

# The Arlin M. Adams Center FOR LAW AND SOCIETY

---

## Susquehanna University

Established in 2001, the center focuses on the law and its impact on institutions and people, providing a rich learning and experiential resource for students, faculty, visiting scholars and members of the community.

The family of Sigfried and Janet Weis and The Degenstein Foundation of Sunbury, Pa., with support from the Annenberg Foundation, founded the center in honor of prominent Philadelphia jurist Arlin M. Adams whose distinguished legal career includes 17 years on the bench of the 3rd U.S. Circuit Court of Appeals.

The center explores the significant place law occupies in our ever-changing social, political, economic and cultural life. It provides a forum for thought-provoking examination of contemporary issues in areas such as human freedoms and civil rights, social responsibility, technology and privacy, and constitutional interpretation.

Susquehanna's emphasis on undergraduate liberal arts education and preprofessional studies offers an ideal home for the Adams Center. The center supports activities and resources that expose students to the theory and practice of law through internships and field experiences, networking, professional seminars, independent study, research projects, and enhanced library resources. The interdisciplinary programs and activities of the Adams Center enrich and inform civic life in the Central Susquehanna Valley and nationally.

Welcome Remarks  
Director Allan Sobel

MR. SOBEL: Good evening. Welcome to tonight's Adams Center program on judicial independence and accountability. I am Allan Sobel, the director of The Arlin M. Adams Center for Law and Society of Susquehanna University. Of the three branches of government, I believe the role and the responsibility of the judiciary is the least understood by American citizens. While there are certainly times when a judge may exercise discretion in deciding a matter before the court, for the most part a judge's rulings are not discretionary. A judge must be faithful to the applicable rule of law without regard to public opinion or how the judge favors the outcome based upon his or her own ideology or personal preference.

Most court cases do not draw much attention from anyone other than the participants and those close to the participants. A disappointed litigant in the average case really has nowhere to go with his or her own complaint that will arouse any particular public outcry against a judge.

On the other hand, controversial cases deciding matters of great public importance draw attention and may prove challenging to the effective administration of justice. In the recent past there have been a number of such cases. You will probably recognize them by some of the names I mention: Terri Schiavo. Terri Schiavo was the subject of a Florida case in which the trial court judge found that Ms. Schiavo did not want to be kept alive by artificial means, was in a persistent vegetative state, and that her feeding tube could be removed.

The Dover School District case, decided here in the Middle District of Pennsylvania by the Federal Court, holding that intelligent design theory is not a scientific theory at all, but instead a repackaging of creationism, which is a religion belief and, therefore, intelligent design theory may not be taught by a public school in its science curriculum.

The Ten Commandments case, a case in Alabama where a Federal Court ordered the Chief Justice of the Alabama Supreme Court to remove a monument of the Ten Commandments that he had placed in the Alabama Judicial Building because it was an unconstitutional establishment of religion.

The gay marriage case, a case out of Massachusetts where the court -- the Supreme Court of that state legalized same sex marriages in the Commonwealth of Massachusetts. The judicial pay increase case, the one decided by our Pennsylvania Supreme Court last year, holding that the legislature could not constitutionally roll back judicial pay increases. Such controversial decisions and the judges who author them are often severely criticized and in some circumstances those decisions lead to efforts by some in the community to remove the responsible judges from office. Today an organization in Pennsylvania known as PA Clean Sweep wants to see every judge in the Commonwealth who has kept the most recent judicial pay increase kicked out of office in the next retention election, which takes place next month during the municipal elections. They refer to the Pennsylvania Supreme Court's judicial decision regarding the judicial pay increase as a judicial swindle and this is what they say about it. "Every member of Pennsylvania's judicial branch now benefits from this judicial swindle. When they want

to talk about the record they must first explain how they justify keeping the loot from what many non-judge and non-lawyer Pennsylvanians consider to be a disgraceful act of self-service. Just because it has been deemed legal doesn't make it right. After all, how was it deemed legal in the first place? That's right. Judges push for a pay raise. The top judge has secret meetings behind closed doors to get it. Judges file the challenges to the repeal and the judges make the final legal decisions. Well, judges may decide the law, but we, the people, decide who the judges are."

Federal judges, unlike Pennsylvania State Court judges, have the benefit of lifetime appointments. When they make controversial and unpopular decisions we hear calls for impeachment or other threats to take action, but those threats really pose no serious threat to a federal judge's position. If judges are expected to look only to the law and ignore public opinion, unlike the members of the other two branches of government, do they need security against the public uprising? How and for what should we hold judges accountable?

Tonight's program is designed to help you understand the twin concepts of judicial independence and accountability. I will now turn the mic over to Professor Michelle DeMary, who is a member of the Adams Center steering committee, and will introduce tonight's speakers and serve as the moderator. Thank you.

## Introductory Remarks

Dr. Michelle DeMary, Professor

Good evening and welcome to what I anticipate will be an interesting and invigorating discussion of a very timely topic. I am pleased to have been asked to moderate this evening and will try to hold my own as the only political scientist on a panel of distinguished judges and lawyers.

As the moderator, it will be my job to keep us on track, to field questions from the audience, and to enjoy the dialogue that's about to ensue. Before I introduce our panelists, I would like to present the rules of tonight's presentation.

Each panelist has been asked to limit his or her opening comments to 15 minutes. After the panelists have presented, we will open the forum up to questions. I will start with a question while those in the audience get their chance to get to the microphone and then we'll begin to take questions from the audience. We have microphones on either side of the aisle, you will note. As is our practice, we would ask that questions from students take precedence over others.

Now, allow me to give you a little information on our panelists. First, Justice Cynthia Baldwin is an Associate Justice of the Pennsylvania Supreme Court. She was appointed to this position on an interim basis by Governor Rendell in 2005 and confirmed by the Pennsylvania Senate in 2006.

While preparing for tonight I searched information on our panelists that wasn't printed in your program. I assumed you could read that. I found two distinct items in Justice Baldwin's biography that may be of interest to our audience. For the Nittany Lions fans in the house, you will be interested to know that Justice Baldwin has served as chair of the Board of Trustees of Penn State from 2004 to 2006, and is now the immediate past chair of the Penn State Board of Trustees.

And perhaps more closely connected to her training in law and of great interest to those of us here at Susquehanna who are promoting the development of more expansive cross-cultural experiences for our students is the fact that Justice Baldwin served as a Fulbright scholar for the summer of 1994 at the University of Zimbabwe law faculty and in 1998 she was chosen as one of five judges to travel to mainland China to conduct seminars for judges, law professors, and students. As a result, Justice Baldwin's perspectives on the questions on tonight's panel may be formed not only by events here in central Pennsylvania and throughout the State, but also by her experiences in other countries.

Sitting next to her, Professor Stephen Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania law school, the alma mater of the man for whom our center is named, the Arlin M. Adams Center for Law and Society. Professor Burbank has many credits to his name, including one of particular interest to me. While most people would probably be more impressed by the fact that he did clerk for the Chief Justice of the United States Supreme Court in 1973 and 1974, I, as one whose dissertation focused on the judiciary of Massachusetts, was more impressed and pleased to see that he clerked for Justice Braucher on the Supreme Judicial Court of Massachusetts before moving to that other court in Washington, D.C.

One other fact that may make Professor Burbank more wildly popular than either of these experiences, however, is the fact that he conducts arbitration hearings for the

NFL, a job that was described as follows in the Wall Street Journal earlier this month. And I quote, "Today's law blog coolest job title award goes to Penn law professor Stephen Burbank, NFL special master." Hopefully we won't need any of his special master talents tonight.

Judge John Jones is a United States District Court judge in the Middle District of Pennsylvania, a position he has HELD since being appointed by President George W. Bush in 2002. Instead of reading to you his many credentials that are listed in your program, though, I want to share with you a quote from the judge himself that I found in a commencement speech that he delivered to his alma mater, Dickinson College, in 2006. It's a quote, I think, that tells us how perfectly suited he is to be here tonight at our liberal arts institution engaging with us in this conversation, for he has a commitment to education and learning in a setting very much like Susquehanna.

And I quote, "Not long ago I decided a case that caused me to become, at least temporarily, somewhat famous in the world at large. And while I have accomplished some interesting things in my life, I know that my invitation to speak to you today is largely the result of my work in that trial involving the concept of intelligent design.

"In the course of the *Kitzmiller vs. Dover* case I heard from experts in, among other fields, those in biology, philosophy, theology, paleontology, and scientific education. And while I have used my common sense and, hopefully, good judgment to weigh the credibility of many lay witnesses as well, one might be tempted to assume that I received all of the tools necessary to understand the complex expert testimony and determine the facts solely through my law school education. If so, they would be incorrect. In fact, it was my liberal arts education achieved right here at Dickinson College that provided me with the best ability to handle the rather monumental task of deciding the *Dover* case."

Given our commitment to ending this evening's formal presentation by 8:30, let us begin. Justice Baldwin.

## The Dialogue

JUSTICE BALDWIN: Thank you, Professor. Good evening, everyone. Good evening, everyone. Okay. Thank you.

First, allow me to thank the Arlin M. Adams Center for Law and Society at Susquehanna University for providing this forum and putting me on a panel with such distinguished colleagues.

One summer 13 years ago, while I was still a trial judge, I boarded a plane at JFK in New York and after approximately 20 hours, I placed my feet for the first time on the continent of Africa, in Johannesburg, South Africa. The next day I flew to Harare, Zimbabwe, where for a little over three months I was to live and teach at the University of Zimbabwe law faculty as a Fulbright lecturer. In addition, I had brought with me some cases concerning constitutional interpretation here in the United States and due process because the trial and appellate courts of Zimbabwe were just beginning to deal with the issue of land redistribution.

When I wasn't teaching, I was working with the Supreme Court on the many constitutional issues the court was facing. I got to know Chief Justice Anthony Gubbay, as well as the other four members of the court, five brave men – two white, two black, one Indian -- who stood firm in the face of Mugabe's threats of upholding the rule of law and exercising judicial independence. By December 2001, two of those judges were gone and the next year a third judge was forced to resign over the land redistribution issues.

In addition, Mugabe had previously attempted to water down the votes of the judges by appointing three of his supporters to the court, thereby increasing the size of the court. And eventually he excised all of the five original Supreme Court justices.

Since my initial experience in Zimbabwe, I have traveled on five continents, lecturing on judicial independence and preservation of constitutional rights, proud of the tradition of rule of law and judicial independence in my own country.

I can't honestly say that I have the same pride today, but I am proud of the men and women who stand firm in this toxic environment and say, I will stand for the Constitution. I will stand for the rule of law. I will stand for an independent judiciary. For if I stand for nothing, I will fall for anything. The latter phrase was said by Alexander Hamilton.

In speaking about a recent movement in South Dakota to pass a proposed state constitutional amendment that would eliminate judicial immunity and allow a special grand jury to censor judges for their decisions, retired Justice Sandra Day O'Connor said, and I quote, "Although the amendment supporters claim they seek a judicial accountability initiative law, jail for short, they aspire to something far more sinister; judicial intimidation."

How right she is. Whether it is attempting to forbid courts from citing foreign law in interpreting the Constitution, creating an inspector general to monitor and investigate the federal bench, trying to prohibit the Supreme Court from considering whether the Pledge of Allegiance inclusion of the words "under God" violates the First Amendment or threatening to remove judges during retention votes for decisions for which they are not accountable or for not deciding a certain way, it's judicial intimidation. If you judges don't decide the way my group wants you to decide, we will punish you. If you judges don't decide the way my group wants you to decide, you are an activist judge.

Although many Americans rarely think of our independent judiciary as anything extraordinary, when this country was founded the idea of a separate judiciary with power to challenge popular leadership was certainly not commonplace. Now, over two-and-a-quarter centuries after our constitutional framework was created, establishing a truly independent judiciary remains a goal for many countries around the globe.

While our society encourages, in fact, needs healthy criticism of our leaders, including judges, in order to remain responsive, there are both healthy and unhealthy challenges to judicial independence today. The American Bar Association warns that respect for the judiciary is in decline and that threats to the judiciary which cross the line from healthy debate into fear and intimidation have no place in our democracy.

Criticism of the courts is occurring with increasing frequency as popular criticism and threatening rhetoric in the media collides with individual judicial decisions. Within the last few years, for example, two matters, which have already been mentioned, involving judicial independence monopolized the national media; the heart-wrenching plight of Terri Schiavo and the intelligent design case heard by my friend and fellow panelist, Judge Jones. Both of these cases drew criticism to the bench and provoked discussion about how independent America wishes its judiciary to remain.

Although we seek to protect the independence of the judiciary from outside forces -- the media, the public or other branches of government -- that is not to say that the judiciary doesn't have responsibilities of its own. Judges must not overstep the domain of the third branch or mix personal politics with their professional role. As that great legal scholar, John Grisham, wrote in *The Summons*, "A judge who counts his votes before the trial should burn his robe and run for the county line."

If judges are to yield to the popular view in deciding cases, what happens in a case like *Roe vs. Wade*, where both sides are committed, outspoken, and well organized? To which side does the judge listen? If judges are to yield to the popular view, how do lawyers determine what the precedent is since it would change with the popular view? There would be no rule of law. There would be chaos.

It is imperative that the United States continues to protect its third branch of government, yet we see mounting threats to the courts' independence. When developing nations look for examples of model government, the United States is something of a contrast in terms. For over two centuries the courts have stood the test of time and remain the vital, integral, and coequal branch of government, yet, as we see, there are new and growing threats to that vitality that must be addressed.

Former Chief Justice William Renquist final year-end report on the fellow judiciary issued in January of 2005, reminded all of the importance of maintaining the independence of our judicial branch. He said this: "The judiciary, including the Supreme Court, will continue to encounter challenges to its independence and authority because of dissatisfaction with particular decisions or the general direction of jurisprudence. Let us hope that the Supreme Court and all of our courts will continue to command sufficient public respect to enable them to survive basic attacks on the judicial independence that has made our judicial system a model for much of the world."

In a famous paper that I think you all have probably heard of and read, the *North Country Gazette*, a New York State newspaper, in an article dated March 17th, 2006, there appeared an editorial entitled "Forget Judicial Independence; It's Time for Judicial Accountability." People don't understand that judicial accountability is an inherent part of

judicial independence. But allow me just to read a few paragraphs.

"Last week Supreme Court Justice Ruth Bader Ginsburg attacked Congressional critics like Tom DeLay and labeled the Court's critics an irrational fringe. It's the judges in this country who have become tyrannical and irrational, despots in black robes enamored with themselves. Members of the judiciary nationwide claim that they were intimidated by Tom DeLay. Last spring when he issued a statement following the death of Terri Schindler Schiavo, saying that the time will come for the men responsible for this to answer for their behavior. DeLay said that he wanted to examine what he called the failure of state and federal courts to protect a disabled woman who died 13 days after the court order to withdraw her feeding tube by a lowly probate judge in Pinellas County.

"Judges quickly cried foul and said that their judicial independence was being undermined. DeLay later apologized for saying that the federal judiciary was responsible for Schiavo's death, but he asked the House judiciary committee to investigate the judges who refused to issue an order to reinsert the woman's feeding tube while the courts conducted a de novo" -- or new -- "review of the Schiavo case as the Congress and the President mandated. He said that Congress should look at an arrogant, out of control, unaccountable judiciary that thumbs their noses at Congress and the President."

Actually, after an article like that it's easy to see that our system of checks and balances is being misunderstood. Every day I'm on the bench it behooves me to remember the oath that I made to people that I serve, you. I raised my right hand and I said this: "I do solemnly swear that I will support, obey, and defend the Constitution of the United States and the Constitution of the Commonwealth and that I will discharge the duties of my office with fidelity."

If I don't, I won't remain an independent judge, accountable only to the people's law, and we will not remain an independent people with those hard-fought rights still intact. And this is the message I will continue to take abroad to countries in the hope that there will be fewer situations like in Zimbabwe.

In March 2002, the United Nations' special rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, expressed great concern about Zimbabwe's judiciary, saying, "These latest developments seen in the light of previous attacks, harassment, and intimidation of the judiciary by the executive and others, as well as defiance of court orders by the government, are indicative that Zimbabwe is no longer a government of laws, but of men who have no regard whatever for the independence of the judiciary and the majesty of the law." We do not want to say that in the United States.

So what do I say judicial independence means? It means fair and impartial courts upholding the Constitution, in spite of political intimidation, the media, and special interest groups, guaranteeing access to the courts, and protecting individual rights within our system of checks and balances. I continue to swear to do so.

**PROFESSOR BURBANK:** It's a pleasure to be here with you tonight to discuss a subject that is of critical importance to the health of our society and not simply to the health of the judiciary. In these remarks I propose to do two things.

First, I want briefly to summarize the key insights about judicial independence and accountability that emerge from some recent work that I've done on interdisciplinary

basis on that subject. And second, and for most of my time, I want to use some of the fruits of that work, of work that I've done on judicial independence in state courts, and of recent research that I've done on the career of a distinguished federal judge, the late Richard Sheppard Arnold, to illustrate the critical role that judicial accountability plays in judicial independence and hence the critical role that politics of a certain sort must play in the work of courts and the judiciary if they are to continue to serve as the guardians of our fundamental rights and liberties.

Believing that discussions and debates about judicial independence have produced more heat than light, and that scholars in different disciplines have been talking past one another, in 2001 Barry Friedman and I convened a conference of some 30 prominent academics with backgrounds spanning four disciplines to discuss what we knew, and ought to know, about judicial independence. In a chapter of the book that emerged from the conference, and in a free-standing article, I sought to demonstrate that judicial independence is merely the other side of the coin from judicial accountability. In other words, that the two are not at war with each other, but rather are complements; that neither is an end in and of itself, but rather a means to an end or a variety of ends; that the relative ends relate not primarily to individual judicial performance but rather to the performance of courts and the court system; and that there is no one ideal mix of independence and accountability but rather that the right mix depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system.

From these premises one can derive a number of additional propositions that may be helpful in considering the relationship between judicial independence and judicial accountability. The first proposition is that judicial accountability has as many roles to play as does judicial independence. As a result, judicial accountability should serve to moderate what would otherwise be unacceptable decisional independence; for instance, decisions unchecked by law as it is generally understood or, in the case of inferior courts, by the prospect or reality of appellate review. In addition, judicial accountability should moderate other judicial behavior that would be considered hostile to or inconsistent with the ability of courts to achieve the roles envisioned for them in a particular society; for example, as to federal judges, conduct that, in the words of the Federal Discipline Statute, is prejudicial to the effective and expeditious administration of the business of the courts.

The second proposition is that, just as judicial independence must be conceived in relation to other actors, independence from whom or from what, so must accountability, accountability to whom or to what. As a result, judicial accountability should run to the public, including litigants, whose disputes courts resolve; the people's representatives, whose laws the courts interpret and apply; and courts and the judiciary as an institution. In each instance, to be sure, proper regard for the other side of the coin -- that is to say, for judicial independence -- requires that the accountability involved not entail influence that is deemed to be undue.

Although Judge Arnold in his extrajudicial writings was always talking about judicial accountability, he did not often write about judicial independence. That is not, I think, because he thought that everyone understands what judicial independence is and accepts that, as a judge might like to define it, it is an unalloyed good. He knew that if

the federal judiciary is in fact, or a perceived to be, insufficiently accountable, it will lose the independence necessary for it to accomplish what the architects of our system intended.

Judge Arnold believed that the judiciary must have what he calls the "continuing consent of the governed" – this is, I think, what political scientists refer to as "diffuse support" -- in order to do its job. He also believed that once a court has observed all jurisdictional limitations on its power, it must render and accept responsibility for a decision, however unpopular that decision may be, that the law requires.

From this perspective, his repeated expressions of concern about judicial accountability represented underlying anxiety about the prospects of judicial independence, the continuing willingness or ability of the courts not, as he put it, to "pull their punches" when the law requires an unpopular decision. Thus, I believe that Judge Arnold would have been pleased and relieved by Judge Jones' decision in the Dover Area School District case.

Judge Arnold enjoyed his service as Chair of the Budget Committee of the Judicial Conference of the United States, he said, because, "it has a little touch of politics about it ... and I have always enjoyed politics." He also observed that, "politics is people, and ... it should be and can be an honorable profession." On another occasion, however, noting that "many members of the public seem to feel that judges are just politicians in another guise," Judge Arnold concluded that, "sometimes some of us are, but we should not be."

These views are not inconsistent insofar as, while acting as Chair of the Budget Committee, Judge Arnold, although a judge, was not acting as part of a court exercising judicial power. Moreover, he could and likely would have distinguished between a federal judge and an elected member of Congress with words similar to those he used to describe why the federal judiciary is not usually uppermost in the minds of members of Congress -- "we lack a particular constituency." In any event, that Judge Arnold disapproved of deeming federal judges as "just politicians" hardly suggests that he intended the bright line between law and politics that the distinction might suggest.

I believe that Judge Arnold would have distinguished between, first, a situation in which, responding to popular sentiment at the time, a court evaded a result that either clear, and clearly controlling, precedent or the unmistakable tenor of positive law required and, second, a situation in which, precedent or positive law not unmistakably dictating the result, the court considered the implications of alternative decisions for the continuing ability of the judiciary to make decisions that are hard precisely because the law as generally understood leaves no room for equivocation. In the former the court would be engaged in a political act difficult to distinguish from the behavior of an elected politician responding to a constituency. In the latter the behavior would be political only in the sense that statesmanship, deference, and compromise in a world of disputable premises and conclusions are part of the art of the governance. Put another way, like separation of powers, to which it is instrumental, judicial independence should be seen as an architecture that has structural integrity but can nevertheless adapt spaces and functions to meet changing needs.

And what bearing do state arrangements have on this conception of core judicial independence? Attention to methods of selecting state court judges in historical context

puts in question whether elections are, as they are often said to be, in purpose or effect, inimical to the goal of insulating judicial decisions from control by the executive or legislative branches. Recent scholarship demonstrates that an important goal of many of those who advocated the election of judges was precisely "to insulate the judiciary from the branches it was supposed to restrain."

These people were distressed by the level of partisanship in the existing selection systems and believed that the elective system would be less subject to partisan abuse. Of course, elections are potentially a very powerful tool of control of judicial decisions at the state level because of the risk they pose to the rule of law.

But at the end of the day, political scientists and others who believe that judicial independence has less to do with formal methods of selection and tenure than it does with culture are probably right. If so, the risk for state judges in elective systems is less than people who catch on the fact that judges do, in fact, make law than about making their own decisions about selection or retention, the people will take their cues as they do in the broader political and social culture. Come to think of it, federal judges face a similar risk of being that removed.

Attention to the core of federal judicial independence, separation of powers, can obscure the view that, apart from enabling judicial review, it is instrumental to the resolution of ordinary cases according to the law, which was a view expressed by Alexander Hamilton in the Federalist No. 78.

If one is concerned, as Hamilton was concerned, about what he called "unjust and impartial laws" and sees in judicial independence the best protection against such laws, it makes sense to define judicial independence in such a way that it has the capacity to do the job. The need is greater in a legal culture that accepts the propriety of judicial lawmaking. For this purpose the concept of judicial independence requires, close to the core, that those responsible for judicial decisions interpreting or making law themselves be impartial, free of interests, prejudices or incentives that could materially affect the character or results of the judicial process.

Five years ago I noted how much more difficult the road was for judges dedicated to technical proficiency and the common law method than it was 30 or even 20 years ago and I suggested that, in any event, technical proficiency is a fortuity among judges selected, by whatever appointive or elective system, for their ideology or for their willingness to trim their judicial sails to the prevailing winds of interest group politics. Moreover, having argued that politics need not be the enemy either of judicial independence or of judicial distinction, I asked, what room is there in tomorrow's politics for patience, for persuasion or for compromise?

The intervening years have done nothing to quell my anxiety about the state of the judiciary or about the state of politics of which courts are inescapably a part. We are at risk of the appointment or election to the bench of individuals who lack the capacity for both judicial independence and constructive political engagement.

I draw a distinction between ideology in the weak sense of the preferences as to the political, social and economic arrangements that all sentient adults, and hence all judges, have and that inevitably affect decisions in which there is an element of discretion, on the one hand, and ideology in the strong sense of preferences that hold sway with such power as to be impervious to adjudicative facts, to competing policies or the governing law as it is generally understood, on the other.

Ideology in this second sense, I have argued, is revealed as the enemy of judicial independence. It is in that regard no different from non-ideological pre-commitment to certain legal positions for the purpose of securing or retaining a judicial position.

Judges whose belief systems are hard wired are likely to be eager law makers. Those who are pre-committed for reasons of personal advancement may or may not be. True believers, no matter what their beliefs or political persuasion, whether they are on the left or on the right, know what is right, and the brighter, the more self-confident, and the more energetic they are, the more likely they are to regard processes and institutions of dialogue and accountability as obstructions and to endeavor to render them irrelevant. Non-ideological pre-commitment forecloses dialogue and, while motivated by a vision of accountability, contributes to its degradation.

Recent years have witnessed, as you already heard and you know full well, attacks on the courts, federal and state, that have been remarkable for both their frequency and their stridency. It is clear that many of these attacks have been part of calculated strategies to create and sustain an impression of judges that makes courts fodder for electoral politics. The impression sought to be created is that not only are courts part of our political system, and of course they are; they and the judges who make them up are part of ordinary politics.

At the federal level, success in creating this impression enables politicians to win votes by promising to hold courts accountable by staffing them with reliable judges and, when they stray, reining them in through the instruments of ordinary politics. At both the federal and state levels, it enables interest groups to wield influence by framing judicial selection in terms of the supposed causal influence of a vote in favor of or against a judicial nominee or candidate on results in high salience cases such as those involving the death penalty and abortion.

What I have called judicial instrumentalism, the idea that judges are a means to an end and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit in advance to pursue those ends on the bench, is most vividly demonstrated at the federal level in the appointment strategies of presidents who follow what the political scientist Sheldon Goldman calls a judicial policy agenda, as opposed to a personal or partisan agenda, in making judicial nominations. Presidents following a policy agenda seek to fill judicial vacancies with individuals they believe will reliably decide cases in accordance with their preferred policies.

Now, of course, selecting strong ideologues with hard-wired preferences is not the only means of pursuing a strategy of judicial instrumentalism. If a judicial aspirant is not adequately equipped to be a reliable policy agent by background, education or experience, perhaps he or she can be induced nonetheless to commit to a desired path of judicial decision in advance.

Thus has the First Amendment, the same First Amendment that was invoked to protect Nazis marching in Skokie, been enlisted in an effort to assimilate judicial elections to the elections of ordinary politics. Thus has judicial independence been sacrificed at the altar of a degraded notion of judicial accountability. The Supreme Court's decision in *Republican Party of Minnesota vs. White* has paved the way for a self-fulfilling prophesy.

If such prophecies are to be confounded rather than fulfilled, and if we are therefore to have judges who are free of political commitments and policy commitments other than commitment to the rule of law, we shall need to rescue both judicial accountability and politics itself from their current degraded states. Richard Arnold was adept at the politics of judging and the politics of the judiciary, and it would help if other judges followed his example.

It would thus help if the justices of the Supreme Court of the United States were less inclined to posterity-worship and institutional aggrandizement. For, having apparently forgotten that their independence exists for the benefit of the Court and the judiciary, and of course for us, as a whole, the justices may discover that in the world of power politics, the reality of judicial independence does not match the rhetoric. Thank you.

JUDGE JONES: I am delighted to be with you tonight for this great program. I want to talk to you for just a few minutes before we start some dialogue. I am up here with some substantial candle power, present company excluded, of course. I have known Justice Baldwin for quite some time. We have, it appears, a mutual admiration society. But she has done tremendous work as a Supreme Court Justice in Pennsylvania and as she completes her tenure I congratulate her for these good works.

Professor Burbank has been a strong proponent of judicial independence and, as you can tell, a scholar in that area. And I commend him. I have admired him from afar.

It is an honor to be at the Arlin Adams Center. Anything that has Arlin Adams' name on it, Judge Adams, as you know, is a distinguished jurist. He would -- this year -- he does this year celebrate his 60th year as, I believe, both a distinguished jurist and attorney.

I thank Allan Sobel, who months ago came to my chambers and said, "You know, Judge, we ought to do something sometime and have a program." And I guess tonight is the result of our talk and some other talks that he had, obviously, with our other distinguished panelists.

I want to give you some thoughts and then tell a little story before, as I said, we get to the dialogue. And if you will indulge me, you know, this past September 17th, about a month ago, marked the 220th anniversary of the culmination of the Constitutional Congress in Philadelphia. Of course, I serve as judge under provisions of Article III of that Constitution that the framers produced. Article III, of course, reasonably implies that there are two articles preceding it.

And yet it is sad to note -- and I have to note -- that a great percentage of Americans do not know that there are, in fact, three branches of government. And this lack of knowledge on the part of our citizens, our fellow citizens, really extends in a number of directions and pointedly to the Bill of Rights. If you look at the polls you find that an astonishing 65 percent of Americans in a recent poll by the First Amendment Center believe that the founders intended the United States explicitly within the Constitution to be a Christian nation and that 55 percent, in fact, believe that the Constitution says that, that it establishes a Christian nation. I read this morning in the Philadelphia Inquirer this interesting factoid. It said that 15 percent -- 15 percent of a large sample of Americans recently polled -- only 15 percent could identify

John Roberts as the Chief Justice of the Supreme Court. However, 66 percent could tell you who one of the judges on American idol.

Time and again I think it's become too clear that the central purpose of our Bill of Rights has either been distorted or grossly misused. The central principle, I would submit, of the Bill of Rights is that certain fundamental rights to which every citizen is entitled must be placed outside the reach of political exigency. And it's incumbent upon all of us to try to understand that better and to understand in particular the tension, the sort of brilliant tension that the framers intended to operate within our system, that system that they hammered 220 years ago during that long and hot summer in Philadelphia.

And what is lost time and again in criticism of judges, I think, is that intentionally the framers designed the Congress and the President under Articles I and II of the Constitution to be majoritarian; that is, to reflect the will of the people. However, my branch, the branch in which I serve -- I don't mean to say that I own it -- but the branch in which I serve, the third branch, was expressly designed to be counter majoritarian. We are here to protect against the tyranny of the majority when rights are protected under the Constitution are violated.

Against that backdrop let me make mention of the case that has brought me some notoriety; that is, the famous intelligent design case, *Kitzmiller vs. Dover*. It is well to recall that this case featured the enactment of a policy by a significant majority of a popularly elected school board. A minority -- in this case a group of parents -- challenged that policy in my court as violating the Establishment Clause within the First Amendment the Constitution.

Now, we all know how that case turned out, but in the aftermath of that decision, many pundits wondered why, in light of the board's enactment, in light of polls in the country that say that a significant number of Americans think we ought to teach creationism either alone or along side evolution, why this the federal judge in Pennsylvania didn't just get with the program and go along with it. Well, they fundamentally misunderstand the system if they feel that way.

If those parents did not have the safe harbor that the courts provided to them, what were they to do? The ballot box is supremely unsatisfactory when a policy such as this is enacted, operational, and the next election is miles away. And suppose a majority of the voters disagreed with an assertion that a person's constitutional rights had been trampled upon and violated. What would you do?

You may disagree with individual court decisions, but you should not disagree, I would submit, with the idea that government should create a haven where citizens can enjoy their constitutional and civil liberties, and they should be permitted to do this notwithstanding the pressures the majority in the state bring to bear.

So in our system, because of the important role all the judges play, how they are selected and, perhaps as importantly, the conditions under which they must operate are of critical importance. Threats against judges, career threats, personal threats, court-stripping legislation, and the debilitating lack of a good baseline civics education by the public have combined to create, I think, a witch's brew. It is debilitating and I think it has reached epic proportions in the United States; not just in Pennsylvania but in the United States, as well.

That brings me to a story. I found out tonight at dinner that this story was well known to Professor Burbank because he was there and knows this, as well.

I was last week in the company of Justice Sam Alito of the United States Supreme Court, of course, and he returned this summer from a trip that Professor Burbank, as I said, attended and it was to Latvia. He met extensively with jurists in that nation. Justice Alito told us that he had learned the history of their high court during his visit.

And there was something remarkable to him about that visit. It was this. You may or may not remember your history. I didn't, incidentally, recall it, so don't feel guilty if you don't.

But Latvia was occupied and then annexed to the Soviet Union around 1940. It had a functioning Supreme Court or the equivalent at that time. Latvia was then invaded and occupied by Nazi Germany and then in 1944, it again became under Soviet domination, where it remained for years afterwards.

When visiting the court, Justice Alito was shown the picture of the court, the Latvian court, as it existed around 1940, and he was told that all of the justices on that court died in the subsequent years, either at the hands of their occupiers or in prison, executed, whatever fate befell them in that subsequent period of time, because they attempted to uphold the rule of law in that country. I think that, as Justice Alito reminded us, we should take a moment to reflect on that as we debate the efficacy, vitality, and appropriateness of the judiciary in 2007.

In deciding the *Kitzmiller* case as I did, and cases that I have on my docket every day, I was in part guided by these sentiments as expressed so cogently by former Supreme Court Justice, the late Robert H. Jackson, and I cite them now because they go to the heart of my essential point. Justice Jackson said this: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit such an exception, they do not now occur to us."

I think you should reflect on that, those sentiments, as well. I am delighted and honored to be here. Thank you for the opportunity to speak tonight.

PROFESSOR DeMARY: Thank you to our panelists. I think they've given us plenty to begin to think about. And I would encourage people who have questions or thoughts, or anything they want to add, to please come forward to the microphones. I have several to begin with, but I will only choose one and then go to the microphones, so I want to figure out which one.

I think that, well, not denying the fact that, as Professor Burbank noted, that judicial elections don't only affect those who get elected, but also have an impact on those who vote, maybe making the voters see that judges somehow are no different than legislators or executives, I think, at least as a political scientist, we so often talk about the method of judicial selection as a way of either holding judges accountable or giving them independence.

I wonder, since we have judges who work in systems where the judicial selection systems are different, whether or not they would speak -- I guess I will start with you, Judge Jones, asking whether or not your job would have been more difficult or different had you known that you had to face a retention election a year later, six months later, two months later in your case.

JUDGE JONES: Infinitely so. I don't think there is any question about that. It gets to issues of how judges are selected.

And I don't know, had I been, for example, a York County, Pennsylvania common pleas judge, trial judge, deciding that case, what would have happened to me in a subsequent retention election. That's a very good and open question. Because of the wisdom, at least in my case, of the framers, I was insulated from that.

I do think that as time has passed since the decision was rendered and as people learned more about it, even those who might have had an initial knee jerk response and are critical, have understood better and I've been on a quest for the last several years to explain better how judges operate. But in a reactionary atmosphere, depending on where the proximity or how proximate the election was to the decision, I might have lost my position. It's quite clear.

PROFESSOR DeMARY: I will come to you in a second. I just want to give Justice Baldwin a chance, I know when you were appointed justice you told the Governor that you would not seek retention election, if I'm not mistaken, So you're in a slightly different position. Maybe you don't have to deal with that, but your colleagues on the bench do.

And I wondered the degree to which you understand from the conversation that the notion that not only does it mean that they spend time having to run for office in some ways, but the notion that they're going to have to be held accountable in a retention election affects their behavior and the way in which they approach their jobs.

JUSTICE BALDWIN: First let me clarify, I wasn't going to be in a retention election. I am serving an interim position on the Supreme Court, which is the reason that I was appointed by the Governor. If you will remember, Justice Russell Nigro was not retained. When he was not retained, they had to appoint someone to the Court until the election. The election will be in November, so someone will fill that seat.

In the meantime, Chief Justice Cappy announced that he was resigning from the bench, so I was asked if I would take another two-year appointment and I declined to do that. Let me speak to that right now before any rumors get started about why I declined to do that.

I declined to do that because, although I have been on the Supreme Court two years, I have been on the bench for 18 years. And unlike maybe some of my colleagues and maybe some here in the audience, I believe do believe there's life after the judiciary. I would like to enjoy some of that. So that is the reason that I am not taking another two-year term.

JUDGE JONES: You can show us the way.

JUSTICE BALDWIN: Now, let me speak to retention. Some of you may have seen a letter that I wrote. I wrote a letter, an op-ed piece, on retention. And I know that a lot of times judges are afraid to do anything. I mean, they are very afraid. This is a hostile environment.

But the reason that I wrote the piece is, first, it's not political and, secondly, people talk about merit selection. Actually, the constitution was changed in '68, and

this is the only time you really get merit selection – that is, merit retention -- you can look at the record of the judges over the ten years that they have served and decide whether you want them to stay or leave. I truly believe that is a right that you have and that you should exercise it well, but it should be based on merit.

In this environment I do believe that judges and justices are very afraid what might happen, because they might be voted out not based on what they did on the bench, but based on a number of things over which they had no control. That has nothing to do with merit. And certainly if you vote out 67 judges, it has nothing to do with merit, but the appointment of where you find 67 judges to take their place.

So that's what I have to say on the retention issue.

QUESTION: Judge Jones, during the course of you hearing the case and deciding the case in Harrisburg, the play *Inherit the Wind* was at the Whitaker Center and I attended that. Would that have tainted your decision if you had attended that and either side had said that that somehow colored your decision?

JUDGE JONES: No. It was all good fun that the play was in town and I was a little busy, so -- and I also thought it might not create a good appearances. I was actually asked to attend a version in York County shortly after I decided the case. I didn't think that was a good idea, either, particularly at the time.

I did see last year or earlier this year the Broadway remake with Brian Dennehy, which I found intriguing. It is an interesting experience for me, but it had absolutely nothing to do -- has nothing to do with the way I decided the case. But thank you very much.

QUESTION: So we talked a little bit about merit selection, which I might be stealing Dr. Sobel's question. He is a big fan. But there is this idea going around that really the biggest mechanism for judicial accountability, for holding judges accountable is the selection process, at least with respect to federal judges who, you know, get appointed for a life term. So obviously impeachment doesn't really work if they make a bad decision. You know, there's really – the only mechanism we have for insuring that we have good judges is the selection process, at least the most important one.

So there is this thing called merit selection, which Dr. Sobel could probably do a much better job explaining than I can, but somehow involves this notion of an appointment, but based on merit; not on political ties, cronyism, anything like that.

So I guess my question is, do you think this is a good thing? Should we have this in place on the federal level, on the state level? Have at.

PROFESSOR BURBANK: I actually don't agree with the proposition that the appointment process is the only basis for holding federal judges accountable. That was the premise of and it is the premise of a lot of academics who are currently writing about and seeking to get Congress interested in changing the terms of the Supreme Court Justices to a fixed 18-year term.

I've written an article in which, among other things, I've argued that one of the flaws in the analysis is precisely the notion that the appointments process is it, that everything -- that accountable is completely front loaded in the federal system.

In fact, apart from impeachment, which I think is essentially toothless now and should be, at least as a basis for holding judges accountable for their decisions, there are all sorts of ways in which Congress exercises influence, oversight. And I don't mean oversight of an individual federal judge. I mean oversight of the judiciary's implementation of federal laws. Of course, appellate review of lower courts.

Now, if you are talking just about the Supreme Court, the Supreme Court actually does pay attention to what the public is thinking and consistently the polls over the last 50 years have showed that in high salience cases the Supreme Court comes out in the way in which a majority of the public favors in close to 70 percent consistently. The other 30 percent are cases, I take it, of the sort that Judge Jones was talking about, in which the majority of the public feel that the law ought to be such and so, and the Supreme Court interprets the Constitution in another way.

It's a dialogue. And, again, the notion that the appointment process is the only way for federal judges, I think, is simply wrong. The federal courts do pay attention. Congress does flex its muscles once in a while. Sometimes it goes overboard, but then, you know, Mr. DeLay is no longer a member of Congress. He is back to killing termites.

Unfortunately, he thought of the federal judiciary as another bunch of termites. As I said in an editorial in *Judicature*, "Take no prisoners," which was the language he used in connection with this bogus group called the House Committee on Accountability, which, of course, only has Republicans on it. He said, "Take no prisoners." I said, that's an appropriate view of a pesticide expert about termites, but it's not an appropriate view by a member of Congress about the federal courts.

There is a dialogue or should be a dialogue. When Bob Kastenmeier was in the House of Representatives -- and he was for 30 some years -- he had very detailed oversight here of the federal judiciary. He really held their noses to the fire in terms of the implementation of federal statutes. They came to believe that he was the best friend they ever had. That's the way it's supposed to work; not through threats.

If it works the way it's supposed to work and has worked most of the time, before politicians found it convenient to make judges and courts part of the political process -- that's the problem. The politicians today -- unfortunately it's more on one side of the aisle than the other, but there is blame to go around on both sides -- have come to regard judges and courts as part of the ordinary political process. They want to persuade us as citizens that they are. They aren't. They are not part of the ordinary political process. If they ever become that, the rule of law is dead.

JUDGE JONES: To that point, a couple of things. There are examples, of course, as Professor Burbank knows and he has cited, to the fact that the court is making decisions that if you polled the majority of Americans might go along. But historically, of course, as we all know, if you go back to *Brown vs. Board of Education* in the 1950s, if you polled in the United States at the time the Court decided that case, you would not have the public take the view that it was the right decision. Now, of course, you can't imagine any other result perhaps. Most people couldn't today, but in its time it was entirely controversial.

And on the accountability issue that I know Professor Burbank has written about, the portion of accountability that is of interest to me, and particularly in light of my experience, is that I think it's incumbent upon us, as judges -- and it certainly isn't part of

our written job description; it's not part of Justice Baldwin's and it's not part of mine -- to get out and do things like we are doing tonight. It would be very easy for me to hide in my chambers and not talk about the process.

I'm not an apologist for my decision. It's done. It's finished. You may agree or you may disagree with it, but I think that I owe the public an obligation -- and I know Justice Baldwin feels this way -- to explain how judges work, what the process is, and how we decide cases. We would serve, we do serve our colleagues better. And I think that you are going to see, I predict, in the years ahead judges being somewhat emboldened in terms of speaking out and talking about these things. At least I hope that that would be the case.

So there is some accountability to the public in terms of educating the public and enlightening the public, not necessarily to respond to the public will, as I said during my remarks.

JUSTICE BALDWIN: If I may add, good judges do make bad decisions.

JUDGE JONES: Yeah.

JUSTICE BALDWIN: And most of those bad decisions are decisions with whom somebody doesn't agree. You know, if we agree with someone, we say, That was a great decision. Boy, was that a great decision. If you disagree, we say, That stupid judge made that decision.

So the fact is that that doesn't change that judge from being a good judge. If that judge is doing the types of things that judges should do -- that is, if that judge is researching the law, if that judge is listening to the case, if that judge is fair and impartial -- that judge may still come down with a decision that a lot of people don't agree with.

QUESTION: If I may, though, what if that judge does none of those things?

JUSTICE BALDWIN: If that judge does none of those things, it depends on the system, whether it's in John's system or my system, how you treat that. If it's in my system, needless to say, if you think that judge over and over again doesn't do things, that judge doesn't have any of the qualities you want, then that judge doesn't merit retention.

PROFESSOR BURBANK: If I may add, unfortunately, but perfectly understandably, so much of the focus of discussion, whether it's acknowledged or not, is about the Supreme Court. Again, most judges are not Supreme Court judges. If you are talking about somebody who gets it wrong on a lower court, that person is going to be reversed. That person is going to be reversed.

So to pretend that all judges in the country are sitting on a Supreme Court, which has unfortunately been a big problem in political science literature, because that's practically all they study. They never bother to study -- now, that's changing -- but they never bother to study lower courts. There is a simple answer. You reverse them. And they are reversed.

I mean, but there was a case involving Judge Anderson out in California a few years ago. People got all up in arms. They said activist court. The fellow is a District Court judge. He got reversed.

MR. SOBEL: I believe and I believe that those on the panel believe that, for the most part, Americans don't have a clear understanding of the role and responsibilities of members of the judiciary. That confusion contributes to the unfavorable climate the judiciary finds itself in.

What would you suggest as the top two or three activities we might pursue in this country to address that problem?

JUSTICE BALDWIN: I am going to jump right on this, because I talked about what I was doing outside of this country. Right now I am working on an anti-corruption educational project in Uganda. The reason I'm working on that is because people don't understand the system, so the judges are having a difficult time because they think that, as you were saying before, that it's part of the ordinary political system. And one of the things that we are doing is we are instituting civics courses. You remember -- I'm sorry. People my age remember civics courses, people over 25; okay? Civics courses.

So the fact is that what we did, if you'll remember at one point in our history we decided that certain things were too expensive and that we needed to do science and math, and we needed to stick to the basics. And we took a lot of things out of the school system. One of the things we took out of the school system, yep, civics courses.

Now when you talk to young people about balance of power and all those kinds of things, there is not a lot of understanding of the system and their responsibility. I was taught in school that freedom is a two-sided coin with privilege on one side and responsibility on the other. Unfortunately, there is not a lot of that going around.

So like the project in Uganda, I think that we need to do a lot about educating ourselves and the public about how this system works and should work, and our responsibilities in the system.

JUDGE JONES: I agree with that. As I have alluded to, I agree wholeheartedly with Justice Baldwin. But we have an interesting phenomenon. You know, criticism of judges, justices, what have you, is not anything new in the republic. It goes back as far as we can see. Some of it has been entirely venomous. And in the early days, of course, those of you who studied this know we had an attempted impeachment of a Supreme Court justice in the early days of the nation for a decision that people disagreed with. And that was sort of the end of that. But there have been other issues.

I talked about *Brown vs. Board of Education*. There were impeach Earl Warren signs on lawns all across the country after that decision had been rendered.

But there is another component to it. And I mentioned this in my remarks. We have this unprecedented 24-hour news cycle dominated by certain pundits and, as I said, we've got this bad mix of a lack of civics education and then people who get the gospel according to that pundit or those pundits that they latch onto and whatever rolls out of their mouth regarding political figures, judges, whomever, they accept. It might be as low ranked as a local radio talk show host up to a Rush Limbaugh or other cartoon characters that appear -- if you will forgive me -- Ann Coulter and others. I will call it the way I see it as far as that's concerned.

So you have, I think, a dumbing down of the electorate through this process. People need to retain a degree of objectivity that I don't think that they have.

Someone mentioned the phrase activist judge. That is an all-purpose phrase that is used to describe a judge with whom you would disagree. I was with Sandra Day O'Connor, former Justice Sandra Day O'Connor, a couple weeks ago, as was Justice Baldwin. She said, "Where I come from I thought that an activist judge was someone who got up and went to work every day." I think that, too. So that's my answer on that point.

QUESTION: I would like to ask a question about the Patriot Act. I understand that the Patriot Act has been scrutinized and found unconstitutional by at least one federal court. I am not aware of any changes being made to the Patriot Act in Congress.

And so I'm wondering, what is supposed to be happening now? If the Federal Court says this law is unconstitutional, does the Congress have some obligation to change it? I don't see any change. Should there be change? Why isn't this change and, if there isn't change, does that mean that our checks and balances are out of whack?

PROFESSOR BURBANK: I am not an expert in the Patriot Act, I'm happy to say, only because it's very complicated. I have enough complicated things I have to worry about.

But as I understand it -- which may be completely wrong and forgive me if it is -- what I think you are referring to is a decision of the Supreme Court of the United States that held that there have to be some basis for a review of a determination somebody was an enemy combatant and the attempt has been made in the military through military commissions to do that. There was intervening legislation by Congress.

My understanding is that the constitutionality of the military commission is presently on review by the Supreme Court. They denied review in a case and then an extraordinary affidavit was filed by somebody who had been a military member of one of the military commissions, which revealed that they were a complete sham. The Supreme Court took what may be an unprecedented step of reconsidering -- upon the request that they do so, reconsidering the Petition for Certiorari, and they granted it.

So I believe that the issue is now before the Supreme Court of the United States, but I could be wrong. If that's not what you're talking about, I apologize.

JUDGE JONES: You will notice how we toss all the very difficult questions to the professor.

PROFESSOR DeMARY: Can I add -- I mean, I don't know the specifics any more than Professor Burbank does. I do know there have been cases where district courts have made decisions. But this does get back to the accountability and oversight that, in fact, if a district court makes a decision that is subject to the review by the Court of Appeals and by the United States Supreme Court.

So until such time as that's done, it's not incumbent upon Congress to necessarily take an action. And then if congress chooses not to do so at that point, then -- it would not be absolutely unprecedented in our nation's history; then, in fact, I think maybe the checks aren't working -- but then it becomes incumbent upon citizens to pay attention to what it is that the members of Congress are or are not doing.

QUESTION: My question is, do you have any comment on the PBS program a week ago that said that the Congress and the Supreme Court had been overridden by the office of legal counsel and so that it's not a matter of accountability? They are just plain ignored by the present administration. There have been, I think, 98 statements coming out of the office of legal counsel determining the legality of a number of the administration's decisions lately.

JUDGE JONES: Professor Burbank reminds me that you are talking about signing statements. No, I've not had occasion to have a case before me involving signing statements, so -- and I didn't see the PBS show. So I apologize. I can't comment.

It's a very controversial issue, to be sure, the whole issue of signing statements by the President of the United States. It may end with this administration. It may not. I don't know.

PROFESSOR BURBANK: On the other hand, it did not begin with this administration.

JUDGE JONES: That's right.

PROFESSOR BURBANK: But this administration has made far greater use of signing statements.

For the benefit of the audience, these are statements that the President makes upon signing legislation. Occasionally, basically, everybody would agree that the legislation says X and the President says, I'm signing it because I believe it says Y. And sooner or later -- the judge doesn't have to and probably shouldn't express a view. Sooner or later that case is going to come up before the courts and they are going to say, You can't do that because you have taken an oath to faithfully execute the laws of the United States.

Yes, if there is some reasonable room for disagreement about what the law means, fine. But if the law says X, you are not free to ignore it.

This, of course, is the way that this President has avoided having to veto legislation. He has only vetoed, I think, one piece of legislation, but he effectively has vetoed scores of bills through this what I regard as blatantly unconstitutional technique. But I'm not a judge.

JUDGE JONES: As Professor Burbank says, I should not express and I won't express an opinion on the vitality of a signing statement itself, but I will say this. Judges every day when particular legislation is called into question in their courts have to grapple with interpretations and among other things that they use is an examination of the legislative history of a particular enactment. I think many of you know that.

It seems to me that your task is made infinitely more difficult if you have some unclarity, if you chase down the legislative history and you have that argued, and then that's compounded by essentially a signing statement that's in variance with both the language of the bill and perhaps the legislative history. I say that as a structural issue without expressing an opinion as to the constitutionality of the President of the United States --

PROFESSOR BURBANK: It is an interesting prospect to think about a case coming before --

JUDGE JONES: Not for me.

PROFESSOR BURBANK: -- certain justices of the Supreme Court who say that legislative history is not to be consulted in interpreting statutes. I am thinking of, for purposes of unanimity, Justice Scalia and him getting a case where the statute says X, the President says it means Y, and he is stuck because the statute says X. I can't wait.

QUESTION: Professor DeMary, your opening comments brought our attention to Operation Clean Sweep and the election coming up next month. And there are a number of justices, judges running for retention and this group seeks to unseat them because they accepted a pay raise.

I know that Chief Justice Roberts has lobbied the Congress to get pay raises for the federal judiciary and that's what Chief Justice Cappy with the Pennsylvania legislature a couple years ago. Many people don't know that good judges have left the bench. One of your colleagues, Bob Sedwick, left the bench for a more high-paying job.

There are first year graduates of law schools going into private practice earning more than judges. I recall reading in Chicago first year associates are offered 150, \$160,000 a year, more than judges make around here.

So my question deals with the administration of the court that is non-judicial, in the sense you are not judging cases, but rather administering the system, when the Chief Justice of the United States lobbies Congress, is that back door or some -- is it political and is that okay when the Chief Justice of Pennsylvania lobbies for a pay raise to bring the judges' salary up to something commensurate?

I know it's public service. That's why I hate to see some of these good people leave the bench, when a career in public service is accepting less compensation, and taking their talents to go elsewhere. Could you comment on that?

JUSTICE BALDWIN: Not only do they leave the bench, they don't come to the bench. Let me share, see, I couldn't afford being on the bench. I am still working to get back where I was when I left my law firm.

Let me preface my remarks, because I want to be perfectly honest with everybody. I took the pay raise. Why did I take it? I hadn't had a raise in ten years. How many of you haven't? That's why I took the pay raise. Did the Chief Justice do anything wrong? Of course not.

Now, let me answer the tough question. Everybody talks about the Constitution. We have to remember that the Constitution, in order to protect us, says that during the term that you give a judge a raise you can't reduce it, because you may do that because you don't like what the judge does. So if a judge gets a raise and then you say, I don't like that decision. I am going to talk to the legislature. Let's take them back down again, the Constitution says you can't do that or the judges aren't independent.

So that's the reason -- if you read all those many pages, basically that's the reason that the pay raise stayed for the judges.

I think that it's very, very important to figure out what we want in this country as far as judges are concerned. If we want independent judges and if we want a good quality of judge -- where is the young man who was talking about this quality -- but if we want good people to run for the bench, then we're going to have to give them a fair wage.

Now, having said that, when we go on the bench, we do realize we are not going to be making what they make in law firms. We do realize we will probably be taking a cut in pay from what we were making and that's okay. That's okay. But the important thing to remember is that if you want a judiciary, you want people to serve in the judiciary, you have to pay a fair wage.

And I want to ask a question. How many of you in the audience didn't know that the judges hadn't had a raise in ten years? Okay. I'm looking at -- it's probably about half and half. If you do, if you did know that, that's good, because it means somebody out there is talking about what is going on, and the judiciary, and the checks and balances and the balance of power. But I think this is very important.

And let me say one last thing. There is nothing in the Pennsylvania Constitution that gives an age for judges or says how long they have to practice before they go on the bench. So if we don't start attracting people who have the maturity in the law, that means that people can graduate from law school and run for the bench. As we say in Allegheny County -- it's probably not true anyplace else -- if you have a good name, you'd probably win. So the fact is that it's very important for us to look at all of those parts.

PROFESSOR BURBANK: The demographics are not promising at the federal level. You look at the trend over the last 30 years and, for a variety of reasons, this trend has been younger appointees and appointees from prosecutorial positions. I have a friend, who will remain nameless, who is a federal judge who believes that we are approaching a crisis point because the government is stacking the federal judiciary with people who have spent most, if not all, of their professional lives representing the government.

Whether or not one agrees with that, one needs to recognize that policy about salary affects the demographics of the bench. I hope that we will never get in a position where we either have people who are wealthy because they have inherited wealth or have become accustomed not to making much money because they have been serving as government prosecutors for the entire time that they've been lawyers.

We need a mix. You are not going to get a mix if you follow policies that Congress has been following since 1989, when they promised the federal judiciary that in returns for the Ethics in Government Act, which seriously reduced the ability of federal judges to make money on the outside through speeches, honorariums, stuff like that, they said, "We'll make sure you get cost-of-living increases." They broke that promise very, very quickly.

I know that a lot of people don't make \$167,000. I think that's a lot of money. It is a lot of money, but not if you have three kids that you have to send to college.

I think we are heading for a disaster and, frankly, some people know that and that's exactly what they intend.

PROFESSOR DeMARY: This will be our last question for the night.

QUESTION: Justice Baldwin, I will be happy to talk to you later about pay raises, but in spite of what we've been discussing --

JUSTICE BALDWIN: Should I look forward to this?

QUESTION: Sure. The clergy have a special focus there, too. Justice Jones, my question for you is, having been nominated for the bench by President Bush, was there awkwardness for you when he was publicly quoting or publicly stating that he felt intelligent design should be taught in public schools while the Kitzmiller case was making its way through the courts?

JUDGE JONES: No, there wasn't. The aforementioned Justice O'Connor once -- former Justice O'Connor once opined that the selection of federal judges by A president who obviously nominates them is a little bit like when your kids are emancipated and when they leave the house. Once we get nominated and we get confirmed, we sort of leave the house and there is really not a lot that can be done.

Through history, you know, presidents have been confounded by their nominees. Dwight Eisenhower comes to mind when he said that Warren was one of the great mistakes of his presidency. I don't know if President Bush feels that way about this little federal judge in Pennsylvania, but that was not within my calculus.

I read the papers like anybody else. You know, one of the things I found out during the pendency of the case -- and I think this happens frequently regardless of the subject -- is that as the case progressed I knew far more about the topic and the subject than those who rather glibly -- and I don't mean -- this is not against President Bush -- because there were a lot of people who rather glibly said, for example, pertaining to intelligent design, "Well, I just think that both sides ought to be taught." Assumption in the belief there is that one of those sides is a viable scientific concept.

So no. I was not moved or swayed by comments either pro or con. If that's the case, we shouldn't have these jobs. And I decided --

QUESTION: The man who nominates you comes out and tells you what side you should come down on, it would be hard.

JUDGE JONES: You'd be surprised, I think that -- you know, I practiced law for 22 years. I had occasion to be involved in deeply unpopular cases on the wrong side. That's what we do as lawyers. As advocates in sometimes controversial cases, you bring those tools with you to the bench. And you might be surprised. We are trained that way and can appropriately tune that out.

Now, that said, I was acutely aware of the criticisms that I got after I decided the case. I am human just like anyone else. Some of it stings. To be disemboweled on national television is not a pleasant thing when it happens. But that goes with the territory and you know you have to move on. The case was already decided at that point. I couldn't get it back if I wanted to.

But no. That did not affect my decision-making process, his views or anybody else's, other than the experts and the witnesses who testified in the case and the submissions that I read from the parties and the amicus filed in the case.

QUESTION: Was there any follow-up on the findings as they related to the charges of perjury against some of the --

JUDGE JONES: They were referred to the United States Attorney for the Middle District of Pennsylvania. There was not a prosecution. That is within the realm of the United States attorney to do that. I referred it. I – I cannot bring charges.

QUESTION: I asked that because a faith-based group is lying in Federal Court.

JUDGE JONES: If you -- I'll let it as I said in my opinion.

QUESTION: That's fine. I was grateful for the Harrisburg paper for publishing it. I thought it was well done.

JUDGE JONES: My view is memorialized.

PROFESSOR BURBANK: But you recognize, Father, that if United States Attorneys spend all their time prosecuting people who perjured themselves in court, they wouldn't be doing anything else.

PROFESSOR DeMARY: I want to thank each and every one of you for coming tonight. I want to thank Professor Sobel for putting together such a wonderful panel. I particularly thank our panelists for their insight this evening.

(Whereupon, the presentation concluded at 8:35 p.m.)