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**REMARKS OF THE HON. SHIRLEY S.
ABRAHAMSON BEFORE THE AMERICAN
BAR ASSOCIATION COMMISSION ON
SEPARATION OF POWERS AND JUDICIAL
INDEPENDENCE, WASHINGTON, D.C.,
DECEMBER 13, 1996**

HONORABLE SHIRLEY S. ABRAHAMSON*

Good morning! I am Shirley S. Abrahamson, Chief Justice of the Wisconsin Supreme Court. I have been Chief Justice since August of this year, having served as a justice of the court since September 1976. I am pleased to participate in this second public hearing of the ABA Commission on Separation of Powers and Judicial Independence and to join friends and colleagues in discussing judicial independence, a "core value" of our democratic society and of our tripartite system of government.

The commission has established the following tasks as part of its work on the issues of separation of powers and judicial independence in the context of the federal system:

1. Review the different forms of judicial independence, and
2. Explore the tension between judicial independence and judicial accountability.

More specifically, today's hearing will focus on, as I understand it, two areas of tension: the tension between the doctrine of separation of powers and the interdependence of the three branches of government, and the tension between judicial independence and the public's concern for accountability. How can we maintain an appropriate balance, and how can we resolve the tension between these fundamental yet conflicting concepts? I have attempted to keep your tasks in mind in preparing my remarks.

* Chief Justice, Wisconsin Supreme Court.

Before I begin, I want to give you a context, a framework, for my remarks. As you know, each state has its own judicial system and its own political and legal culture. I cannot speak about all state court systems, only my own. My experience derives from the Wisconsin court system, a state court system whose constitution gives the power of self-administration to the judicial branch.

I also want to posit a working definition of judicial independence as a context for my remarks. Scholars speak of two overlapping types of judicial independence: institutional judicial independence (sometimes referred to as branch independence) and individual judicial independence (sometimes referred to as decisional independence).

Institutional judicial independence, or branch independence, embodies the concept that the judiciary as a separate branch of government acts independently of the other two branches, without legislative or executive control. Institutional judicial independence includes the relationships among the branches of government and is closely related to the doctrine of separation of powers. Branch independence serves individual judicial independence.

Individual judicial independence, or decisional independence, embodies the concept that individual judges decide cases fairly, impartially and according to the facts and the law, not according to whim, prejudice or fear, or the dictates of the legislature or executive, or the latest opinion poll.

The general consensus is, I believe, that judicial independence, although difficult to define, is valuable in our system and that threats to either branch or decisional independence are ultimately threats to the rule of law.

I have organized my presentation into five parts. First I briefly discuss the doctrine of separation of powers in Wisconsin, the institutional independence of the Wisconsin judiciary, and the interlocking relationship of the three branches of Wisconsin government, particularly with respect to the budget process. Second, I speak about the Wisconsin experience with individual judicial independence, specifically the election of judges. Third, I describe a recently created Wisconsin State Bar Commission on the Judiciary as a Co-equal Branch of Government, which has been in the forefront of discussing judicial independence in the state of Wisconsin. Fourth, I review modes of interbranch communication and the extent to which they implicate judicial independence concerns.

And fifth, I conclude with a discussion of how Wisconsin's initiatives at the state level promote a partnership between the judiciary and the public and an examination of how court-community relations implicate judicial independence concerns.

I. INSTITUTIONAL JUDICIAL INDEPENDENCE IN WISCONSIN

The Wisconsin Constitution implicitly provides for the separation of powers by vesting the state's legislative power in a bicameral legislature, its executive power in a governor and its judicial power in a unified court system. The Wisconsin Supreme Court has recognized, however, that the terms judicial, legislative and executive power are not self-defining and that the separation of powers doctrine states the principle of shared, rather than completely separated powers. We have a system of separateness with interdependence, autonomy with reciprocity. The Wisconsin Supreme Court has explained that "the Wisconsin Constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another The doctrine envisions a government of separated branches sharing certain powers."¹

The Wisconsin Constitution, in addition to vesting judicial power in a unified court system, expressly provides that the supreme court shall have superintending and administrative authority over all courts. Furthermore, the Wisconsin Constitution declares that the chief justice shall be the administrative head of the judicial system and shall exercise this administrative authority pursuant to procedures adopted by the supreme court.

The Wisconsin Constitution thus recognizes the independence of the supreme court in the administration of the courts. No similar provision exists in the Federal Constitution.

Although the Wisconsin Constitution gives the supreme court superintending and administrative powers, it does not expressly give the court procedural independence, that is, the authority to promulgate rules of pleading, practice and procedure. These matters are addressed in a Wisconsin statute that can be traced back

¹ *State v. Holmes*, 315 N.W.2d 703, 709 (Wis. 1982).

to 1849 - the first statutes of the new state of Wisconsin. According to the statute, the supreme court "shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure" in judicial proceedings in all courts. The court-adopted rules, however, "shall not abridge, enlarge or modify the substantive rights of any litigant." The statute makes clear, however, that "the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure" is not abridged.

Intrinsic to the separation of powers is the doctrine of the inherent power of the judiciary. This doctrine is based on the principle of necessity; courts must have certain powers to carry out their functions as courts.

Our supreme court has described inherent powers as follows:

In order that any human agency may accomplish its purposes, it is necessary that it possess power In order to accomplish the purposes for which they are created, courts must also possess powers. From time immemorial, certain powers have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers.²

The Wisconsin Supreme Court has had to determine the respective powers of the judiciary and the legislature when the issue has been raised in the context of a constitutional challenge to specific legislation on the grounds of violation of the separation of powers doctrine or when a court's functioning has been threatened by the action or inaction of a legislative or executive body.

For example, a legislative enactment setting time limits on judges' decisions was struck down as impinging on the courts' core zone of power.³ Similarly, legislatively enacted educational requirements for guardians ad litem were found to violate the court's exclusive power to regulate the legal profession.⁴ In another case, the court found that the power to set attorney fees for court-appointed guardians ad litem and special prosecutors was shared between the legislature and the judiciary, but that legisla-

² *State v. Cannon*, 221 N.W. 603, 603 (Wis. 1928).

³ *In re Grady*, 348 N.W.2d 559, 569 (Wis. 1984).

⁴ *State ex rel. Fiedler v. Wisconsin Senate*, 454 N.W.2d 770, 775 (Wis. 1990).

tion in this regard could not unduly burden or substantially interfere with the work of the courts.⁵ Our court has also held that a state statute permitting a criminal defendant a peremptory right to substitution of the judge assigned to hear the case was valid because on the basis of the record the court could not conclude that the statute materially impaired or practically defeated the proper functioning of the judicial system.⁶

Recently, the court struck down as a violation of the separation of powers doctrine legislation abrogating a judge's power to appoint counsel for anyone other than the child in abuse and neglect cases.⁷ The court concluded that the legislature's elimination of a trial court's power to appoint counsel unreasonably burdened and substantially interfered with the court's powers.

The inherent power of the courts has been held to extend to the retention of a court janitor in the face of an executive branch effort to dismiss him;⁸ to the decision to remain in an old courthouse when the county government ordered a move to inadequate facilities;⁹ to a demand for payment for installation of a courtroom air conditioner;¹⁰ and to ordering the release of state funds to procure an automated legal research system for the courts.¹¹

To summarize, the Wisconsin Supreme Court has recognized that each branch has a core zone of exclusive authority upon which another branch may not intrude. The authority of the legislature and judiciary may overlap in other areas and in these areas the legislature is prohibited from unreasonably burdening or substantially interfering with the judicial branch.

The following introductory passage from a Wisconsin Supreme Court decision summarizes the court's view of separation of powers in Wisconsin:

Each branch has a core zone of exclusive authority into which the other branches may not intrude. "Great borderlands of

⁵ *Friedrich v. Circuit Court of Dane County*, 531 N.W.2d 32, 34 (Wis. 1995).

⁶ *State v. Holmes*, 315 N.W.2d 703, 724 (Wis. 1982).

⁷ *Joni B. v. State*, 549 N.W.2d 411, 413 (Wis. 1996).

⁸ *In re Janitor of Supreme Court*, 35 Wis. 410, 421 (Wis. 1874).

⁹ *In re Court Room & Offices of Fifth Branch Circuit Court Milwaukee County*, 134 N.W. 490, 495 (Wis. 1912).

¹⁰ *State ex rel. Reynolds v. County Court of Kenosha County*, 105 N.W.2d 876, 884 (Wis. 1960).

¹¹ *State ex rel. Moran v. Department of Admin.*, 307 N.W.2d 658, 662 (Wis. 1981).

power” lie in the interstices among the branches’ core zones of exclusive authority. . . .

When the powers of the legislative and judicial branches overlap, the court has declared that the legislature is prohibited from unreasonably burdening or substantially interfering with the judicial branch. This subtle balancing of shared powers, coupled with the sparing demarcation of exclusive powers, has enabled a deliberately unwieldy system of government to endure successfully for nearly 150 years. . . .

If a statute falls within the judiciary’s core zone of exclusive authority, the court may abide by the statute if it furthers the administration of justice, “as a matter of comity or courtesy rather than as an acknowledgment of power.” Thus the court acknowledges the legislature’s power to declare itself on questions relating to the general welfare and the court complies with the legislature’s declared policy as long as the policy aids but does not obstruct “the court in its own exclusive sphere.”¹²

In recent years, concerns about the doctrines of separation of powers and inherent powers have focused on the issue of funding for the courts. The Wisconsin Constitution makes no express provision for funding the operations of the courts. The legislature, under its authority to tax and spend, determines the appropriation for the court system, subject to the governor’s veto.

In Wisconsin, judicial branch budget requests are submitted to executive budget officials for review and revision. Once so revised, the courts’ budget requests are incorporated into the governor’s budget for submission to the legislature.

Judges are concerned about the underfunding of the court system. For example, the state has invested \$16 million in a single statewide computer system for the Wisconsin courts which has served as a model for other states seeking electronic solutions to information management problems. We need continuing, substantial funding to ensure the adequate maintenance of our electronic infrastructure, let alone pursue the new electronic initiatives necessary to sustain and enhance our effectiveness.

The bottom line is that if the courts are to operate effectively for the public, the courts must be adequately funded. Along with the legislature’s power to tax and spend comes the responsibility to

¹² *Friedrich v. Circuit Court of Dane County*, 531 N.W.2d 32, 36 (Wis. 1995) (citations omitted).

ensure that the courts, as a co-equal branch of government, have sufficient funds to fulfill their responsibilities to the people of the state. The legislature, in the exercise of its independent judgment and careful scrutiny, should, in my opinion, give deference to the funding needs of the judiciary, just as the judiciary, in its adjudicative functions, gives deference to the legislative branch. To give deference, of course, does not mean to rubber stamp.

Underfunding of the courts may stem in large part from a lack of communication among the branches. Like the general public, the legislative and executive branches may not be sufficiently familiar with the workings of the courts and thus may not fully appreciate our funding needs.

We must communicate effectively with our co-equal branches if we are to successfully plead our cause with them and avoid damaging confrontations about funding. I shall address strategies for such communication more fully in a later segment of this presentation.

II. INDIVIDUAL JUDICIAL INDEPENDENCE IN WISCONSIN

I turn now from institutional judicial independence to individual judicial independence, that is, decisional independence. In the federal system, appointment of judges and life tenure during good behavior are intended to safeguard decisional independence. But appointment and life tenure are not part of many state court systems. In these states judges must stand for election, either in contested races or retention elections.

For some, judicial elections are a significant threat to decisional judicial independence. Critics of the elective system question whether elected judges can remain objective when they are dependent on certain groups or persons for support in election campaigns.

Proponents of an elected judiciary believe that judges should be accountable to the people for their legal skills and practical knowledge, their effective and efficient administration of their case load, their integrity, fidelity to law and judicial temperament. Proponents of the elective system nevertheless believe that judges should be impartial and independent.

There is no perfect selection system for judges. While elected judges may face great pressures on their ability to be independent, appointed judges are not free from outside pressures either in the

selection process or thereafter. Neither system can claim a monopoly on good judges. The best system is the one that suits the particular legal culture of the jurisdiction. And the best judges, whatever the system, are those who resist threats to their decisional independence.

An elected judiciary is a fundamental part of the framework of Wisconsin state government. Under the Wisconsin Constitution our justices and judges are elected by the people in nonpartisan contested races.

Wisconsin Supreme Court justices serve ten-year terms, while trial and appellate court judges serve six-year terms. Originally appointed by a governor to fill a vacancy, I have stood for election twice.

I wholeheartedly support an elected judiciary for the state of Wisconsin, a state with a strong populist tradition. I also believe that Wisconsin voters, for the most part, exercise their right to elect judges in a sound manner. A Wisconsin voter is more likely to vote - I believe and hope - on the basis of a judicial candidate's qualities - her ability, fairness and independence - than on that voter's agreement or disagreement with a judge's decision in a particular case or a candidate's position on a particular issue. Other states, with different political and legal cultures, have opted to select judges through an appointive or retention election system.

Many factors contribute to making the elective system (with all its difficulties) work in Wisconsin.¹³

Wisconsin is a middle-sized state, in terms of both geographical size and population. In contrast to the 200 elected judges in Cook County, Illinois, Wisconsin has about 250 judges in the entire state. Nearly two-thirds of our counties have only one or two judges. In our largest county, Milwaukee County, we now have 46 circuit court judges. Even in Milwaukee County, at most seven or eight judges will be on the ballot at any one time. We have seven supreme court justices who serve ten-year terms. Only one supreme court justice is on the ballot at any given election.

Wisconsin judges are elected in nonpartisan spring elections in which unfortunately only a small percentage of the eligible voters

¹³ This paragraph and the next two paragraphs were added to the statement by letter to the commission in response to questions.

participate. Nevertheless, the voters seem interested, involved and informed. Wisconsin judges generally enjoy bipartisan support in elections, regardless of any past party affiliation of the judge or the party of the governor who may have appointed the judge. The costs of campaigning are increasing in Wisconsin but they are still lower than those of judicial campaigns in other states.

Underlying the debate about appointed versus elected judges is a fundamental disagreement about the capacity of the voters to choose wisely. But as Thomas Jefferson said, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."¹⁴

Rather than scuttling judicial elections because we fear voter ignorance, we should capitalize on the judicial election as a vehicle for voter education. It is disappointing, but true, that many know little about the courts, yet public education about judicial candidates and about the courts is, in my opinion, key to judicial independence.

Judicial elections can and should serve to educate the public about what we judges do on a daily basis, about case management, court powers, the general principles underlying court decisions and the core value of decisional independence. The public must understand that judges' decisions are circumscribed by law, that a judge's discretion is often very limited and that the law sometimes requires decisions that are unpopular - even with the judge herself.

We must explain to the public the difference between the policy-making functions of the legislature and the adjudicatory function of the courts. Following a recent speech, an unhappy citizen asked me why judges released so many criminals from prison on parole; he saw that as a flaw in the judicial system. My questioner - and many others in the audience - were surprised to learn that the parole system in Wisconsin is governed by statute and administered by the Department of Corrections, an executive branch agency, not by the judiciary.

¹⁴ Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *reprinted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 473 (1968).

Yet despite the educational opportunities offered by judicial elections, the elective process can prove troublesome. Election campaigns, especially statewide campaigns, are labor intensive efforts that take judges away from the primary task of judging.

Campaign behavior can erode public confidence in independence and impartiality. Judicial candidates have been charged with being too aggressive in stating their views on legal and political matters and calling into question their future independence in a particular case or on particular issues.

The increased cost of judicial election campaigns has, in the eyes of many, cast a shadow over the judiciary and adversely affected the perception of judicial independence. Though judicial campaign costs in Wisconsin are not nearly as high as those in Ohio as described by Chief Justice Moyer at the last public hearing, the costs of campaigning in Wisconsin have increased in the last few years.

Again, the solution to problems of judicial campaigning in a state like Wisconsin is not to scuttle judicial elections but to promote the development of clear and reasonable rules for judicial campaign behavior including solicitation and acceptance of campaign contributions. The ABA Model Code of Judicial Conduct prohibits judicial candidates from making pledges or promises of conduct in office; from making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; and from knowingly misrepresenting the identity, qualifications, present position or other fact concerning the candidate or an opponent. Furthermore candidates are forbidden to personally solicit or accept campaign contributions or to personally solicit public statements of support. The Wisconsin Supreme Court is in the process of appointing a commission to propose rules to govern campaigns for judicial elections in Wisconsin.

There is no definitive answer to the underlying question: Are elected judges less independent than those appointed with life tenure?

On the basis of my experience in Wisconsin, I answer this question in the negative. Elected judges, just like appointed judges, are subject to pressures which threaten individual judicial independence. United States District Court Judge William M. Hoeveler has reported that "even though [appointed judges] have

life tenure, we're human; don't ever think we're not subject to outside pressures."¹⁵

Decisional independence, in my view, arises out of a judge's training, oath of office and social and cultural conditioning. The constraints on judges demand judicial independence. Because judicial independence is valued in our society, judges strive to live up to this norm. In sum, I believe that judicial independence is a matter of the character of the individual judge. The quality of the individual, not the selection process, determines decisional independence.

III. WISCONSIN STATE BAR COMMISSION ON THE JUDICIARY AS A CO-EQUAL BRANCH OF GOVERNMENT

I turn now to the Wisconsin State Bar Commission on the Judiciary as a Co-Equal Branch of Government, a 33-member panel appointed by then State Bar President-elect David Saichek in August 1995. The commission is composed of lawyers, non-lawyers, judges, and representatives of the legislative and executive branches. It is co-chaired by President Saichek and my colleague on the Wisconsin Supreme Court, Justice Jon P. Wilcox. The members are organized into five committees: Court-Community Collaboration, Interbranch Relations, Court Accountability, Funding and Resources, and Research.

The commission has two stated purposes:

1. To "research the historical and current framework of the separation of powers doctrine"; and
2. To "explore means by which the courts can properly maintain their independence while cooperating with other branches of government toward the goal of serving the citizens of Wisconsin with basic good government."

In the words of State Bar President David Saichek, the commission is addressing the following questions:

Is the judiciary strong and independent? Is it using its resources wisely and efficiently? Is it accountable to the citizens? Is it funded sufficiently to perform its proper role as a coordinate branch of government? Or, is the judiciary treated

¹⁵ Panel, *What is Judicial Independence? Views from the Public, the Press, the Profession, and the Politicians*, 80 JUDICATURE 73, 75 (1996).

like a powerless relative who must beg for sustenance at the sufferance of the other branches of government? What powers does the judiciary have to determine its own fate?¹⁶

Having read the transcript of your October 11th public hearing, I know these questions are familiar to you.

The Wisconsin commission has conducted public hearings in five cities across the state soliciting the views of judges, state bar members, state and local legislators, court staff, court users and the public. Draft reports of the several committees will be circulated for public comment in January 1997, and the commission expects to present its final report to the State Bar Board of Governors in April 1997.

Although I am unable to present the commission's findings to you today, I can say that the Court Accountability Committee will make a preliminary recommendation that the Wisconsin Supreme Court create a task force on the quality of the court system to consider a methodology for judicial assessment using the Trial Court Performance Standards and Measurement System developed by the National Center for State Courts. In addition, several preliminary recommendations from the Court-Community Collaboration Committee are similar to suggestions I make later in my remarks about a court-community coalition for justice.

I would be happy to forward copies of the drafts submitted for public comment and the final report of the commission as they become available.

IV. INTERBRANCH RELATIONS

I turn now to the issue of interbranch communication and the extent to which it implicates judicial independence concerns.

In speaking about relations and communications between the judiciary and the legislature, I have in the past referred to the song "Shall We Dance?" from the musical *The King and I*. The song and the scene of Anna (an English school teacher) teaching the King of Siam to dance point out that although Anna and the King had significant and conspicuous differences, the two had enough in common to learn from one another and to work together toward a single purpose. So, too, the legislature and the judiciary

¹⁶ David Saichek, *President's Perspective*, WIS. LAW., Oct. 1996, at 4.

who “move in proud and silent isolation”¹⁷ can learn to understand each other, communicate with each other and work more effectively together for the public good.

In simple terms, the goal of interbranch communication is that the judicial and legislative branches listen to and learn from each other so that we can better serve the people. The legislature and judiciary are important to each other. This interdependence gives both branches a basis for communication.

Every day the judiciary sees the importance of the legislature to the functioning of the courts. The legislature creates substantive law which can increase, decrease or change the business of the courts. The quality of legislative drafting affects our cases, many of which involve statutory interpretation. The legislature establishes procedural rules which affect the operation of the courts, sometimes in unforeseen ways. The legislature, through the budget process, funds court operations. And on a more personal level, the legislature sets the working conditions of judges, including salary, benefits and retirement.

So, too, is the judiciary important to the legislative function. As Judge Abner J. Mikva has observed, courts are an integral part of the legislative process. If we consider the legislative process as a continuum, the judiciary is at the far end of that continuum as we interpret and act on legislative enactments. I have heard many a legislator say, “Third branch? Nonsense! The courts are the only branch. The legislature can pass all the laws it likes. Then you interpret them, and it’s nothing like the legislature intended, or you strike them down as unconstitutional.”

The framers of both the Federal and Wisconsin Constitutions clearly envisioned the interdependence as well as the independence of the branches of government. A legislative-judicial partnership rests by constitutional design on an uneasy footing. Some of the tension between the branches is a healthy part of our system of separation of powers and checks and balances. Nevertheless, both judges and legislators see some unhealthy barriers to interbranch communication.

One barrier is that legislators and judges may have ingrained negative attitudes about each other. In my home state when the judicial branch receives a memorandum from the legislative or ex-

¹⁷ Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 125 (1921).

ecutive branch, it is usually addressed to "all agencies," as if the judicial branch is simply another executive entity. It is hard for many judges to get beyond this first line without getting angry. By the same token, if you want to raise the hackles of a legislator just whisper the words "inherent powers of the judiciary," or "judicial independence."

A second barrier is that the two branches have limited knowledge of each other's institutional roles and each other's methods of working.

In addition to the negative attitudes and lack of information that keep us apart, a number of other more troubling obstacles arise when we begin to consider interbranch communication. Some would argue that interbranch communication is not permissible. Some judges interpret their constitutional role as a barrier to their participation in any manner in the legislative process. They view judges who participate in legislative matters as walking violations of the separation of powers doctrine.

Legislators do not universally welcome judges in the legislative process. Some legislators express resentment toward judges' incursions into their domain and view judges' attempts to communicate about proposed legislation as an interference with legislative independence.

For those who believe that interbranch communication is permissible and desirable, the lack of clear guidelines for judges' extrajudicial activity in the legislative process presents an obstacle. For example, the ABA Model Code of Judicial Conduct (Canon 4B, C) permits judges to participate in extrajudicial activities concerning "the law, the legal system, or the administration of justice." The overriding rule is that a judge must conduct all extrajudicial activities in a manner that will not cast doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties. Still the exact rules of judicial conduct - the proper steps for this legislative-judicial dance - need further refining.

Although many see no constitutional or ethical barriers to interbranch communication and indeed believe that interbranch interaction is necessary and desirable, it is generally acknowledged that there are prudential concerns; caution is necessary. Legislative activity enmeshes a judge in partisan politics and can tarnish the judiciary's reputation. Participation in legislative matters

may give the appearance that a judge has prejudged an issue or statute which may later come before the court, so as to necessitate the judge's disqualification. If there is any consensus, it is that judicial communication with the legislature must be conducted with minimal damage to institutional credibility and reputation.

Another troubling aspect of interbranch communication is determining whether a judge is approaching the legislature as a judge or as an individual who happens to be a judge. A judge wears several hats; he or she may speak for the institutional concerns of the judicial branch, for the personal interests of judges as a group or as an individual citizen expressing individual policy views. As former Oregon Supreme Court Justice Hans Linde has commented, what is important is to maintain clear distinctions about the judge's role.¹⁸ But that is often easier said than done.

Beyond the different roles of the judge, and perhaps more important, is who decides the position of the judicial branch on a particular issue. If all the judges do not agree with the official position, can a dissenting judge present a minority view? Under what circumstances?

From the foregoing discussion one might conclude that judges and legislators do not communicate, but merely agonize about whether and how to do so. On the contrary, given their shared interest in improving the law and the administration of justice, the two branches have tried many ways of working more closely together on their common enterprise.

As I have written before, I join Robert Katzmann in his wise counsel that if communication between the two branches is to be improved and routinized without impinging on the prerogatives and integrity of either branch, we must discuss and evaluate the communication devices that have been tried. We must also continue our efforts to discover new devices.

The most obvious way in which the judiciary communicates is through judicial opinions. In my experience, however, this communication device is limited in the legislative arena. Legislators simply do not read our opinions. Legislators most often learn about our opinions from their constituents or from the media. Of course in fairness I acknowledge that judges are frequently una-

¹⁸ Hans Linde, *Observations of a State Court Judge*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 128 (R. Katzmann ed., 1988).

ware of the legislature's primary communications with us: the bills they enact in response to opinions of the court.

A second form of judicial communication with the legislature is the Chief Justice's State of the Judiciary address. In Wisconsin this address is delivered annually to fellow judges at the state judicial conference. The judges are the target audience, but the written address is also disseminated to the executive and legislative branches. In other states, the State of the Judiciary address is delivered by the Chief Justice to an open session of the legislature. Such direct communication is probably more effective.

Since some of the barriers to effective interbranch communication result from lack of knowledge about and understanding of the other branches' perspectives and problems, programs that educate members of each branch about the other branches can be instrumental in opening the door to communication.

For example, the legislature might invite judges to participate in orientation sessions for new legislators, describing for them the work of the judicial branch. Likewise, the judiciary might invite legislators to orientation sessions for new judges, or to judicial conferences.

In Wisconsin, we have designed a program to have legislators observe the courts in action. We call it the Judicial Ride-Along Program. (It's really a sit-along, but that doesn't sound quite as exciting.) Through the Ride-Along program, we invite legislators from each of the counties to sit alongside a trial court judge for half a day, observing how the judge handles the caseload and then evaluating the experience. So far about 80 legislators across the state have participated in this program. Many of them have reported a new appreciation for some things judges have been saying for many years: our dispositional alternatives are limited and our resources are slim. Our hope is that the legislators translate their learning experience into effective legislation and public policy.

Many kinds of official and two-way communication devices have also been tried: Some states include legislators in the judiciary's long-range planning process; through this involvement legislators realize that they have a stake in the courts. Other states employ joint study commissions and task forces comprised of representatives from the three branches, as well as the public. Regular state or regional conferences involving legislators and judges can for-

malize a mechanism for regular communication between the two groups. Legislatures may appoint liaisons to the judiciary; former legislators who become judges may act as liaisons to the legislature.

Attaching judicial impact statements to proposed legislation to measure the effect of legislation on the business of the courts is also being used in some jurisdictions.

More informal methods of interbranch communication are also possible. For example, in some states the chief justice holds an annual reception for legislative leaders.

In Wisconsin, we have created an informal discussion group composed of about five legislators, five executive branch officials and five judges - trial and appellate. The group meets several times each year to discuss matters of mutual interest to the three branches. For example, in our first meeting we talked about the Governor's new task force on sentencing alternatives; the second meeting was devoted to a demonstration of the courts' automation program; the third featured an explanation of the executive budget process. An outgrowth of this informal discussion group has been a unique partnership between the executive and judicial branches of government by which the executive branch is making use of the judicial system's recognized expertise in automated systems implementation.

An additional or alternative option to direct communication between the branches of government is the use of intermediaries. Administrative offices of the court can serve this purpose, as can professional organizations such as bar associations.

The subject of interbranch relations will continue to be a difficult one; it is a work in progress. We know intuitively that good interbranch relations can benefit the three branches of government and the people, but the nuts and bolts of forging positive relationships often escape us.

So, shall we dance? Sometimes. But let's watch out for each others' toes.

V. A COURT-COMMUNITY COALITION FOR JUSTICE

I conclude with Wisconsin's initiatives to promote a partnership between the judiciary and the public and a discussion of how court-community relations implicate judicial independence concerns.

The power of the courts lies in the confidence and trust of the people. As Justice Thurgood Marshall noted, "[w]e must never forget that the only real source of power we as judges can tap is the respect of the people."¹⁹ We, the judges, must be vigilant to retain that public confidence.

Wisconsin is fortunate that public confidence in the judiciary remains high. In my non-scientific, non-random sampling of more than 400 members of service clubs in Wisconsin I am pleased to report that over 98% of the respondents expressed confidence in Wisconsin judges, believing them to be generally honest and ethical. In response to the question "what are the greatest assets or strengths in our judicial system?" many answered "impartiality," "fairness" and "judicial independence." We cannot, however, be too sanguine. Many were critical of "delays," "costs" and "frivolous litigation."

Earning the people's confidence in and respect for the judiciary's work is a many-faceted process. But two things are critical: we must have the people's understanding and we must understand the people.

One of the goals of the Wisconsin Supreme Court's efforts regarding judicial independence is to foster court-community collaboration, to create a true partnership for justice. This partnership has two elements: (1) Outreach - the judiciary working with citizens to help them become better informed about the work of the courts and to show them the value of judicial independence; and (2) Input - direct public involvement in the work of the justice system.

Because the judiciary is the least understood of the three branches of government, the Wisconsin Supreme Court has numerous outreach programs to educate the public including a speakers bureau, court visitors' guides, forums and programs for journalists and journalism students, and an electronic bulletin board for easy access to appellate judicial opinions. I have described these programs in a recent article and shall not elaborate on them here.²⁰

A very successful, recently organized supreme court and bar program called "Court with Class" has invited high school stu-

¹⁹ CHI. TRIB., Aug. 15, 1981.

²⁰ Shirley S. Abrahamson, *A True Partnership for Justice*, 80 JUDICATURE 6 (1996).

dents from every public and private school in the state to come watch a supreme court oral argument and meet with a justice over the noon hour. Response has been overwhelming and we are now booking classes into 1998.

In speaking with the public, we also listen to the public's concerns, criticisms and suggestions. In this connection, we have developed several programs to encourage the public to assist the operations of the courts.

One ongoing project is to increase the use of volunteers in the court system. We are now creating a database of existing trial court volunteer programs to be used as a resource for replication of volunteer projects throughout the state.

Whether elected or appointed, judges need to see ourselves as accountable to litigants, the bar and all who are consumers of our services. Judges should look at our roles from the perspective of those who appear before us and of the entire community we serve. Consumers' impressions of the system of justice are all important - whether litigants and lawyers are treated fairly and with respect, whether claims are promptly and efficiently resolved according to the law, whether, in short, our courts are seen as this society's chosen forum for resolving disputes and achieving justice. Considering the users of the system and increasing their opportunities for involvement in the courts does not impede judicial independence. On the contrary, only with public support for an independent judiciary is the judiciary truly independent.

* * *

In conclusion, I want to thank the commission for the opportunity to present one state judge's views on judicial independence. While I understand that your mandate is limited to judicial independence in the federal system, I applaud your including state experience in your hearings.

I look forward to the commission's report at the conclusion of your work.

APPENDIX

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