite having prevailed on

summary judgment, the carrier paid half of the plaintiff's claim.

Judge Downing calls the foregoing case illustrative of Judge Lasnik's "tremendous gift for seeing the big picture . . . and how an apparently small issue may have a large consequence." "His breadth of vision distinguishes him as a lawyer, judge and policymaker." At Judge Lasnik's investiture, Judge Anne Ellington of the Washington State Court of Appeals referred to the "Lasnik Laser," which "burns away all the chaff and exposes the true issues." Judge Lasnik recognizes the importance of seeing the "big picture" and understanding the litigants' perspectives in all cases: "Usually when lawyers become judges, they are at or near the top of their careers and are used to handling big, important cases. But not all cases before judges are 'big and important.' I try to make every person in my courtroom feel that their case is the most important case in the world—for them it is. This job is most rewarding when even the loser is satisfied that he or she got a fair hearing."

On September 1, 2004, Judge Lasnik succeeded the Honorable John Coughenour as Chief Judge for the Western District of Washington. Although Judge Coughenour jokingly told his successor that "being chief judge is a lot like being caretaker at a cemetery—you know you're above people, but you don't know if they're listening," Judge Lasnik shows obvious pride in being Chief Judge of this district.

"This is a great district with great judges," Judge Lasnik explains. "We have a reputation for very good work,

and our judges staff important Ninth Circuit and national committees. We also have a wonderful bar. Just to give an example, Tom Hillier is an



Judge Lasnik speaking at the 2004 Ninth Circuit Judicial Conference

exceptional Federal Public Defender and John McKay is a great United States Attorney."

Statistics kept by the Administrative Office of the U. S. Courts support Judge Lasnik's praise for this district. The Western District of Washington is first in the Ninth Circuit and eleventh of the ninety-four districts nationwide in the average time from filing a civil matter to disposition. The Western District has the lowest percentage of civil cases pending more than three years of any district in the Ninth Circuit, and ranks fifth in the nation in that statistic. Judges in this district not only work quickly, they work hard. The Western District is second in the Ninth Circuit and fourth in the nation in the number of civil case filings per judge.

As proud of the Western District as Judge Lasnik is, the pride and happiness he finds in his family can't be matched. He and Seda, an

elementary school teacher, have three children. Their daughter is a college junior, and their two sons are in high school. Judge Lasnik is quick to share stories about his children. Many of those stories are about their experiences or accomplishments, and reveal that his children often poke fun at their dad. (Dog-eared baseball cards aren't the only things that show this judge doesn't take himself too seriously.)

Judge Lasnik's family may help him keep current on popular culture, but this federal judge is far from cloistered. When the author's wife went into labor, Judge Lasnik quickly offered his law clerk a ride home. After the judge started his car, Kurt Cobain's haunting voice and Dave Grohl's heavy drumming thundered through the speakers. "Has your daughter been driving your car?" I asked. "Oh no," Judge Lasnik replied, "I'm a huge Nirvana fan."

At a time when some elected officials find it convenient to criticize the "unelected judiciary" as "out of touch with the people," judges must not abdicate their essential constitutional responsibilities, even if exercising those responsibilities leads to unpopular results. Yet judges must also express themselves in ways that are accessible to Americans from varied walks of life. To succeed in this difficult role, a judge must have intelligence, compassion, eloquence, and the common touch. Those traits have served Judge Lasnik well in King County Superior Court and the U.S. District Court, and will continue to benefit him as Chief Judge of the U.S. District Court for the Western District of Washington.

PRO BONO PANEL OFFERS OPPORTUNITY TO SERVE COMMUNITY

By Tracy Morris and Judy Ramseyer

You can make a unique contribution to the community by participating in the U.S. District Court's Pro Bono Panel. As a member of the Federal Bar Association of the Western District of Washington, you can assist the Court in its efforts to ensure that pro se litigants are afforded the highest quality of justice.

Pro se plaintiffs in Civil Rights Act cases often apply for the appointment of counsel. Although an attorney representing a successful civil rights or discrimination plaintiff is frequently awarded reasonable attorney fees, there is no guarantee that all claimants will find private counsel to take their case. Accordingly, the Court and the FBA-WDW have established a Pro Bono Panel of attorneys to represent these litigants in certain circumstances.

Under the Pro Bono Panel program, a plaintiff who requests counsel submits an application to show financial eligibility and that he or she tried, unsuccessfully, to retain counsel. A screening committee of volunteer lawyers then evaluates the potential merits of the plaintiff's claims, as set forth in the complaint, and forwards its recommendation to the Court. The Court considers the recommendation of the screening committee to determine whether the case has sufficient merit to warrant the appointment of a panel attorney, and makes an appointment when appropriate.

Participation in the Pro Bono Panel is strictly voluntary. Once an attorney joins the panel, however, the rules

require him or her to accept an assigned case, with some exceptions—including the existence of a conflict of interest, a Pro Bono Panel appointment in a case that is still pending, or active service on the Pro Bono Panel screening committee. Through the generosity of bar associations and other entities and individuals, the Court has funds available to assist Court-appointed counsel in defraying some litigation costs. The King County Bar Association also offers malpractice coverage for panel attorneys who are not otherwise insured.

The Court welcomes participation in the Pro Bono Panel by lawyers at all levels of experience. Panel participation offers a unique opportunity for lawyers to gain experience in civil litigation in federal court. Many of the cases involve claims of employment discrimination, some involve claims by prison inmates, and others involve a variety of Civil Rights Act issues. No subject matter experience is required.

You may request a copy of the plan establishing the panel and the rules for the panel by calling Ms. Sharon Haas, Panel Coordinator, at (206) 553-5598, or you may review these

documents by visiting the Court's Web site at <http://www.wawd.uscourts.gov>. The plan is structured to permit participation by individual lawyers and by law firms. If your firm is already a panel member, you are encouraged to take cases through that membership, rather than by submitting an individual application.

Pro se plaintiffs asserting Civil Rights Act claims are at a serious disadvantage in the unfamiliar world of civil litigation, even when their claims have substantial merit. The Federal Bar Association of the Western District of Washington and the U.S. District Court share the obligation of ensuring that these claims are addressed and resolved on their merits and that the interests of justice are protected. Your help in discharging this responsibility is most appreciated.

For further information you may contact either of the current Co-Chairs of the Pro Bono Panel, Tracy Morris (425-707-3665) and Judy Ramseyer (206-447-0900). You may also address questions to United States Magistrate Judges J. Kelley Arnold, Monica J. Benton, Karen L. Strombom, and Mary Alice Theiler; or to Sharon Haas in the Clerk's Office.

NINTH CIRCUIT JUDICIAL CONFERENCE FOCUSES ON HUMAN RIGHTS, RACE AND DIVERSITY

By Duncan Manville and Kevin Swan

The Ninth Circuit Judicial Conference meets annually “for the purpose of considering the business of the courts and advising means of improving the administration of justice within [the] circuit.”¹ The 2004 conference was held on July 19-22 in Monterey, California, with the theme of “Human Rights and Human Wrongs—Then and Now—At Home and Abroad.”² The event brought together judges and lawyers practicing in the federal courts of the western United States. Among the attendees were the Ninth Circuit Lawyer Representatives from the Western District of Washington—Todd True, Sheryl Willert, John Wolfe, Kelby Fletcher, Salvador Mungia, Kevin Swan, David Burman, Rebecca Roe and Jay Stansell.

Chief Judge Mary Schroeder of the Ninth Circuit Court of Appeals presided over the conference’s opening session.¹ Her State of the Circuit speech emphasized education and communication, “two important values that are at the core of our legal system.” The conference, Judge Schroeder noted, “is perhaps the most visible annual expression of our commitment to those values, but it is only one of many efforts we have undertaken and will continue to pursue during the next year.”

Among those efforts are a number of programs organized by the Court of Appeals’ Education and Community Outreach Committees—including a commemoration of the century-old Court of Appeals building in San Francisco, a tribute to women’s “firsts” in the Northern District of California, and a series of workshops with media



Chief Judge Mary Schroeder, Justice Sandra Day O’Connor

representatives in various cities. Judge Schroeder noted that “the Ninth Circuit has a critical role to play in media relations because we have the most experience.” For many years, she observed, the Ninth Circuit has been

the only federal jurisdiction that has permitted television cameras in appellate courtrooms during civil arguments. The circuit “hit prime time” in 2004 by opening its San Francisco Courtroom One to television cameras for a live argument in the California gubernatorial recall case. Judge Schroeder was “aware that there was a comment or two about a wee bit of perceived impatience on the part of some of the judges, but we are working on it. As the first President Bush might have put it, ‘It’s that temperament thing.’”

Judge Schroeder also cited the efforts of the Jury Instructions and Trial Improvements Committees, which are working to improve communication with and utilization of juries; the Task Force on Self-Represented Persons, which is exploring ways of improving screening, staffing and processing of pro se litigation in federal courts; and a group of judges who are evaluating experimental programs that might assist the Court of Appeals in processing its burgeoning load of immigration cases, the volume of which has quadrupled in the past four years.

Among the year’s frustrations, Judge Schroeder noted, were the budget crisis faced by the federal courts, and the “deep felt need on the part of some persons in Congress to have hearings on splitting the circuit.” Although Judge Schroeder said she remained “open to discussion of any and all possible ways to improve the administration of the circuit, including realignment, . . . none of the current proposals make a lot of sense and, in the current financial crisis, all are financially unjustifiable.” “Divorce is expensive,” she observed.



Sr. District Judge Louis Pollak, attorney Jack Greenberg, Senior District Judge Jack Weinstein

“This family is going to stay together.”

Judge Schroeder concluded her remarks with a citation to *Gideon’s Trumpet*, the story of *Gideon v. Wainwright*,² in which the Supreme Court held that the U.S. Constitution guarantees the right to counsel for all criminal defendants charged with serious offenses. In a letter to his attorney, Abe Fortas, Clarence Earl Gideon wrote:

I have no illusions about the law and courts or the people who are involved in them. I have read the complete history of law ever since the Romans first started writing them down and before the laws of religions. I believe that each era finds an improvement in law. Each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward.

Those words, Judge Schroeder noted, embodied “the spirit of this great

conference and of this great circuit for the coming year.” “Enjoy being together and learn from each other,” she concluded.

The second day of the conference began with a 50th-anniversary commemoration of *Brown v. Board of Education*,³ the landmark U.S. Supreme Court decision striking down so-called “separate but equal” public schooling.⁴ A panel discussion about *Brown* was moderated by Harvard Law School Professor Charles Ogletree, Jr., and featured a “legal dream team” of lawyers and judges who had worked with the NAACP on the case. The panelists described the meticulous and deliberate legal campaign that culminated in the *Brown* decision.

A second panel focused on the aftermath of *Brown*, with an emphasis on contemporary problems in education relating to race and diversity. The panel was moderated by Harvard Law School Professor Lani Guinier.

Panel member Michele Barraza Lawrence, Superintendent of the Berkeley Unified School District, described how California’s schools remain segregated by race 50 years after *Brown*.

Other events at the conference included panel presentations on the increasing involvement of U.S. courts in global issues, innovative approaches to national and international human-rights controversies, and scientific uncertainty and the ethical and practical aspects of scientific information; and a multimedia presentation entitled “Everything You Always Wanted to Know About Sleep But Were Too Tired to Ask.”

Midway through the conference’s third day, a three-judge panel of the Ninth Circuit Court of Appeals handed down a controversial 2-1 decision in *United States v. Ameline*,⁵ holding that the U.S. Supreme Court’s ruling in *Blakely v. Washington*⁶ concerning state court proceedings also bars federal judges from using facts not found at trial to increase criminal sentences. The Supreme Court had ruled 5-4 in *Blakely* that an exceptional sentence imposed under Washington’s sentencing guidelines based on facts that were neither admitted by the defendant nor found by the jury violated the Sixth Amendment to the U.S. Constitution. In *Ameline*, the Ninth Circuit joined the Seventh Circuit in applying the *Blakely* rule to sentences imposed under the U.S. Sentencing Guidelines.

Copies of *Ameline* were handed out at the conference, and *Blakely* and *Ameline* were a central focus of the

conference's concluding event, a conversation with U.S. Supreme Court Justice Sandra Day O'Connor.⁷

any difference, and that things were just as bad as ever—I was shocked because I thought he had made a

recognized the Justice on television at Ronald Reagan's funeral and pointed her out to her granddaughter. "Grandma, was she married to George Washington?" the granddaughter had asked. "So that began to make me think, good heavens time has passed," Justice O'Connor remarked.¹⁶

Next year's Ninth Circuit Judicial Conference will be held in Spokane, Washington and Coeur D'Alene, Idaho. Judge Robert Lasnik will assist in organizing the event, and will be the program chair for the 2006 conference.

Photographs of Ninth Circuit Judicial Conference courtesy of the Office of the Circuit Executive.



"Conversation with the Justice"

Ninth Circuit Judge Raymond Fisher, Justice Sandra Day O'Connor, University of Arizona Prof. Ana Merico-Stephens, U.S. Attorney John McKay

Justice O'Connor had strenuously dissented in *Blakeley*, protesting that the majority's ruling would obliterate 20 years of sentencing reform and jeopardize thousands of criminal judgments.⁸ At the conference she called *Blakely* "a No. 10 earthquake."⁹ "We really have a lot of difficulty right now," she said. "I think the consequences are severe and it's going to take a little time to figure out what to do."¹⁰

Justice O'Connor also spoke about affirmative action in higher education. It is disappointing, she said, that dramatic racial disparities still exist in education 50 years after *Brown*. She reported having been "depressed" by conversations with former U.S. Supreme Court Justice Thurgood Marshall shortly before his retirement in 1991: "To hear him tell me that he didn't think anything he had accomplished in that regard had made

monumental difference."¹¹

Justice O'Connor was the key vote in *Grutter v. Bollinger*,¹² the Supreme Court's June 2003 decision upholding the use of racial preferences in admission decisions made by the University of Michigan Law School. She wrote in *Grutter* that "race-conscious admissions policies must be limited in time,"¹³ and expressed the hope that "25 years from now, the use of racial preferences will no longer be necessary."¹⁴ She acknowledged at the Ninth Circuit Judicial Conference that "it's going to take a real effort to achieve this. If we're going to see this resolve itself in 25 years, I don't think we have a lot of time to lose."¹⁵

Justice O'Connor also reflected on her current status as one of the more senior members of the Supreme Court. The point was driven home, she said, when a friend in Arizona told her that she had

¹ See Chief Judge Mary M. Schroeder, *State of the Circuit Speech, 2004 Judicial Conference—Monterey, California, Monday, July 19, 2004*, available at <http://www.ce9.uscourts.gov/Web/OCELibra.nsf/0/71a2006cb736feb888256edf005edc40?OpenDocument>.

² 372 U.S. 335 (1963).

³ 347 U.S. 483 (1954).

⁴ See *Ninth Circuit Judicial Conference to Focus on Human Rights, Race, Diversity*, *supra* note 2; Dan Laidman, *Judges recall rights struggle: Jurists gather in Monterey to discuss landmark case*, *MONTEREY HERALD*, July 21, 2004, available at <http://www.montereyherald.com/mld/montereyherald/news/local/9205731.htm>.

⁵ 376 F.3d 967 (9th Cir. 2004).

⁶ 542 U.S. ____, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

⁷ *O'Connor disgusted by federal sentencing case: 'Looks like a No. 10 earthquake'*, *CNN.com*, July 23, 2004, available at <http://www.cnn.com/2004/LAW/07/22/oconnor.sentences.ap/>; Dan Laidman, *O'Connor criticizes court decision*, *MONTEREY HERALD*, July 23, 2004, available at <http://www.montereyherald.com/mld/montereyherald/news/local/9225258.htm>.

⁸ 124 S.Ct. at 2543, 2550 (O'Connor, J., dissenting).

⁹ *O'Connor disgusted by federal sentencing case*, *supra* note 9; *O'Connor criticizes court decision*, *supra* note 9.

¹⁰ *O'Connor criticizes court decision*, *supra* note 9.

¹¹ *Id.*; see also Betsy Mason, *Justice reflects on colleague's legacy*, *CONTRA COSTA TIME*, July 23, 2004, available at http://www.contracostatimes.com/ml/cctimes/news/local/crime_courts/9224237.htm?1c.

¹² 539 U.S. 306 (2003).

¹³ *Id.* at 309.

¹⁴ *Id.* at 310.

¹⁵ *Justice reflects on colleague's legacy*, *supra* note 13.

¹⁶ *Id.*

Federal Judiciary

Continued from Page 5

Although the federal judiciary survived its latest brush with budgetary disaster—thanks in no small part to the efforts of Chief Justice Rehnquist, Judge Heyburn, and countless other individuals and organizations who understand the importance of maintaining a strong and fully-funded court system—the appropriations struggle is expected to continue. The Congressional Budget Office currently projects a budget deficit of \$348 billion for FY 05, and a total deficit of \$2.3 trillion for FY 05-14.²⁸ The third branch may be feeling the pinch for years to come. Federal practitioners are encouraged to keep abreast of developments in this area, and to urge their Congresspersons and Senators to support legislation that provides adequate funding for the judiciary.

¹ See *Joint Statement of John W. Snow, Secretary of the Treasury, and Joshua B. Bolten, Director of the Office of Management and Budget, on Budget Results for Fiscal Year 2004* (“*Statement on Budget Results for FY 04*”), available at <http://www.ustreas.gov/press/releases/js2032.htm>.

² *Id.*; see also 150 Cong. Rec. H10113-14 (daily ed. Nov. 20, 2004).

³ See *Statement on Budget Results for FY 04*.

⁴ See *Funding and Electronic Access Top Judicial Conference Agenda*, News Release, Administrative Office of the U.S. Courts, March 16, 2004, available at http://www.uscourts.gov/Press_Releases/.

⁵ *Id.*

⁶ See *Judicial Business of the Federal Courts in FY 2003: Substantial Caseloads Continue to Fill Courts*, News Release, Administrative Office of the U.S. Courts, March 16, 2004, available at http://www.uscourts.gov/Press_Releases/.

⁷ See *Statement of Honorable John G. Heyburn II, Chairman, Committee on the Budget of the Judicial Conference of the United States Before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the Committee on Appropriations of the United States House of Representatives*, March 11, 2004, available at http://www.uscourts.gov/Press_Releases/heyburn021904.pdf.

⁸ See *Funding and Electronic Access Top Judicial Conference Agenda*, *supra* note 4.

⁹ *Id.*

¹⁰ *Id.*; see also *As Workload and Resources Head in Opposite Directions, Crisis Looms for Federal Courts*, News Release, Administrative Office of the U.S. Courts, March 11, 2004, available at http://www.uscourts.gov/Press_Releases/.

¹¹ *Id.*; see also 150 Cong. Rec. H10114.

¹² See *As Workload and Resources Head in Opposite Directions, Crisis Looms for Federal Courts*, *supra* note 10.

¹³ *Id.*

¹⁴ The bill's text and legislative history are available at <http://thomas.loc.gov>.

¹⁵ See *Judiciary's Budget Moves Forward in Uphill Budget Battle*, *The Third Branch*, Vol. 36, No. 7 (July 2004), available at <http://www.uscourts.gov/ttb/july04ttb/budget/>

[index.html](http://www.uscourts.gov/Press_Releases/); *Conference Adopts Cost-Containment Plan in Wake of Limited Congressional Funding: Continues Push for Court Funds*, News Release, Administrative Office of the U.S. Courts, September 21, 2004, available at http://www.uscourts.gov/Press_Releases/.

¹⁶ See *Chief Justice Seeks Early Budget Relief from Congress*, News Release, Administrative Office of the U.S. Courts, September 14, 2004, available at http://www.uscourts.gov/Press_Releases/.

¹⁷ *Id.*

¹⁸ The bill's text and legislative history are available at <http://thomas.loc.gov>.

¹⁹ See *Judiciary Fiscal Year 2005 Facts and Figures*, available at <http://www.uscourts.gov/judiciary2005.html>.

²⁰ See *Conference Adopts Cost-Containment Plan in Wake of Limited Congressional Funding: Continues Push for Court Funds*, *supra* note 15.

²¹ See *Daily Digest for October 11, 2004*, available at <http://thomas.loc.gov/r108/r108d11oc4.html>.

²² The bill's text and legislative history are available at <http://thomas.loc.gov>.

²³ 150 Cong. Rec. S11740-41 (daily ed. Nov. 20, 2004).

²⁴ See *Conference Report on H.R. 4818*, available at <http://thomas.loc.gov>. Division B, Title III of the Consolidated Appropriations Act, 2005 actually appropriates \$5.50 billion for the judiciary, but Congress also enacted an across-the-board cut of 1.34% to most of the discretionary spending provided for in the Consolidated Appropriations Act, including most of the appropriations to the judiciary. Congress ignored the judiciary's request for an exemption from such a cut.

²⁵ See *Judiciary Fiscal Year 2005 Facts and Figures*, *supra* note 19.

²⁶ See *Congress Approves Funding for Courts: Is it Enough?*, News Release, Administrative Office of the U.S. Courts, November 23, 2004, available at http://www.uscourts.gov/Press_Releases/.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *CBO's Current Budget Projections*, available at <http://www.cbo.gov>.

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