

THE CHANGING NATURE OF JUDICIAL LEADERSHIP

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When we think about leadership in the legal profession, the work of lawyers and, particularly, the work of bar associations come most often to our mind. We have tended to think of leadership in the judicial sense by reference to the cases decided or the jurisprudence developed by individual judges through the decisions of appellate tribunals.

In the twenty-first century, the judicial members of the legal profession have begun to view leadership in ways beyond the jurisprudence that flows from individual cases. Increasingly, judges have been taking responsibility for the overall health of the judicial institution and for its effectiveness at dispensing substantial justice in the society that relies on us for doing that.

This essay focuses on ways in which leadership occurs in the modern or recent judiciary, as a way of exploring how we might go about building stronger institutions and a more effective system of justice. I will do that by examining four dimensions of modern judicial leadership.

I. PUTTING THE INSTITUTION ON THE LINE

To be sure, there are occasions when the demand for extraordinary judicial leadership arises in the context of litigation. The leading example is a very familiar story about a moment in history. The 1954 decision in *Brown v. Board of Education (Brown I)*¹ is rightly regarded as the seminal event in the nation's great civil rights era. Anyone with more than a passing knowledge of *Brown I* knows about the central role of the remarkable litigation team led by Thurgood Marshall and his associates at the NAACP. Those lawyers developed just the right case and chose just the right moment.

The Supreme Court, of course, overruled *Plessey v. Ferguson*² and held that separate could not possibly be equal.³ It ordered schools to be de-segregated in dozens of states, including the northern state of Kansas that gave the case its caption.⁴ We think of the *Brown I* moment in American history as one of the great counter-majoritarian judicial acts.

To be sure, the lawyers were crucial to the event, but so were the members of the Supreme Court and, particularly, the Court's leader, Chief Justice Earl Warren. Many people can still remember and very occasionally still see barns painted with "Impeach Earl Warren" as a result of this decision. Contemplate for a moment why it mattered so much that Chief Justice Warren managed to

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1. 347 U.S. 483 (1954).

2. 163 U.S. 537 (1896).

3. *Brown I*, 347 U.S. at 494-95.

4. *Id.* at 495; see also *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300-01 (1955) (ordering that schools desegregate).

engineer a unanimous decision in *Brown*.⁵ It was not at all preordained that this would occur. Diaries and notes revealed long afterwards indicate that there was every chance that the case would have been decided on the basis of a very divided vote.⁶ It was the political savvy of former Governor Warren that managed to produce a unanimous decision.⁷ It speaks the obvious to say that the fact that the decision was unanimous made all the difference in the world as respects how *Brown v. Board of Education* would be received by the public and how it would be enforced. It helped enormously, of course, that President Eisenhower ultimately sent the 101st Airborne Division to Little Rock to enforce the order of the Supreme Court. It was a skillful choice made by a President who knew that the public remembered the 101st for its heroic deeds during World War II. He knew that Americans would respond better to the sight of heroes on duty to enforce the rule of law.⁸ One need only pause but briefly to imagine what the aftermath of the *Brown* decision might have been like had the Supreme Court decided the case on a divided vote with accompanying concurrences and dissents.

One might make a similar point about the case involving President Richard M. Nixon and the Watergate tapes. We have known for a long time that Chief Justice Warren Burger, realizing that the case would go against the very President who had placed him in the nation's highest judicial office, worked every day, two weeks straight, to assemble an opinion that might command unanimity.⁹ He had taken the assignment himself, and his commitment to a unanimous decision was so strong that he ended up issuing an opinion that did not actually reflect his own legal views about why the President should lose the case.¹⁰ President Nixon had contemplated not complying if he lost,¹¹ perhaps following Andrew Jackson's approach as respects the Cherokees. When his chief of staff told him the Court's opinion was "tight as a drum," Nixon decided to turn

5. See Melvin I. Urofsky, "Among the Most Humane Moments in All Our History": *Brown v. Board of Education* in *Historical Perspective*, in BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT 1, 25 (Clare Cushman & Melvin I. Urofsky eds., 2004).

6. See EARL WARREN, THE MEMOIRS OF EARL WARREN 281-86 (1977); see also John D. Fassett, *A Plea for the Demise of a Stubborn Myth*, in BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT 117, 123-27 (Clare Cushman & Melvin I. Urofsky eds., 2004).

7. See Urofsky, *supra* note 5, at 20-21, 26.

8. President Eisenhower's actions stood in marked contrast to Andrew Jackson's response to the Supreme Court's ruling on discrimination against the Cherokees. Jackson's modern fans express skepticism that he actually said, "John Marshall has made his decision, now let him enforce it." What is important, however, is that President Jackson did not in fact enforce the Court's decision. See JOHN MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 203-04 (2008).

9. See BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 310-46 (1979).

10. For an early but fulsome account of these events, see *id.* at 287-347.

11. *Id.* at 347.

over the tapes.¹²

While we have not experienced any of these titanic moments on a national level in recent decades, it is easy enough to identify occasions when various state courts confronted similar dynamics under important circumstances. Perhaps the most prominent illustrations are the school finance cases brought in states like Ohio,¹³ Kentucky,¹⁴ and Texas.¹⁵ In each of these, litigants asked the state supreme court to determine that the existing method of financing education did not comply with guarantees contained in the state constitution, guarantees quite common in state constitution but without any analog in the Constitution of the United States.¹⁶ Among the significant features of these cases was the continued volley back and forth between the political branches of those states and the state's highest court, as legislators and governors sought out solutions that might be held satisfactory by a majority of the state supreme court.

Indiana's recent moment of great tension was the challenge to Secretary of State Evan Bayh's candidacy for Governor on the basis that he had not been a resident of the state long enough to qualify under the Indiana Constitution.¹⁷ A court of four Republican justices and one Democrat voted unanimously that Evan Bayh met the legal standard.¹⁸ To his credit, the sitting Governor of the State,

12. *Id.*

13. *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997) (finding that the school financing system violated state constitutional guarantee of a "thorough and efficient system of common schools").

14. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989) (finding that the existing school system did not provide "an efficient system of common schools" as required by the state constitution).

15. The Texas Supreme Court appears to hold the record for decisions invalidating school finance arrangements. For the latest of these, see generally *Neeley v. West Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746 (Tex. 2005).

16. For these state constitutional provisions, see ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. 9, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

17. *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1314 (Ind. 1988).

18. *Id.* at 1314-18.

Robert D. Orr, responded to the court's decision by saying that he was pleased the issue had been put to rest. Surely his reaction and the reaction of others would have been different had there been a divided vote.

At junctures such as these, the rectitude and authority of the judiciary is plainly on the line. Judicial leadership requires assessing the court's role in the larger context of democratic self-government, weighing its destiny as against the other mechanisms of self-government, and moving in a wise direction.

II. BUILDING THE INSTITUTION

Perhaps eighteen months ago at a small dinner of chief justices and state court administrators held in Cambridge, Massachusetts, Chief Justice Margaret Marshall invited those around the table to think for a moment about "who was a great Chief Justice of the United States," limiting the choices to three possible answers: Earl Warren, Warren Burger and William Rehnquist. She asked each of us to cast but one vote. The largest number of votes went to Earl Warren, with William Rehnquist running a respectable second, and Warren Burger receiving none. Chief Justice Marshall said this result was typical of other occasions when she had asked the same question, but argued that this division of the house did not fairly credit the contributions of Warren Burger.

She pointed out that Warren Burger had accomplished a great deal to enable the federal judiciary to conduct its work in a modern and effective way. He had much improved relationships between the courts and the Congress, and he had persuaded the legislative branch to approve better budgets for the federal judiciary.¹⁹ This campaign produced better staff and law clerk support and better physical working conditions.²⁰ The great federal court building boom commenced while Burger was Chief Justice,²¹ leading to the phenomenally improved federal court facilities that the nation enjoys today. He likewise inspired creation of the National Center for State Courts, the principle court reform body and innovation vehicle aimed at those courts where most Americans go in search of justice.²²

Efforts of a similar sort by Indiana's trial and appellate court leaders have produced a good many happy results. In the \$100 million or so budget of the Indiana Supreme Court, there are now nearly \$20 million appropriated annually for improvements to the state's trial courts—all the way from revolutionizing the use of technology to upgrading local public defender services to supplying qualified interpreter services in the county courthouses. There is every reason to believe that this trend will continue. Part of this progress has flowed simply from paying attention to the mechanics of how the state budget is assembled and adopted, and part of it is the product of work by judges in educating legislators

19. EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER 1969-1986*, at 10-11 (2000).

20. *Id.* at 10.

21. *Id.* at 11.

22. *Id.*

on how additions to the state budget can make justice work better in their own districts.

III. SPENDING CAPITAL ON THE BIG PROJECT

Observing the activities of a state officeholder some years ago, a friend of mine said that the officeholder seemed to be running for something but did not know what it was yet. This was meant to refer to a rather common human trait of accumulating credibility and capital with other people without necessarily knowing when or on what topic one might need to use it.

One usually needs to use it when something really big demands to be done. A very early example of this was the willingness of Chief Justice Taft to commit himself early in the twentieth century to step out of his regular role and lead in creation of the country's first code of ethics for judges.²³ Yet another example was the willingness of Justice Robert Jackson to step out of his role as adjudicator to accept President Harry Truman's entreaty that he become one of the prosecutors at the Nuremburg war crimes trials.²⁴ A third example is the willingness of Earl Warren to serve as chairman of the President's Commission on the Assassination of President Kennedy.²⁵ Indeed, as so often happens, it was Warren as chair who gave the Commission its very name in the minds of most Americans. A much more modest, but similar example was my decision to accept Governor Mitch Daniels' request that I join with former Governor Joe Kernan and others to devise a series of improvements in local government structures and services (including those of Indiana's trial courts). Being careful not to end up violating the Code of Judicial Conduct myself, I asked that the endeavor be organized in a way that did not cross any of those lines.

Each of these reflects a moment when a member of the judicial family is called upon to play roles which are not strictly a part of the classic adjudicative function but reflect instead the exercise of leadership in other ways, like lending a part of the credibility the judicial branch acquires over time to a very important undertaking that society needs. I would be the first to say that these moments must be few and far between, lest they detract from our principal obligations. In the long run, though, they represent a way that judges can sometimes contribute to building a more decent safe and prosperous society.

IV. TRIAL COURT LEADERSHIP

While many of the preceding examples have reflected work of appellate court judges, particularly the work of the leaders of courts of last resort, there are also a host of examples of changes that have been made by trial court judges or members of intermediate appellate courts.

Judge John L. Kellam of the Henry Circuit Court has been an indefatigable

23. See *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 449, 449 (1923).

24. See ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 14 (1984).

25. See generally G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 190-213 (1984) (discussing Chief Justice Warren's role on the aptly named "Warren Commission").

reformer in a wide variety of fields. He laid out his vision of trial court organization in this law review.²⁶ He set the Indiana court system on a path we still tread today.

In a variety of senses the Chief Judge of the Indiana Court of Appeals, John G. Baker, began his leadership of court reform while serving as a trial judge in the Monroe Superior Court. Most people would say that Judge Baker's leadership of the group of judges in Monroe County was a leading factor in creating a unified court there. Moreover, he and his colleagues proved to other trial judges that this was an effective and convenient way of building better courts at the local level.

Another example is the work Judge William Miller of the Vanderburgh Circuit Court did during the 1980's to create alternatives to incarceration. Judge Miller's activities on drug and alcohol programs, work release, and other corrections methods were very much a forerunner of today's ubiquitous movement we now call "Problem Solving Courts."

I might mention one other trial judge whom I know, Judge Michael Dann, now retired from the courts in Arizona. While a student in the Master of Laws program at the University of Virginia School of Law, Judge Dann chose to examine and formulate ideas for improving the way American courts conduct jury trials. He made proposals on everything from recruiting a representative venire to re-empowering jurors to decide cases in the way that adults actually decide important matters in real life.²⁷ It is not too much to say that Judge Dann's work as a trial court judge in Arizona ultimately spawned a national movement which prompted dramatic changes from Arizona to New York, and of course here in Indiana.²⁸

CONCLUSION

A society's institutions either grow and adapt, or wither and get bypassed. Just as the adjudicating judge long ago ceased being the passive non-manager of litigation, today's judge must take interest and responsibility for building better systems of justice.

26. John L. Kellam, *The Indiana Judicial System: An Analysis of Change*, 21 IND. L. REV. 273 (1988).

27. See generally B. Michael Dann, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996) (discussing jury research and reform).

28. See generally Randall T. Shepard, *Jury Trials Aren't What They Used to Be*, 38 IND. L. REV. 859 (2005).