

# COMMENT

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I have been a victim of the interplay between the two political branches of government. Inherent in my view of judicial independence is the responsibility of those of us who are honored to serve as judges to execute constitutional mandates. There are some dilemmas in our mission. First, the legislative and executive branches sometimes try to supplement or supplant judicial authority. In South Carolina, only after the governor recommends the budget of the judicial branch and the legislature makes an allocation based upon a division of the resources available do we get the total funding for the judicial branch. This process affords the other two branches of government an opportunity to use the judicial branch's budget as leverage to intimidate or coerce the judiciary. I can give you a recent example of this.

In South Carolina, video poker is the hottest political issue. Two weeks before the South Carolina Supreme Court was to rule on whether video poker constituted a lottery under our Constitution, I picked up my Sunday paper. At that time, I had under consideration a proposed opinion dealing with this issue. A group of legislators had written an op-ed piece in the newspaper. The legislators said that if the Supreme Court did not hurry up and decide this issue vital to the welfare of the people of South Carolina, the legislature ought to do a number of things. These included changing the way that judges are elected and holding our budget hostage to a "proper" decision in that case. This is the kind of dilemma we confront.

We also face a problem of perception. Either consciously or unconsciously, the executive and legislative branches tend to portray the judiciary as an agency subject to their directives instead of as a coequal branch. It is difficult to be a coequal branch of government when you get less than one percent of the total state budget. Instead, the other branches perceive us as an instrument to administer the will of the people as expressed through their elected representatives.

The problem of perception leads to another dilemma. Legislation is often enacted without due regard for its impact upon the judicial branch. Routinely, the legislature has its staff send over to Court Administration a Fiscal Impact Form, which elicits cursory information about the costs associated with a particular bill. We are unable to furnish more than rough estimates because of insufficient background data on the proposed legislation. Consequently, we are often provided inadequate resources with which to implement legislation. Con-

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sider an example. Most of you are familiar with something called “two strikes” or “three strikes” criminal legislation.<sup>1</sup> The legislature of South Carolina was seriously considering passing such a measure. They believed we had to cut down the size of the criminal population in our state, and the way to do it was this kind of statute. In order to bring to their attention the horrendous impact of this law on the judicial branch, we had to develop empirical data that would show the extent of the impact. We had to show them that, when you go from a system where the solicitors and prosecutors negotiate pleas to a “three strikes” system, anyone who pleads guilty on the third strike is either insane or represented by a lawyer soon to be disbarred. Instead of stream-lining the criminal justice process, we would end up with seventy-five percent more criminal trials than we have under the current system. And if we are going to have that many more trials, we said to the legislature, give us more judges. The South Carolina legislature did not particularly like it, but they dealt with some of our concerns.

This scenario is replayed periodically during each session of the legislature, sometimes with like results, and at other times with a less than favorable outcome. We have suggested to both chambers of the legislature that the solution would be to involve the judiciary at the initial phase of the process for each bill that directly affects the judicial branch. I view it as my responsibility to keep the three branches of state government focused on the narrower function of the judiciary as a protector of the rights and freedoms of our mutual constituents, the people of the State of South Carolina. Part of that responsibility is assuring both the executive and legislative branches of our fullest cooperation—within the parameters of the constitution and the realities of fiscal appropriations. If a governor vetoes essential funds required and requested by the judiciary after good faith disclosure of the need, then it is not feasible to expect that his campaign promises of tough criminal measures will be fully implemented by overwhelmed and understaffed courts. If the legislature in its wisdom enacts cumbersome criminal measures, all I ask is that the additional workload of the courts be reflected in our budgetary appropriations.

I concur that judicial independence is under attack, or at the very least has been relegated to a position of insignificance. My experience, however, reflects that affirming the independence and accountability of the judicial branch yields positive results. Rather than arrogantly asserting constitutional mandates of entitlement to interbranch consideration, the Supreme Court of South Carolina has opted to show the interdependence of each of the branches upon the others. Constructive independence of each branch is dependent upon cooperation with, and support of, each of the other branches.

I am optimistic that the attention currently being focused on this sensitive issue will spark debate and meaningful developments. For that reason, I con-

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1. Following a baseball metaphor, when a criminal reaches his third “strike,” he is “out”—a severe punishment increase is imposed. For example, a criminal with two prior convictions for violent crimes may *automatically* receive a life-without-parole sentence upon his third conviction for a crime of violence, regardless of the facts in the third case. See, e.g., S.C. CODE ANN. § 17-25-45 (Law. Co-op. 1976 & West Supp. 1998).

clude that judicial independence will not be seriously impaired so long as the judiciary remains vigilant and true to its constitutional mandate to remain independent in form and substance.