DAVID CRAIG

STATE REPRESENTATIVE

Assembly Committee on Government Operations and State Licensing
Public Hearing, May 1, 2013
Assembly Bill 161 Testimony
Representative David Craig, 83rd Assembly District

Chairman August and Members of the Committee:

We authored this legislation to address the legal uncertainty Wisconsin residents and businesses are subject to as a result of injunctions on state statutes – injunctions ordered by judges only elected by a fraction of our state's population.

Increasingly, questions have been raised as to:

a) whether individual circuit court judges' rulings impact the state as a whole in regards to the implementation of state law; and

b) whether a ruling from a judge - elected by a small portion of the state - should prevent the statewide implementation of legislation passed by the duly elected statewide legislature, and signed by our Governor, having also been elected statewide, without allowing for an expedited review by a higher court.

Under this bill, if a circuit court or court of appeals places an injunction, restraining order, or other order that, upon entry, suspends or restrains the implementation of any state statute, it would be immediately appealable to a higher court. If such an appeal is made to a higher court within 10 days of entry of the lower court's order, the lower court's order will be immediately stayed pending an order by a higher court or a final and unappealable order disposing of the entire case. It is important to note that nothing in this legislation would prevent any court from entering an order that suspends or restrains the implementation of a state statute, or prevents a higher court from removing the stay should the higher court determine the lower courts order was reached appropriately.

This legislation would facilitate a fair and more efficient judicial system by ensuring that one judge cannot unilaterally prevent the implementation of state law without the possibility of an expedited review by a higher court. This legislation would also ensure that Wisconsin residents and businesses have a greater degree of certainty as to whether a law is or is not in effect during the disposition of a legal challenge. Lastly, this bill reaffirms that the three branches of our government remain separate, but equal, by only altering the process for the administration of injunctions, not interfering with the core function of the judiciary.

Thank you for your time and I am happy to any questions you may have.

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May 1, 2013

To: Members of the Assembly Committee on Government Operations and State Licensing
From: Senator Glenn Grothman
Re: Assembly Bill 161

Assembly Bill 161 is legislation to clarify and expedite the process of review by a higher court of injunctions on state statute. This legislation allows a preliminary injunction to be immediately appealable to either the Supreme Court or an appellate court.

Under current law, individuals can challenge a state law and seek to immediately block that law in circuit court. If the circuit court judge decides the party has a reasonable chance of winning their case they grant a preliminary injunction. By taking this action, the circuit court judge stops the enforcement of the law while the circuit court hears the case. An injunction remains in place until there is a final decision, this can last many months or over a year.

The current process causes unnecessary uncertainty for job creators and residents of Wisconsin. Many citizens have expressed that they are confused by the status of laws when an injunction is placed on these laws.

When the State Legislature passes a law and the Governor signs it this reflects representation from around the state. The idea that a new law can be put on hold by an activist judge that may represent less than one half of one percent of the state's population is offensive and is changed in this important piece of legislation. This bill ensures that a law that applies to the entire state will be decided by a court presiding over a larger portion of the population of the state.

Please support this legislation to make preliminary injunctions immediately appealable to a higher court rather than after the circuit court issues the final ruling. This will help clarify the status of duly passed laws and make residents of Wisconsin certain that they are accurately being represented.

Supreme Court of Wisconsin

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A. John Voelker
Director of State Courts

May 1, 2013

The Honorable Tyler August
Chair, Assembly Committee on Government Operations and State Licensing
Room 317 North, State Capitol
Madison, Wisconsin 53702

RE: Assembly Bill 161, Relating to Injunctions Suspending or Restraining the Enforcement of a Statute

Dear Representative August:

Thank you for the opportunity to comment on Assembly Bill 161. Please accept this written testimony on behalf of the Legislative Committee of the Wisconsin Judicial Conference and on behalf of the court system. The Committee of Chief Judges is still reviewing the specifics of the bill.

Since the bill appears to have some inconsistencies, the Legislative Committee has not taken a position on AB 161. However, the committee does want to raise some questions about the possible interpretations and implications of the bill. I am also supplying explanatory materials about the appellate process in Wisconsin and about the separation of powers doctrine.

Wisconsin amended its Constitution in April 1977 to create an intermediate Court of Appeals and to define the jurisdiction of the Court of Appeals and the Supreme Court.

The constitutional provisions of Article VII, Section 3 provide five methods by which actions may reach the Supreme Court: (1) original action; (2) a writ necessary in aid of its jurisdiction; (3) review of judgments and orders of the Court of Appeals; (4) removal of cases from the Court of Appeals; and (5) certification from the Court of Appeals. Attached is a diagram illustrating those methods; it is called "How a case comes to the Supreme Court." In addition, I have also attached an article from 1985 titled "Discretionary Review by the Wisconsin Supreme Court."

It is unclear to us how the authors of this bill intend for its procedures to modify current methods of reaching the Supreme Court. Some of the questions the Legislative Committee is considering are:

- In what ways will the procedures outlined in AB 161 differ from the methods that already exist?

- How does a "petition for interlocutory review" differ from a Petition for Leave to Appeal or a Petition for Review?

- Does AB 161 maintain the Supreme Court's discretionary review in injunctive matters?

Another question about AB 161 relates to what we believe is an incorrect statement of current law contained in the first sentence of the Legislative Reference Bureau's (LRB) analysis. The analysis says "an interlocutory or final judgment issued by a court in an action for an injunction may not be stayed after the entry of the judgment or during the pendency of an appeal." This statement seems to run counter to the clear terms of Wisconsin Statutes §§ 806.08, 808.07, and 809.12, which seem to authorize the courts to take such action after an appeal has been filed. The Legislative Committee is unsure whether some provisions of AB 161 may be predicated on a misunderstanding of the current authority of the courts.

Provisions within AB 161 raises questions related to the separation of powers doctrine. Since the writing of our original Constitution, there have been books and reams of articles written on this topic. As Nowak, Rotunda and Young wrote in their treatise, *Constitutional Law,* the theory of separation of powers in state constitutions "is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes."

Wisconsin's legislative service agencies have supplied written information to the Legislature that may help it as it considers proposals that may implicate the separation of powers doctrine. I have attached the LRB "Governing Wisconsin" paper on the doctrine and also a Legislative Council staff memo called "Legislative and Judicial Authority," prepared in 2010 for a Council study committee.

For more extensive analysis, I have also attached two *Wisconsin Lawyer* articles on aspects of the topic, one from 1997 and one from 2004. In addition I have attached a 1989 *Temple Law Review* article that explores in great depth the struggles states have faced in addressing separation of powers issues.

We recognize the challenge faced by this committee and the Legislature as it considers AB 161 in light of the separation of powers doctrine. We hope the information we have provided and the questions we have raised will generate meaningful dialogue on the implications of AB 161 on the judicial process.

If you have any questions, please feel free to contact my office or our legislative liaison, Nancy Rottier.

Very truly yours,

A. John Voelker
Director of State Courts

AJV/NR/lai
Attachments

cc: Members, Assembly Committee on Government Operations and State Licensing
Nancy Rottier

How a case comes to the Wisconsin Supreme Court

WISCONSIN SUPREME COURT: At oral argument, each side is allowed 30 minutes to present its case. Oral argument supplements and clarifies arguments the lawyers have already set forth in written submissions called briefs.

Following each day's oral arguments, the court meets in conference to discuss and take a preliminary vote on the cases argued that day. After the vote, a justice is assigned by lot to write the majority opinion. There are seven justices on the Court.

The Court usually releases opinions for all cases heard during its September through June term by June 30 of that year. Opinions are posted on the court system Web site on the morning of their release (www.wicourts.gov).

The losing party in the Court of Appeals case may ask the Wisconsin Supreme Court to hear the case. This is called a ***Petition for Review***. The Supreme Court receives about 1,000 petitions for review each term, and agrees to hear approximately 100 of these cases. It takes the vote of at least three justices to take a case on a Petition for Review.

THE COURT OF APPEALS is an error-correcting court. It is made up of four districts and 16 judges. The Court of Appeals considers all cases appealed to it and will either:

- review the case, using the transcripts of the circuit court proceedings, sometimes supplemented with oral argument. The Court of Appeals will rule in favor of one party.
- certify the question to the Wisconsin Supreme Court. ***Certification*** means the Court of Appeals, instead of issuing its own ruling, asks the Supreme Court to take the case directly because the Court of Appeals believes the case presents a question of law that belongs before the Supreme Court. It takes a vote of at least four justices to take a case on Certification.

The Wisconsin Supreme Court, on its own motion, can decide to review a matter appealed to the Court of Appeals, ultimately bypassing the Court of Appeals. This is called ***Direct Review***. It takes a vote of at least four justices to take a case on Direct Review.

The losing party may file a ***Petition to Bypass***, asking the Wisconsin Supreme Court to take the case directly, bypassing the Court of Appeals. It takes a vote of at least four justices to take a case on Petition by Bypass.

The losing party may ***appeal*** the decision to the Court of Appeals.

An individual, group, corporation, or government entity may bring a civil case, and the government may commence a criminal case, in the **CIRCUIT COURT**. After the proceedings, the circuit court will rule in favor of one party. There are 249 circuit courts in Wisconsin.

An individual or government entity may ask the Wisconsin Supreme Court to take ***Original Action*** in a case. This means that the case has not been heard by any other court. Because the Supreme Court is not a fact-finding tribunal, both parties in the case must agree on the facts.

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Discretionary review by the Wisconsin Supreme Court

By Joseph M. Wilson and Gregory S. Pokrass

Since court reorganization in 1978, the Supreme Court of Wisconsin has been without any mandatory appellate jurisdiction. Pursuant to §808.10, Stats., its jurisdiction is exclusively discretionary. Thus a party seeking court consideration of its case must either, petition for review of the court of appeals decision or petition for bypass while the matter is still pending in the lower court.

This article highlights particular problem areas in the above processes and describes the court's procedures for handling these petitions. It is hoped that such focus will assist the bar in its practice before the court and thereby aid in the administration of justice. The basic mechanics of the petitioning process and certain specialized procedures such as certification and orginal actions will not be addressed. In addition to the statutes themselves, other sources have adequately covered these areas. *See, e.g.*, R. Martineau & R. Malmgren, *Wisconsin Appellate Practice* (1978).

Jurisdictional and procedural requirements for petitions for review

Several recent cases have discussed some of the more important jurisdictional and procedural requirements for petitions for review. Litigants or attorneys considering filing a petition for review should be aware of the following cases and rules.

Timeliness of filing and service

The court in *First Wis. Nat. Bank of Madison v. Nicholaou*, 87 Wis.2d 360, 274 N.W.2d 704 (1979), clearly signaled that the 30-day time limit of §808.10 within which a petition for review must be filed would be strictly enforced. If a petition for review is not filed within 30 days of the court of appeals' decision, the court lacks subject matter jurisdiction and the petition must be dismissed. This 30-day period cannot be enlarged under §809.82(2), nor is it extended by §801.15(5) due to mailing of either the court of appeals decision or the petition for review.

In *Gunderson v. State*, 106 Wis.2d 611, 318 N.W.2d 779 (1982), the court reiterated its conclusion that the filing of a petition does not occur upon its mailing. In order for a petition for review to be timely, it must be actually received in the clerk's office within 30 days of the court of appeals decision. The fact that such petition was mailed within 30 days and first received by another governmental office is irrelevant; the potential vagaries in mail delivery are the responsibility of the petitioning party if the mail is chosen as the means of transmittal.

However, in *State v. Rhone*, 94 Wis.2d 682, 288 N.W.2d 862 (1980), the court decided that it had jurisdiction to consider a petition for review even though the petition was served after it was filed and such service, but not the filing, occurred more than 30 days after the court of appeals decision. The court pointed out that even though it had jurisdiction, the opposing party could nonetheless move to dismiss the petition or move for other relief under §809.83(2) on the ground of improper of untimely service. Thus, the prudent petitioner will make sure that the petition is not only timely filed, but also timely served.

Reviewability and finality

In *Neely v. State*, 89 Wis.2d 755, 279 N.W.2d 225 (1979), the court held that a party may only seek review of an adverse decision of the court of appeals. It is the decision, not the opinion, of the court of appeals that is reviewable by the supreme court pursuant to §808.10. A party who is successful in the court of appeals may not seek review in the supreme court even though that party disagrees with the rationale expressed in the opinion.

Furthermore, the subject of the petition for review must be the final decision of the court of appeals. *In Interest of A.R.*, 85 Wis.2d 444, 270 N.W.2d 581 (1978). Generally, an order if the court of appeals disposing of a motion filed in that court cannot be the subject of a petition for review unless such order finally disposes of the case. Accordingly, an order by the court of appeals denying or granting a petition for permissive appeal under §808.03(2) is not reviewable in the supreme court. *State v. Whitty*, 86 Wis.2d 380, 272 N.W.2d 842 (1978). Moreover, on review of the court of appeals' decision in a case in which permissive appeal has been granted, the supreme court will consider only the merits — not the court of appeals' discretion — in granting the permissive appeal. *Aparchor v. DILHR*, 97 Wis.2d 399, 293 N.W.2d 545 (1980).

In the past the court often has expressed the rule that a litigant cannot raise new issues for the first time on supreme court review or appeal. *See Goranson v. DILHR*, 94 Wis.2d 537, 289 N.W.2d 270, (1980); *State v. Killory*, 73 Wis.2d 400, 243 N.W.2d 475 (1976). This rule was usually applied in the context of excusing the court from deciding issues which had not been raised or considered in the trial court or court of appeals. *See Martin v. Liberty Mut. Fire Ins. Co.*, 97 Wis.2d 127, 293 N.W.2d 168 (1980). Recently a variation of this rule has been codified in §809.62(6); if a petition for review has been granted, the petitioner may not raise or argue issues on review that were not set

forth in the petition for review. The court, of course, in granting petitions for review may specify or limit the issues to be considered; however, if the court does not do so, the issues identified in the petition will control. Accordingly, it is the wise petitioner who is as specific and inclusive as possible in the petition for review.

Format of the petition

The court's recent amendments to §809.62(2) also have specified the proper format petitions for review must follow. The petitions are now more formalized with a statement of issues, table of contents, statement of criteria relied upon, statement of the case, argument and appendix required in each petition. Petitions and responses are also now limited to 35 pages in length, not including the appendix. However, it should be the rare petition which reaches that length.

The criteria for review

The criteria for evaluating petitions for review have been recently codified in §809.62(1) pursuant to Supreme Court Order of Oct. 30, 1981, effective Jan. 1, 1982:

"Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

"(a) A real and significant question of federal or state constitutional law is presented.

"(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

"(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

"1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

"2. The question presented is a novel one, ...e resolution of which will have statewide impact; or

"3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

"(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

"(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination."

As the statute itself emphasizes, cases which may or may not satisfy those criteria may nonetheless be granted or denied depending upon numerous undefinable factors which may exist in any given case. The criteria are neither controlling nor limiting measures of the court's discretion; they are simply guidelines. In the final analysis, the court's discretion controls its calendar. Yet, certain general principles should be kept in mind by counsel to aid them in evaluating their cases and presenting meaningful arguments to the court.

Non-codified criteria

Several recent court pronouncements concerning its functions *vis-a-vis* discretionary review should be noted.

In *State v. Mosley*, 102 Wis.2d 636, 665-66, 307 N.W.2d 200 (1981), the court emphasized that its primary purpose is not to correct error in trial court proceedings, a function now largely met by the court of appeals. Rather, the court intends to oversee and implement the statewide development of the law.

In accordance, *Winkie, Inc. v. Heritage Bank*, 99 Wis.2d 616, 299 N.W.2d 829 (1981), stated that the court ordinarily does not take a case on review which involves merely the question of sufficiency of the evidence.

Similarly, in *Hagenkord v. State*, 100 Wis.2d 452, 302 N.W.2d 421 (1981), the court indicated it typically does not review a court of appeals' decision affirming or reversing a trial court's finding on an evidentiary matter; basic to court reorganization is the philosophy that the court of appeals decisions on questions of evidence are usually final.

Finally, in *State v. Outlaw*, 108 Wis.2d 112, 321 N.W.2d 145 (1982), the court indicated it ordinarily does not review a court of appeals' decision in a criminal case where only a question of the proper exercise of trial court discretion is involved. This principle would be similarly applicable in civil situations.

Criteria for petitions to bypass

Neither the appellate practice statutes nor decisions of the court have specified the appropriate criteria for evaluating a petition to bypass. However, past practice of the court has indicated that a matter that is appropriate for bypass is usually one which contains issues that meet one or more of the criteria for normal review assuming a court of appeals' decision had been issued. In this respect, the court may feel that it will ultimately want to consider the case regardless of how the court of appeals may decide the issues. A further factor which is present in some, but not necessarily all, successful petitions to bypass is a clear need to expedite the appellate procedure. An example of such a situation might be a case concerning adoption.

Relationship between issues and criteria

The petitioner's arguments should not stress the merits of the issues raised in the

case. Rather, the petition should primarily address why the court should grant review. The merits of the case should be discussed only to the limited extent necessary to urge the court to grant review.

Many litigants also fail to show precisely how the issues for which review is sought satisfy one or more of the criteria. Counsel often parrot the criteria and blanketly submit that they are met. Litigants would be well advised to focus on the aspects of their case that may or may not justify review. The ultimate disposition of the issue, once granted, can thereupon be the focus of the subsequent briefs.

References to court of appeals' briefing

In keeping with the above, petitions should not be carbon copies of the lower court briefing. The necessity to tailor the arguments to the specific purpose of granting or denying review should be kept in mind.

Similarly, portions of previous appellate briefs should not be incorporated by reference into the petitions or responses on the assumption the justices or commissioners will retrieve and review those documents. Although that may occur, prior briefs are not normally part of the appellate record. Litigants are best advised to include in their petitions and responses any specific arguments made to a lower court that are deemed important. If it is necessary to review the entire brief, a copy should be attached to the petition or response.

Motions before the court

Motion practice before the court is regulated by statute. Pursuant to §809.14(1), the motion should state the order or relief sought and the grounds upon which it is based. It may be accompanied by a memorandum.

A party may file a response within seven days of service of the motion. However, pursuant to §809.14(2) a procedural order, such as motions for an extension of time to file a brief, may be acted upon without a response. The statutes do provide for the respondent in such a situation to move for reconsideration of the order within seven days of its receipt.

If the motion seeks an order which may affect the disposition of the case or context of the record or a brief, the time for performing any act required by the rules is automatically enlarged for a period coextensive with the time between the filing of the motion and its disposition. §809.14(3).

Various aspects of certain motions should be understood by litigants.

Extensions of time

Pursuant to §809.82(2), the court upon motion may extend various time limitations. The accompanying Judicial Council Committee Note stresses that such extensions will not be granted merely because the attorneys have so stipulated. In general, requests for extensions are not looked upon with favor by the court.

Relief pending appeal

Pursuant to §809.12, a person seeking relief such as a stay should initially address that request to the trial court. Such a request may be initially made to the supreme court, assuming the case has been accepted, but only if it is impractical to initially seek relief below. The motion to the court should show why it was impractical or, if the motion was actually first filed in the trial court, the reasons given by that court for its negative response.

Summary disposition

Pursuant to §809.21, the court will entertain a motion for summary disposition of a case upon which review has been granted. However, it is obvious that if the court has chosen to review the case, and summary disposition has not been part of the order granting review, the court probably believes the case warrants completion of the full appellate process.

Reconsideration

In *Archdiocese of Milwaukee v. City of Milwaukee*, 91 Wis.2d 625, 284 N.W.2d 29 (1979), the court held that an order denying a petition to review a decision of the court of appeals is neither a judgment nor an opinion and thus there is no statutory authority for reconsideration. Accordingly, as was the result in that matter, such motions are normally dismissed. A limited exception to this principle was enunciated in *Gunderson v. State*, 106 Wis.2d 611, 318 N.W.2d 779 (1982), which indicated that dismissal of a petition for review (which would typically occur when the court has determined it is without jurisdiction, perhaps because the petition is untimely) constitutes a judgment or opinion by the court that it is without jurisdiction in the case. Such a determination is subject to reconsideration to correct possible errors in calculation of time, etc.

Pursuant to §809.64, a party may seek reconsideration of an actual judgment or opinion of the court by filing a motion within 20 days of the decision's filing date.

Court consideration of petitions

All petitions to review and bypass with accompanying responses, and all motions are first submitted on a rotating, random basis to one of three supreme court commissioners. The commissioners review the submitted materials and evaluate the case in light of the rules and criteria for review. A written memorandum usually varying in length from four to ten pages is prepared which generally summarizes the facts, the issues and arguments. Most important, however, it contains an analysis of the nature of the case and a recommendation on disposition of petition, along with a proposed order.

The written memoranda are submitted to the justices along with copies of the material submitted by the parties. Approximately three times per month, the court meets in closed conference to discuss, among other matters, the pending petitions. Each commissioner is present when his cases are considered in order to summarize the matter for the court and answer any questions that may exist. The court, unlike the courts in other states and the U.S. Supreme Court, specifically discusses each petition filed.

The court then votes on disposition of the petition. By Article VII, Section 4, of the Wisconsin Constitution a quorum of four is necessary to conduct the business of the court. Pursuant to court practice, three affirmative votes are necessary to grant a petition for review, regardless of whether some justices may be absent from the conference (although the court usually will delay final disposition of the petition if a missing justice's vote would be outcome determinative). This is patterned after the U. S. Supreme Court practice permitting four of the nine justices to grant certiorari. Four votes are necessary to grant a bypass on the theory that a majority of the court should be required to remove a case from the normal appellate process. Those cases granted are usually scheduled for oral argument. A limited number are submitted on briefs alone for various reasons such as the pendency of a prior accepted case presenting a similar issue.

On a purely statistical basis for the first nine months of 1982, approximately 20 percent of the petitions for review and bypass were granted. Denial, therefore, served to exhaust all state remedies for a vast majority of petitioners. For this reason the supreme court views consideration of the petitions as one of its most important functions and devotes considerable attention to this task.

About the authors

Joseph M. Wilson of Madison received his undergraduate and legal education from the University of Wisconsin, where he was a member of the Order of the Coif and law review. After graduation in 1969, he served as a law clerk for then Justice Horace W. Wilkie of the Wisconsin Supreme Court. From 1970 to 1972 he was an assistant district attorney in Milwaukee County. Since 1972 he has been a Wisconsin Supreme Court commissioner.

Gregory S. Pokrass of Brookfield is a 1971 Carroll College and 1975 University of Wisconsin Law School graduate, where he served as managing editor of the *Wisconsin Law Review*. Appointed a Wisconsin Supreme Court commissioner in 1981, he previously was in private practice with Quarles & Brady of Milwaukee. ☑

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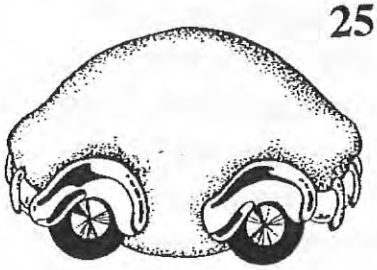
Features



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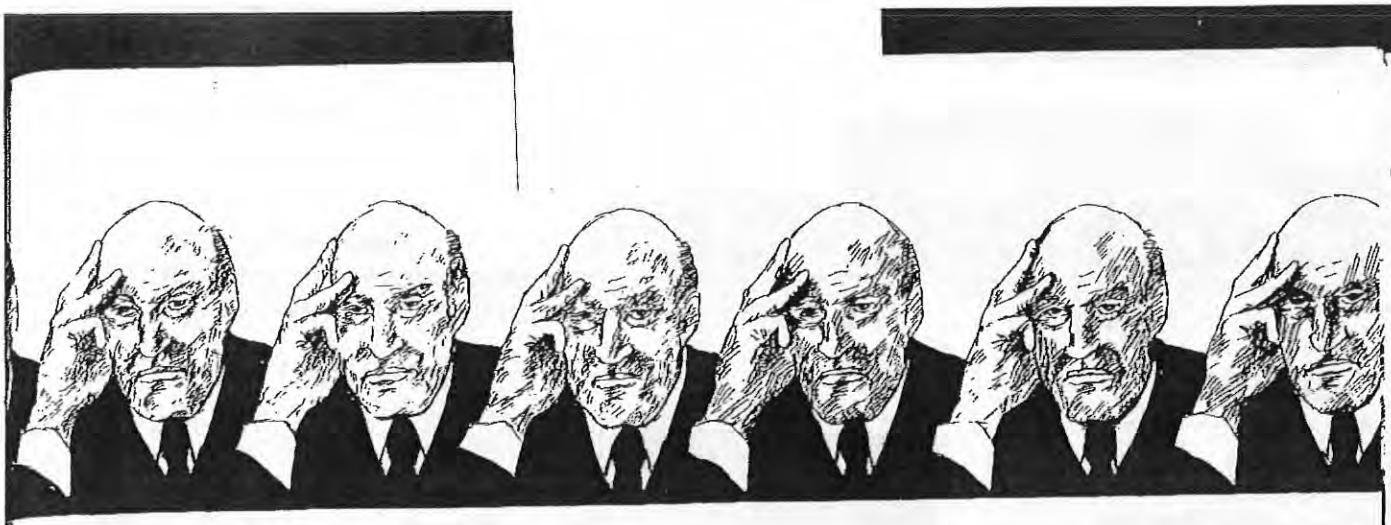

An update

Discretionary review by the Wisconsin Supreme Court

By Gregory S. Pokrass

"Discretionary Review by the Wisconsin Supreme Court," published in the February 1983 issue of the *Wisconsin Bar Bulletin*, discussed the substance and procedure of the discretionary review practice before the court that had developed since the 1978 court reorganization. The subsequent two years have seen further decisions by the court in this area, as well as other related aspects of the Supreme Court process.

This article updates the bar on these recent developments. As with the previous article, it is hoped that such focus will assist the bar in its practice before the court and thereby aid in the administration of justice.

Certifications

Pursuant to sec. 809.61, Stats., the court may take jurisdiction of an appeal or other proceeding in the court of appeals on its own motion or upon certification from the lower court.

As predicted in R. Martineau and R. Malmgren, *Wisconsin Appellate Practice* sec. 3502 (1978), the court has limited means of knowing what is pending in the lower courts and therefore it is unlikely to take jurisdiction on its own motion. This power was exercised in *Wisconsin Bankers Association v. Mutual Savings & Loan Association*, 103 Wis.2d 184, 307 N.W.2d 180 (1981), an unusual situation in which the court was well aware of the pendency of the case, having previously issued a decision remanding and subsequently received a motion for temporary relief. Normally, the court will rely on the parties to petition to bypass or the court appeals itself to certify the matter.

The necessity for litigants to carefully evaluate and prepare their case cannot be overemphasized.

As for certification by the lower court, the Supreme Court has never formally established criteria for acceptance of such a request. Martineau and Malmgren speculated the court would do so if the issues involved in the case were "very controversial" or if the court of appeals was bound by precedent with which it disagreed. Neither has developed as the primary reason for certification.

Most cases certified involve issues which the court of appeals believes already satisfy the criteria for petitions for review specified in sec. 809.62(1). Typically, the issue will be novel, of statewide impact and subject to recurrence, all of which suggest the law development function of the Supreme Court will eventually be called into play and an interim decision by the court of appeals will delay final resolution and be of limited value.

However, even cases that appear upon certification to satisfy the criteria for review may still be rejected at this stage. The case may involve multiple issues, only one of which satisfies the criteria. In such instances, the Supreme Court may want the case to remain with the court of appeals so the other, more routine questions might first be resolved. Thereafter, upon a petition for review, the Supreme Court may then focus on the key issue the case presents. Additionally, the court may believe that an interim appellate opinion from the court of appeals would be useful for the ultimate, final resolution of the matter.

Insofar as the court of appeals might occasionally certify a case because it disagrees with existing precedent, the Supreme Court has issued one published caveat. *State v. Shillcutt*, 119 Wis.2d 7888, 350 N.W.2d 686 (1984), was heard on petition for review but had been previously the subject of a denied certification. The court of appeals, at 116 Wis.2d 227, 341 N.W.2d 716 (1983), concluded that the certification denial reinforced its interpretation on a particular point of law as expressed in the certification request. The Supreme Court emphasized in its opinion that a certification denial carries no implication of approval or agreement. The denial means nothing more than unusual circumstances are not present to require immediate review of the case at the Supreme Court level. Thus it is improper to infer anything from a certification denial regarding the merits of the case.

Petition to bypass

Although no published criteria for bypasses exist, successful petitions typically present issues that meet the criteria for review under sec. 809.62(1) and present some need to expedite the matter.

The court has recently indicated one circumstance under which a petition to bypass will not be considered. *In Interest of J.S.R.*, 111 Wis.2d 261, 330 N.W.2d 211 (1983), presented the court with an attempted bypass on a determination of whether leave to appeal a nonfinal order should be granted. Because the court does not review the exercise of the court of appeals' discretion on nonfinal orders, it ruled it equally would be inappropriate to permit litigants to bypass the court of appeals altogether on this determination. The only theoretical exception would be if the court of appeals itself would certify the issue of whether to permit an appeal, or if the Supreme Court brought the matter up on its own motion, the latter being an unlikely possibility as noted above.

Petitions for review

As explained in the 1983 article, in addition to the criteria for review specified in sec. 809.62(1), non-codified criteria have also been promulgated since the establishment of discretionary jurisdiction.

Several recent decisions have added to the existing law in this regard.

Mootness

The Supreme Court has often indicated a reluctance to decide moot issues, even when it functioned as the only appeals court in the state and had mandatory appellate jurisdiction. This principle has carried over into the discretionary review process.

In *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis.2d 220, 340 N.W.2d 460 (1983), the court suggested that under normal circumstances it would not accept an issue for review that had no practical effect upon the outcome of the case. However, the case recognized that the standard exceptions to deciding moot issues would also control for determining whether the petition for review should be granted initially. Hence, issues of great public importance, involving the constitutionality of a statute, arising so frequently that a definitive decision is essential, or capable of repetition yet evading review, will possibly be considered for review even though moot.

La Crosse Tribune presented a classic example of the exception. An important point concerning closed *voir dire* was taken although the underlying dispute had already been tried. This important issue was capable of repetition and yet tended to evade the normal review process.

Interest of justice

Many petitions for review state as an all-encompassing final issue—and occasionally as the sole question—whether justice was done in that particular case. The Supreme Court clearly retains the power under sec. 751.06, as does the court of appeals under sec. 752.35, to discretionally reverse if justice has miscarried regardless of possible waiver.

However, in *State v. McConnohie*, 113 Wis.2d 362, 334 N.W.2d 903 (1983), the court stressed that ordinarily the question of whether justice has been done in an individual case is primarily, and at least initially, the concern of the court of appeals. Being a discretionary determination, the Supreme Court will tend to avoid "interest of justice" issues in the absence at the very least of an apparent possible error of law.

Of course, litigants should remain aware of the classic admonition in *Mentek v. State*, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976), regarding all-encompassing but nonspecific miscarriage of justice contentions. Adding together previous, non-meritorious arguments under that guise, where the totality of the circumstances does not strongly suggest justice has been denied, is rarely successful because "zero plus zero equals zero."

Attorney misconduct

In *Radlein v. Industrial Fire & Casualty Insurance Co.*, 117 Wis.2d 605, 345 N.W.2d 874 (1984), the Supreme Court reviewed the issue of whether counsel had commenced a frivolous action justifying the award of reasonable attorneys fees. In the abstract, such an issue might typically have not warranted consideration by the court because it involved only the application of well-settled principles to a particular factual situation. Section 809.62(1)(c)1 indicates this is usually not an adequate ground for review. However, the court explained that the onus placed upon the attorney by the lower court's finding of bad faith led it to consider the question.

While *Radlein* does not bind the court to accept such an issue for further review in all instances, it is an indication that the court will particularly scrutinize such matters as part of the process of deciding whether to grant further review.

Radlein also functions as a good example of the court's power to exercise its discretion to hear a case even though it may not precisely satisfy any of the codi-

About the author

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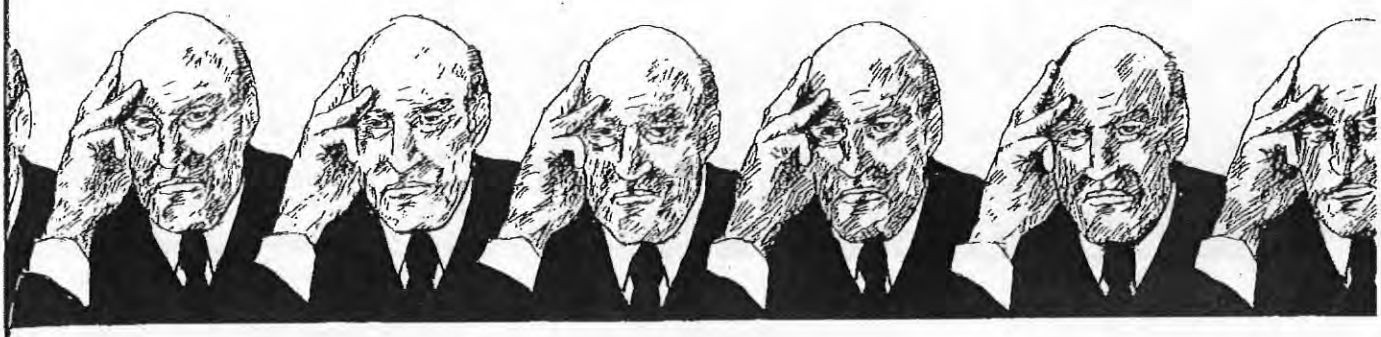

fied criteria for review.

Pro se prisoner petitions

bin-Rilla v. Israel, 113 Wis.2d 514, 335N.W.2d 384 (1983), concerned a petition for a writ of *habeas corpus* that had been denied by the court of appeals because it did not properly challenge the illegality of the commitment. The Supreme Court stressed that at any level in this state's judicial system a prisoner's *pro se* request must be liberally construed to determine if it presents a situation justifying relief. Because *pro se* petitions are often difficult to decipher, flexibility in considering these requests is essential.

This principle is operative in the petition for review process as well. For example, a prisoner's *pro se* request may be in the form of a petition for review where technically a petition for a writ of supervisory jurisdiction under sec. 809.71 would be appropriate. The Supreme Court will usually disregard the technical error and will consider the substance of the petition.

Opinion and decision reconsideration

Section 809.64 states that a motion for reconsideration of a Supreme Court opinion or decision should be brought within 20 days of the filing of the decision. Confusion over the interpretation of this time requirement led to *Lobermeier v. General Telephone Co.,* 120 Wis.2d 419, 355 N.W.2d 531 (1984).

The decision indicated that while the 20-day requirement is not jurisdictional in nature, the motion must still be physically received by the clerk of the court within the 20 days or be dismissed as untimely. Mailing the motion within that period alone is not sufficient. The court did indicate that an extension of this period could be granted prior to remittitur under sec. 809.82(2) but that a request for such an extension would not be looked upon with favor and would be granted only in an unusual situation.

Lobermeier also reaffirmed that successive motions for reconsideration would not be permitted. An exception exists where the second motion is limited to a procedural issue raised by the first motion for reconsideration.

Conclusion

The Supreme Court continues to view the selection of cases to accept on certification, bypass, and review as one of its most important functions, particularly since in many instances a denial ends the litigation. The necessity for litigants to carefully evaluate and prepare their case cannot be overemphasized. Consideration of the court's continuing pronouncements on the entire discretionary review and subsequent appellate process will greatly aid attorneys in this key aspect of their practice. ▲

Governing Wisconsin

From the Wisconsin Legislative Reference Bureau

The "Separation of Powers" Doctrine: Why Do We Separate the Powers of Government?

The Wisconsin Constitution, like most state constitutions, divides the state government's powers into three separate and independent branches. Such a division ensures that no central authority will become too powerful and endanger the liberties of the people. The three branches are the legislative, executive, and judicial. Although they are separate and independent, they must cooperate with each other to run state government.

The three-branch scheme copies the structure of national government, which the original framers of the U.S. Constitution adopted following the American Revolution. They wanted to avoid the concentration of power that was held by the English monarchy at that time, which they believed led to tyranny. So they provided for three branches that assume the three basic functions of government. The framers of the constitution further divided power by giving exclusive powers to the federal government and to the states. State governments also adopted the three-branch model.

Separation does not necessarily mean that the three branches have equal or balanced power. Governmental power comes from the people, who do not entrust it to a single entity. Separating governmental powers diffuses political authority and makes the operation of government in the U.S. more cumbersome. The three branches of government are designed to compete against one another in the formulation of public policy and thereby strengthen our democracy. This is in stark contrast to the governmental structure in many other liberal democracies in which members of the majority political party in the legislature or parliament assume cabinet positions in the executive branch.

Like the U.S. Constitution, the Wisconsin Constitution does not explicitly require separation, but it does grant the powers of government to separate branches. The Wisconsin Supreme Court has held that each branch has an "exclusive zone" of core powers, and that the branches share certain other powers. For example, the judicial and the executive branches share the power to revoke the probation of a convicted felon. Wisconsin's supreme court has taken a fairly permissive attitude toward sharing of power, so the various branches overlap more in Wisconsin than in most other states.

Legislative powers are further divided into a bicameral system, and the governor's powers are similarly limited by the existence of several constitutional officers in the executive branch.

LRB

Legislative Powers

Two houses make up the legislative branch: the senate (with 33 members) and the assembly (with 99 members). Laws must pass both houses in identical form. This branch makes the law, passes the state budget, determines the tax structure of the state, and audits the other branches of government. These legislative actions set the public policy of the state. The legislature possesses plenary power, meaning the constitution does not grant specific powers to the legislature. It has all powers of government not assigned to another branch or prohibited by the federal Constitution.

Only the legislature may judge the qualifications of its members, so the courts cannot determine whether a person qualifies to serve as a legislator. The legislature also has exclusive authority to determine its rules of procedure.

The legislature has powers that serve as checks on the other branches. It can override a governor's veto; it has the power to impeach civil officers from any branch of government; it establishes the lower courts; and it can originate an amendment to the constitution. Certain governor's appointments must have the consent of the senate.

Executive Powers

The executive branch has the power and duty to administer, implement, execute, and enforce the law. The governor serves as the head of the executive branch and as commander in chief of the state military and naval forces. The executive branch includes most state agencies. The Wisconsin Constitution creates administrative officers, such as the attorney general, the treasurer, the superintendent of public instruction, and the secretary of state, who independently exercise some of the executive powers.

The governor also has powers that check the other branches. The legislature must present each bill that it passes to the governor, who can veto acts of the legislature and may call the legislature into special session. Wisconsin's governor has the strongest veto power in the U.S. The governor cannot dissolve a legislature or a legislative session. The governor can fill vacancies in judicial offices and may pardon persons convicted of a crime.

Judicial Powers

The third branch of government, the judicial branch, includes the state supreme court, the court of appeals, and all other courts. The seven-member supreme court controls the other courts, makes procedural rules for the courts, and hears final appeals. The courts determine how the law applies to a particular set of facts. Trial courts determine what evidence may be used to reach a decision and make findings of fact. Courts interpret the law and the constitution in actual cases or controversies, and make binding orders.

Courts fashion remedies—both awards of money damages and injunctive relief—for rights that have been curtailed. Courts have inherent authority to incarcerate any person who disobeys a lawful court order. The judiciary can moderate the powers of the other branches. It can declare that acts of the legislature (statutes) violate the constitution, and it can rule that the executive branch has broken the law.

Shared Powers

In Wisconsin, two or more branches of government share certain powers.

Legislative-executive overlap. State agencies may issue rules or regulations, but this is not a legislative function if the rules merely describe how statutes will be interpreted by an executive branch agency. The governor has a distinct role in the legislative process. He or she may propose bills and veto legislation. The main bill that the governor proposes is the state budget bill.

The legislature has the power to review proposed administrative rules. This function would be considered a violation of the separation of powers doctrine in many other states. If the legislature objects to an executive branch agency's proposed rule, it considers legislation to support the objection. The proposed rule cannot go into effect while the legislature considers that legislation.

When the legislature passes a bill, the constitution requires it to present the bill to the governor for signature. The governor may veto acts of the legislature, although the legislature can override the veto.

Legislative-judicial overlap. The state senate sits as the court for all impeachments of public officers. The state assembly initiates impeachments. The legislature has the power to learn facts upon which legislative choices may depend. It may hold hearings and subpoena witnesses and documents. The legislature can investigate the other two branches, generally acting through its committees. The legislature appoints the state auditor.

Courts usually do not rule on political questions, reserving that task for the legislature. Nor do the courts normally rule on the propriety, practicality, or wisdom of a statute. Courts may only invalidate statutes that violate the constitution.

Executive-judicial overlap. Executive branch agencies may conduct hearings that resemble judicial proceedings. Agencies may hold such hearings to determine if certain facts exist, to grant or revoke licenses, to assess penalties, and to perform other executive acts, subject to judicial review, as long as the hearing officer does not exercise judicial powers.

Summary

The constitution separates the powers of government to avoid concentration of governmental power and to prevent tyranny. The doctrine does not require total separation of powers, but it sacrifices some efficiency in government to ensure that the people will have liberty.

By Steve Miller, Chief
Published by the LRB, Madison WI
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No. 7, November 2005

WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON REVIEW OF RECORDS ACCESS OF CIRCUIT COURT DOCUMENTS

FROM: Don Salm, Senior Staff Attorney

RE: Legislative and Judicial Authority

DATE: September 7, 2010

On May 7, 2010, the Joint Legislative Council created the Special Committee on Review of Records Access of Circuit Court Documents. The committee was directed to review how, and by whom, circuit court civil and criminal records may be accessed through the Wisconsin Circuit Court Access website (WCCA). The issues to be considered by the committee include: (a) the length of time a record remains accessible through WCCA; (b) whether accessibility of a record through WCCA should depend on how far a civil or criminal proceeding has progressed; and (c) whether records of proceedings that have: (1) been vacated or dismissed; or (2) resulted in acquittal or other form of exoneration should continue to be accessible through WCCA.

Before the Special Committee begins its deliberations, a threshold question from committee members may be whether the Legislature has any authority to act in a matter that is of substantial significance to the operation of the judicial branch of government (namely, access to electronic court documents and court documents in general). This Memo addresses that question.

BACKGROUND

Separation of Powers

The Wisconsin Supreme Court has held that the state's three branches of government (legislative, judicial, and executive) exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. Further, an attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of

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courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court made the following comments:

> The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "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."
>
> Each branch has a core zone of exclusive authority into which the other branches may not intrude....
>
> The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." ...The undue burden or substantial interference must be proven beyond a reasonable doubt.... [See *Id.*, 531 N.W.2d at 36, 40; footnotes and citations omitted.]

In another case involving an alleged intrusion of the legislative branch into judicial functions, the Wisconsin Supreme Court stated:

> ...To determine whether legislation unconstitutionally intrudes upon judicial power and therefore violates the separation of powers doctrine, this court developed a three-part test. We must first determine whether the subject matter of the statute is within the powers constitutionally granted to the legislature. The second inquiry is whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. If the subject matter of the statute is within the judiciary's constitutional powers but not within powers constitutionally granted to either the legislature or executive branch, the subject matter is within the judiciary's core zone of exclusive power. Any exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers doctrine. The judiciary may recognize such an exercise of power but only as a matter of comity and courtesy, not as an acknowledgement of power.
>
> If the subject matter of the statute is within the powers constitutionally granted to the judiciary and the legislature, the statute is within an area of shared powers. Such a statute is constitutional if it does not unduly burden or substantially interfere with another branch. [See *State v. Horn*, 226 Wis. 2d 637, 594 N.W.2d 772, 776-7 (1999); citations omitted.]

STATUTORY RELATIONSHIP BETWEEN THE LEGISLATIVE AND JUDICIAL BRANCHES

Section 751.12 (1), Stats., provides that the Supreme Court must, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the proceedings and promoting speedy determination of litigation. The power of the Supreme Court in these matters extends to its ability to affect the work product of the Legislature; that is, the rules of the Supreme Court may modify or suspend existing statutes. [See s. 751.12 (2), Stats.]

However, the statutes reflect the shared power and interests of the judicial and legislative branches in these matters. Section. 751.12 (4), Stats., provides that the authority of the Supreme Court to affect the statutes does not "abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."

DISCUSSION

It appears that the subject of access to civil and criminal court documents, particularly through electronic means, is an area over which the legislative and judicial branches exercise shared powers. This is evidenced by the following:

1. The Director of State Courts' authority to develop and implement circuit court automated information systems, which currently includes the Circuit Court Automation Programs (CCAP), under which free electronic access to circuit court records is provided via the WCCA, was created by the Legislature in 1989 Wisconsin Act 31. That Act created s. 758.19 (4), 1989 Stats., which currently reads:

   > 758.19 **(4)** The director of state courts may develop, promote, coordinate and implement circuit court automated information systems that are compatible among counties using the moneys appropriated under s. 20.680 (2) (j). If the director of state courts provides funding to counties as part of the development and implementation of this system, the director of state courts may provide funding to counties with 1 or 2 circuit court judges for a minicomputer system only up to the level of funding that would have been provided had the county implemented a microcomputer system. In those counties with 1 or 2 circuit court judges, any costs incurred to implement a minicomputer system not funded under this subsection shall be paid by the county. Those counties may use that minicomputer system for county management information needs in addition to the circuit court automated information system use.

2. The Director of State Courts' authority to establish a funding mechanism for electronic filing of court documents under CCAP systems created under s. 758. 19, Stats., was created by the Legislature in 2007 Wisconsin Act 20. That Act created s. 758.19 (4m), Stats., which currently reads:

   > 758.19 **(4m)** The director of state courts may establish and charge fees for electronic filing of court documents under the circuit court automated

> information systems created under this section. The secretary of administration shall credit all moneys collected under this subsection to the appropriation account under s. 20.680 (2) (j).

3. The CCAP system, in part, seems to clearly come within the area of "pleading, practice, and procedure" which is central to the shared power and interests of the legislative and judicial branches under s. 751.12 (4), Stats. A clerk of court's CCAP electronic records of active court cases, and of the disposition of those cases, are the same as the records at the clerk of court's office in his or her county (or counties)--they are the official records. Electronic records under CCAP are records the clerk is required to keep under s. 59.40 (2) (b) and (c), Stats., among other provisions. "When a change is made to the underlying hard copy or electronic court record, the change is reflected at all access points to the court record." [Letter from A. John Voelker, Director of State Courts, to Mr. David R. Schanker, Clerk, Wisconsin Supreme Court, dated February 3, 2010, commenting on Supreme Court Petition 09-07.] These records include records relating to various procedural and practice matters, including items relating to the filing of claims and the docketing of judgments, for example.

It appears that the Legislature has the authority to consider and, in part, regulate the court records-related matters that are the substance of this committee's charge.

There is an additional argument for both the legislative and judicial branches being involved in this area of electronic court records. Although history, practice and, perhaps, case law may indicate that, for example, the judiciary has a more compelling legal argument, and a long-term history of protecting its interests in an area that arguably "skirts the line" of "pleading, practice, and procedure," the court cases have recognized that the three branches of government (in this case, the Legislature and judiciary) share authority, must co-exist, and must show each other a certain amount of respect and deference.

For example, in *Rules of Court Case*, 204 Wis. 501, 515, 236 N.W. 717 (1931), the Supreme Court stated that: "As to the exercise of those powers, however, which are not exclusively committed to them [the courts], there should be such generous co-operation as will tend to keep the law responsive to the needs of society." Similar sentiments were expressed in *State ex rel. Moran v. Department of Administration*, 103 Wis. 2d 311, 317, 307 N.W.2d 658, 662 (1981), in which the Court refused to order the Secretary of Administration to purchase an automated legal research system, although he had the duty to do so:

> We think it appropriate to take judicial notice of the shortfall in state revenue caused by current economic conditions. The end of the 1979-81 biennium is fast approaching. If we ordered the secretary to issue a warrant for the amounts requested, they would be charged against the appropriations for the fiscal year 1980-81. Although the total involved...is miniscule compared to the costs of operations to government...we think it a proper exercise of judicial restraint to withhold granting the writ in the instant case. This court is committed to moderation in budgeting the expenses of the judicial branch of government, just as the governor and the legislature are so committed for the executive and legislative branches. [See *Moran*, 307 N.W.2d, at p. 664.]

In *Friedrich*, cited above, the Supreme Court concluded that the Legislature and the judiciary share the power to set fees for court-appointed guardians ad litem and special prosecutors. The Court stated that the judicial branch has the ultimate authority for setting the fees, but in recognition of the shared interest of the Legislature and in recognition of a statute's presumption of constitutionality, the Court stated that any undue burden or a substantial interference with one branch of government by another must be proven beyond a reasonable doubt. The Court stated that this burden is necessary to ensure that the judiciary will order the expenditure of public funds for its own needs only when it articulates a compelling need. [See *Friedrich*, slip opinion, at pp. 15, 19, and 25.]

FINAL NOTE

In case of a conflict between legislative and judicial proposals regarding the shared power of judicial recusal, the final arbiter of course may be the Wisconsin Supreme Court. The Supreme Court can overturn legislative action either through future amendments to the statutes or, in a contested case, by determining, beyond a reasonable doubt, that the legislative action unduly burdens or substantially interferes with the authority of the judicial branch. [See, for example, legislative and judicial activity regarding ch. 756, Stats., relating to juries. In 1990, the Legislative Council established the Special Committee on Jury Service to review jury selection practice. The committee's deliberations resulted in the enactment of 1991 Wisconsin Act 271, relating to jury service as a civic duty, exemptions and excuses for jury service, jury commissioners, sources for jury lists, juror qualification forms, forfeitures for failure to attend as a juror, length of juror service, and periods of juror eligibility. The Supreme Court, apparently not satisfied with the decisions made by the Legislature, significantly amended ch. 756, Stats., in Supreme Court Order No. 96-08, 207 Wis. 2d xv (1997). The Legislature did not respond to the amendments effected by the Supreme Court.]

DLS:wu

IS OUR JUDICIARY A CO-EQUAL BRANCH OF GOVERNMENT?

Dianne Molvig

On April 2, 1874, the state superintendent of public property, who managed the capitol building, fired the Wisconsin Supreme Court's janitor and hired a replacement. When the justices asked the superintendent to reverse his decision in order to keep the former employee, the superintendent refused.

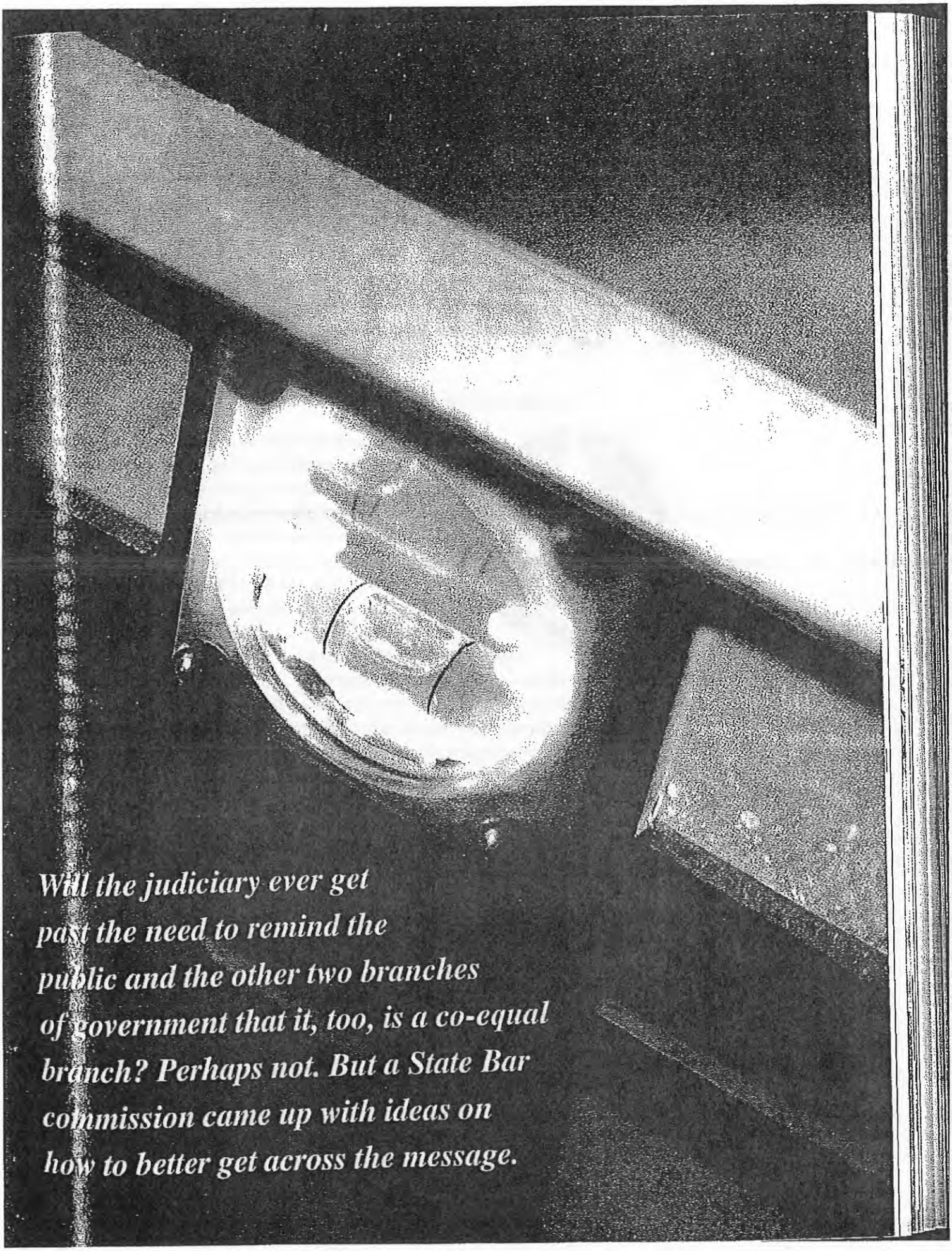
The justices chose to take official action. Within two weeks they had issued a decision, reading in part:

"It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants ... As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separated and independent in its sphere of action from the other branches, it seems to be under the protection of the Constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of either of those departments."[1]

Thus, the court got to keep its janitor. This case may seem trivial by today's standards. But it wasn't the last time the court had to resist attempts by other government branches to usurp judicial authority. More recent examples include:

- Several years ago the Wisconsin Legislature passed a law prohibiting judges from appointing lawyers to represent indigent parents at risk of losing custody of their children in CHIPS proceedings. The Wisconsin Supreme Court ruled that the law violated the federal and state constitutions.[2]
- In 1987 the Legislature took upon itself the authority to require and regulate training for lawyers serving as guardians ad litem in family court actions. The supreme court ruled against the law, stating that it interfered with the court's superintending powers and violated the separation of powers doctrine.[3]

Dianne Molvig operates Access Information Service, a Madison research, writing and editing service. She is a frequent contributor to area publications.



Will the judiciary ever get past the need to remind the public and the other two branches of government that it, too, is a co-equal branch? Perhaps not. But a State Bar commission came up with ideas on how to better get across the message.

I believe the people will be better served by three branches of government that understand each other's functions and communicate with each other in a friendly, cooperative way.

David Saichek

Justice Jon Wilcox

This commission study also was an opportunity to look inward at the operations of the judiciary, its relations with the other branches and how well it is serving the public.

Not all reminders of the judicial branch's independence, however, have come in the form of formal court decisions. When the Department of Administration (DOA) wanted to take over the state courts' computer system a couple of years ago, the supreme court had to point out to DOA, an executive agency, that such a move would be a threat to separation of powers. Therefore, the court graciously but firmly refused to comply. Former Wisconsin Supreme Court Chief Justice Nathan Heffernan discussed the matter in a summer 1995 interview in *The Verdict*, noting, "I think that the main thing that the courts have to be worried about is that they not be treated just as another bureaucracy ... and that under the Constitution they are independent of both the legislature and the governor."

Heffernan's words ring back to what we all heard in grade school civics lessons: Our government has three branches, each independent and equal in stature to the others. History shows that concept needs to be continually refreshed not only in the minds of the general public but in the minds of members of the legislative and executive branches. Toward that end, in 1995 State Bar immediate past president David Saichek established the Commission on the Judiciary as a Co-equal Branch of Government, which recently issued its report and recommendations.

"My reason for appointing the commission," Saichek notes, "is that I believe the people will be better served by three branches of government that understand each other's functions and communicate with each other in a friendly, cooperative way. I also had the perception that in some cases the other branches have treated the courts like an agency of state government. It's not an agency; it's a co-equal branch of government."

"I think there's concern as to just where the judiciary stands," agrees Wisconsin Supreme Court Justice Jon Wilcox, who cochaired the commission with Saichek. "But this [commission study] also was an opportunity to look inward at the operations of the judiciary, its relations with the other branches and how well it is serving the public."

A fresh look

The 33-member commission had two purposes:

1) to research the historical and current framework of the separation of powers doctrine; and

2) to explore ways the courts can properly maintain their independence while cooperating with other branches of government, toward the goal of serving Wisconsin citizens with basic good government.

"What we tried to do," Saichek explains, "was take a fresh look at the separation of powers doctrine as it exists today, because certain changes have been made in that doctrine which now make cooperation among the three branches of government a more realistic goal. I think that's an advance in jurisprudence, in which Wisconsin is on the leading edge."

At the outset, the commission realized its work had to have solid footing in legal and constitutional history. Therefore, the commission set up a research subcommittee, whose task was to create "the platform from which the other subcommittees made their recommendations," says Milwaukee attorney Walter Kelly, who cochaired the research subcommittee with Gary Sherman, Port Wing attorney and State Bar past president.

The research subcommittee's section of the report drives home two key points about the separation of powers doctrine. First, the doctrine exists not to protect governmental turf, but to safeguard individual liberty by diffusing power among three branches, rather than concentrating it in one. Second, the Wisconsin Constitution is even more specific in spelling out judicial powers than is the U.S. Constitution. "Wisconsin's is a strong judicial branch constitution," Kelly points out, "and that has been a developmental and evolutionary process over the years."

That said, history also shows that the judiciary has on occasion deferred to the other government branches, in the interests of cooperation between branches and better government for the state's citizens. "There's no effort by the judiciary in this state," Kelly says, "to drive the other branches to the wall. Sometimes the court will choose, even in an area where it has considerable power, to defer to either the legislative or the executive branch or both. I would call that a form of interbranch diplomacy."

"The trick," Kelly adds, "is to have that kind of diplomacy without surrendering ultimate bottom-line power. For all the talk about cooperation among branches, the final word on separation of powers issues in Wisconsin clearly remains with the supreme court."

With such concepts as a framework, the other commission subcommittees set to the task of drawing up recommendations in four areas: interbranch relations, court-community collaboration, court accountability, and funding and allocation of resources.

Interbranch relations

A certain tension between branches of government perhaps always will exist. In fact, it may be a crucial ingredient in a system based upon three branches keeping one another in check, assuring no one branch exceeds or misuses its powers. Yet, cordiality and respect must exist alongside interbranch scrutiny, or all of government suffers as ultimately do its citizens.

The interbranch subcommittee looked at ways to "build the trust level," says Regina Frank-Reece, commission member and director of the Office of Management and Budget in the Division of Juvenile Corrections. "I think we all realize that our work is interdependent, and that we can have better government if we learn how to work together better."

Frank-Reece describes her subcommittee's recommendations as "very commonsense sorts of things." But she adds, "in

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my experience – which has always been in the executive branch – these just don't happen. One of the challenges is: How do we improve communications?"

The subcommittee came up with the following possibilities:

1) *Formal communications* should be developed among the three branches and all levels of government to foster better understanding of their functions, needs and problems, including:

- presentation of the annual state of the judiciary speech directly to the legislative and executive branches;
- orientation programs for new legislators and new judges that address the roles and responsibilities of each other's branch;
- materials and information on the judicial branch to be included in orientation programs for new legislators and in interbranch conferences;
- materials and information on the legislative branch to be included in orientation programs for new judges and in interbranch conferences;
- expansion of the Judicial Ride-Along Program;
- interbranch conferences; and
- joint study committees and task forces.

Although diverse, the above suggestions all aim toward the same result: improved understanding among the branches of what other branches do – and why and how they do it.

Of these recommendations, one of the simplest to implement may be the first on the list. Currently, the supreme court chief justice delivers the "state of the judiciary" speech to judicial colleagues at the annual Judicial Conference. The impact may be comparable to "preaching to the choir."

"As it is now the [state of the judiciary] speech is printed and circulated to members of the other branches," notes Linda Clifford, Madison attorney and chair of the interbranch relations subcommittee. "But there's nothing like being in the same room together and listening to the speech. That would give it a higher profile than it gets now."

Sharing information is an element running through all the above recommendations. Another common thread is facilitating personal connection to promote communication among branches. "All branches are operated by people," Clifford says. "You can have tools to make communication easier, or more routine or more expected. But it's people who have to carry that out and do it with sincerity."

2) *Informal communications*, such as regular meetings and discussion groups for branch leaders at the state, county and local levels, should be encouraged and fostered to improve understanding of the functions, needs and problems of each branch.

In addition to formal meetings and conferences, the subcommittee cites the value of informal gatherings of members of different government branches. "It can be as informal as having breakfast once a month," Clifford explains, "without having any agenda – just talking about ideas and getting to know people. That keeps the lines of communication open. And it humanizes the issues."

Supreme Court Chief Justice Shirley Abrahamson already has initiated various efforts to informally bring together people from different branches. Likewise, circuit court judges in some counties have made efforts to build friendly relationships with their local government officials. Still, some judges are wary, fearing that efforts to reach out to other branches may be perceived as playing politics.

While the commission recognizes that as a valid concern, it also emphasizes that this concern should not preclude advocating for the judiciary. What's more, if friendly interaction is ongoing, it's far less likely to be construed as politically motivated. "If we can establish formal and informal relationships over time," Frank-Reece points out, "and not just during the biennial budget process, then everybody will be better served. It makes sense that if people are talking to each other on a more frequent basis, there will be better understanding of the judicial branch's needs and perspective."

3) *Institutional mechanisms*, such as judicial checklists, judicial impact statements and joint reports, should be developed cooperatively by the three branches of government to improve the process of legislative drafting and to measure and report on the effect of legislation on the court system.

The mechanisms mentioned here are tools for preventing problems. Judicial checklists could help legislators draft a bill in a way that averts legal conflicts down the road. Judicial impact statements, on the other hand, come along later in the process. For instance, if the Legislature passes a new "get tough on crime" law, a judicial impact statement can assess: What will this law do to the courts? Will it create new burdens the courts won't have the resources to handle? "We'd like to give the Legislature more opportunity to think that through," Clifford points out. "Whether they choose to address that remains up to them. This recommendation just does half the job."

Court-community collaboration

Better understanding of the judiciary among those in government is but one piece of the puzzle. Equally important, the commission emphasizes, is public awareness of the judicial branch. The workings of the judiciary are mostly outside the public spotlight, except for certain notorious trials. The upshot: The public's perception of the courts often is either nonexistent or grossly skewed.

Court-community collaboration works both ways: It's vital to an accurate public view of the judiciary and to the courts truly serving their "customers," the citizens. "Lawyers are a critical part of this process," says Mary Lynne Donohue, Sheboygan attorney and chair of the court-community collaboration subcommittee. "The community can't do it alone; the judiciary can't do it alone. Lawyers, out of honor for their

Public awareness of the judicial branch through court-community collaboration is vital to an accurate public view of the judiciary and to the courts truly serving their 'customers,' the citizens. Lawyers are a critical part of this process.

Mary Lynne Donohue

Patricia Heim

I think there's potential merit when the court needs to go to the Legislature for additional monies for facilities, judges, personnel and so on; to be able to say, 'We have objective measurements and here's why we need such-and-such.'

We'd like to give the Legislature more opportunity to think through [how new laws impact the judicial system]. Whether they choose to address that remains up to them.

Linda Clifford

Regina Frank-Reece

If we can establish formal and informal relationships over time and not just during the biennial budget process, ... there will be better understanding of the judicial branch's needs and perspective.

profession, are an important part of implementing these recommendations." The recommendations include:

1) *The State Bar of Wisconsin should support the Wisconsin Supreme Court's community involvement projects, including its "Volunteers in the Courts" project.*

Noting Chief Justice Abrahamson's proactive stance in this area, the subcommittee called upon Bar members to get actively involved in supreme court projects.

2) *The Local Bar Grant Committee should encourage local bar efforts to make their courthouses user-friendly.*

The State Bar funds small grants to local bar associations for public education. The commission suggests funneling some of these funds into projects that help people find their way through the court system. Ultimately that leads to better understanding of the court's function in society.

3) *The State Bar's Law-related Education Committee and Videotape Committee should develop a videotape and study materials to explain the judicial system and its relationship to the other branches of government for distribution to schools.*

A well-done videotape could introduce a realistic image of the judiciary at a young age and help bring students' civics lessons to life.

4) *The State Bar should increase its support for local bar efforts to enhance community understanding of the judiciary's role as an equal branch of government by:*

- providing program information at the local bar leaders' conference; and
- providing increased opportunity for bench/bar interaction at bar conferences.

Local efforts are key to creating awareness of the judiciary. Through informational and conference programs, the State Bar can support local efforts.

5) *The State Bar should continue its commitment to the work of its Cable and Broadcast Committee, which is educating the public about the role of lawyers and the judicial branch.*

This project was launched last year by then president David Saichek. The program "Law Talk" now is shown on Milwaukee and Madison cable stations and soon will be broadcast statewide.

Court accountability

Proclaiming co-equal status is little more than talk if the judiciary can't demonstrate it is effectively serving the people. "A lot of what we have now is word-of-mouth stories, some true, some untrue," says Patricia Heim, La Crosse attorney and chair of the court accountability subcommittee. "It's hard to actually state with any certainty that a court system has been reviewed and that it's performing to meet standards. We wanted to come up with concrete measurements."

Some might argue that accountabilities for the judiciary already abound: elections, codes of ethics, media scrutiny, to name a few. Why does the commission feel compelled to add more? Heim contends that far from being a burden on the judiciary, new accountabilities based upon objective measures will be a boon to the courts' cause.

"I think there's potential merit," Heim says, "when the court needs to go to the Legislature for additional monies for facilities, judges, personnel and so on, to be able to say, 'We have objective measurements and here's why we need such-and-such.'"

Currently, such negotiations mostly come down to looking at court case-counts. But objective measurements would assess quality of the system, providing "concrete evidence to show whether the system is working or not working," Heim says. "That will take this process out of the number-crunching and elevate it to another level. It also takes it out of the realm of thinking of the judiciary as just another state agency, where the emphasis is on the bottom line."

The recommendations are:

1) *The supreme court should hold court commissioners to the same standards of conduct, education, performance and reporting as the judiciary.*

Often citizens' only contact with the court system is with court commissioners, who are not elected by the public. The commission recommends that court commissioners be subject to regular and objective evaluation, and that they pursue continuing judicial education.[4]

2) *The supreme court should create a task force on the Quality of the Court System comprised of judges, attorneys, legislators and citizens to consider a methodology for judicial assessment and improvement using the Trial Court Performance Standards and Measurement System.*

Creating a measurement tool from scratch would involve years of work. Fortunately, a project of the National Center for State Courts and the Bureau of Justice Assistance of the U.S. Department of Justice has already invested the time and effort. Their Trial Court Performance Standards and Measurement System has been developed and tested in several states. The commission suggests that some of the 68 standards in the Measurement System be implemented in pilot projects in selected judicial districts.

The commission also suggests that the task force explore whether Total Quality Management (TQM), or certain aspects of this evaluation system, are applicable in Wisconsin. TQM is being used by courts in Minnesota, Connecticut, New Jersey, Maryland and Maine.

3) *The* Wisconsin Lawyer *editorial board should consider establishing a monthly column about issues of concern to the bar and the judiciary, including the functioning of the court system.*

This column could be a forum for discussion of concerns about the court system. "This would be a great way for either a judge or lawyer to pose an issue or question and have a response from the other side," Heim explains.

4) *The judiciary should take a leadership role in educating the public about the court system, including sponsorship of public forums and participation in educational programs.*

5) *The judiciary should work cooperatively and proactively with the media to educate the public about the effect of*

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Co-equal

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decisions by legislative and executive branches on the judicial branch.

Recommendations 4 and 5 speak to the need for public education about the judiciary – a need that surfaced in other portions of the commission's report. These recommendations tie into accountability as well. "I think education can only help," Heim says. "When people know more about the court system, they feel more assured about it."

Walter Kelly

Sometimes the court will choose, even in an area where it has considerable power, to defer to either the legislative or the executive branch or both. I would call that a form of interbranch diplomacy. The trick is to have that kind of diplomacy without surrendering ultimate bottom-line power.

Funding and allocation of resources

Funding is a chicken-and-egg issue for the courts. Adequate funding is an indicator that the other branches, and the public at large, value the judiciary's role and deem it a co-equal branch. At the same time, adequate funding is crucial if the judiciary is to function well enough to earn co-equal stature in others' eyes.

The commission refrained from simply calling for more money for the courts – although numerous stories of funding shortages surfaced in the public hearings held in Green Bay, La Crosse, Wausau, Milwaukee and Madison. Rather, the funding subcommittee undertook the gargantuan task of better understanding the state budget process. It also suggested steps to assure the courts get the funds they need. In addition to recommending that the State Bar and the judiciary itself actively educate the public and other branches of government about the courts' needs, the commission recommended:

1) *The State Bar should support the Wisconsin Supreme Court's efforts to reallocate judges throughout the state based upon caseload need.*

This is not about massive reorganization, but simply states that when circuit court judges' caseloads allow, they should step in to help other districts having a caseload crunch. "When I sat as a judge in Waushara County, each judge in that district had to take a certain number of cases in another jurisdiction," notes Supreme Court Justice Jon Wilcox, commission cochair. "I think that's a reasonable expectation. We need that kind of flexibility because it allows optimum use of the judiciary."

2) *Judicial compensation should be taken out of the political process by creation of a Judicial Compensation Commission comprised of members of the public and of the three branches of government.* Until the commission is established, an Advisory Committee to the Legislature's Joint Committee on Employment Relations on judicial compensation should be established.

3) *The supreme court should consider the advisability of submitting its budget directly to the Legislature, in addition to submitting it to the executive branch.*

Recommendations 2 and 3 aim to drive home the key point of this report: The judiciary is a co-equal branch. That point becomes clouded by current practices in which judicial salary negotiations become political haggling. And the judiciary budget is submitted to the Legislature as part of the executive branch budget, further feeding the perception that the court is just another state agency.

"As someone who worked in the state budget office and through my interactions with folks in the Legislative Fiscal Bureau," says commission member Frank-Reece, "my sense is that is sometimes how [the judiciary] becomes perceived." Directly submitting the judiciary budget to the Legislature instead would reinforce the message "that the judiciary is a separate entity," Frank-Reece points out. "It would be very symbolic."

Endnotes

[1]*In re Janitor of Supreme Court,* 35 Wis. 410 (1874).

[2]*Joni B. v. State of Wisconsin,* 202 Wis. 2d 1, 549 N.W.2d 411 (1996).

[3]*State ex rel. Fiedler v. Wisconsin Senate,* 155 Wis. 2d 94, 454 N.W.2d 770 (1990).

[4]For more on court commissioners, see *Expanding the Use of Court Commissioners,* 70 Wis. Law. 10 (Feb. 1997). ■

Page 14: History shows that the co-equal concept of government continually must be refreshed in the minds of the public and members of the executive and legislative branches.

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DEPARTMENTS

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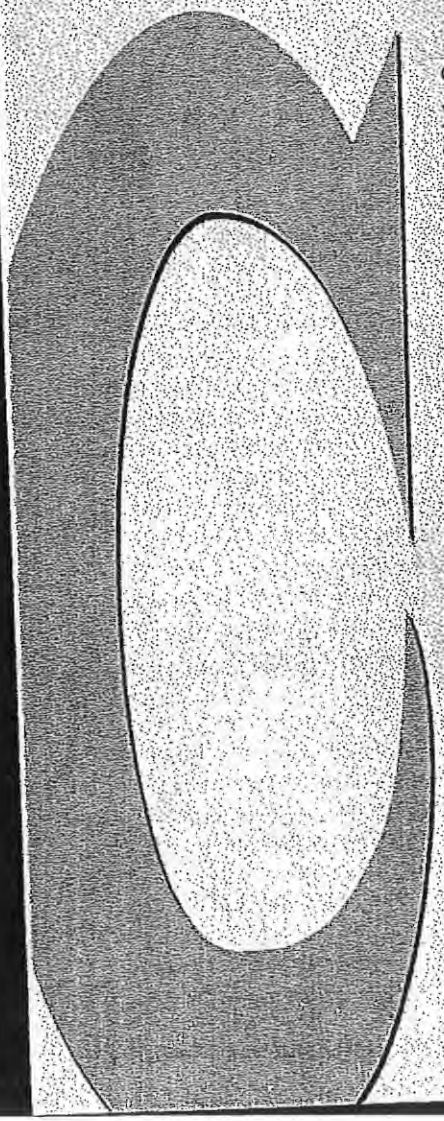
United States v. Shabaz:

Colliding Branches of Government

by Frank M. Tuerkheimer



Collisions between the various branches of government, separated 220 years ago both to provide for a workable government and to avoid the risk of tyranny, occur from time to time. A review of a recent decision by the U.S. Court of Appeals for the Seventh Circuit reveals that a recent collision between the branches occurred in Wisconsin just a few months ago, in *United States v. Shabaz*.[1] This collision arose when the executive branch asserted its right to decide what charges should be presented and the judicial branch asserted its right to ensure that its prerogatives on sentencing were not impermissibly constrained. Prosecution and sentencing are, quintessentially, executive and judicial functions, respectively. *United States v. Bitsky*, which became *In re United States of America* in the Seventh Circuit,[2] presents a common scenario but one in which each party dug in its heels. I have dealt with this issue both as a practicing attorney[3] and as an academic.[4] Hence I followed the Wisconsin case with more than a passing interest. Ironically, had this scenario taken place just a few weeks later the result might have been entirely different.

The Collision

Constitutional confrontations between the different branches of government often have their origins in small places. In this case, the origin is the Adams County jail. On Feb. 11, 2001, Steven Vosen was arrested and brought to the jail for booking. He was drunk and cursed at Kenneth Bitsky, an Adams County undersheriff. Bitsky slammed Vosen into a wall. Vosen suffered cuts to his face and head: minor, but demonstrable

The separation of powers into three co-equal branches of government provides us with a system of checks and balances. But what happens when the branches collide? Which branch prevails? Read how the U.S. Court of Appeals for the Seventh Circuit recently made that determination in a case that weighed the powers of the executive and judicial branches.

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injuries. Bitsky then attempted to persuade another officer to write a false report and threatened a second officer to not tell what she had seen during the incident. Bitsky subsequently was charged by a grand jury in the Western District of Wisconsin in a three-count indictment: one count alleged a violation of the Civil Rights Act based on Bitsky's handling of Vosen; and two counts charged an obstruction of justice with respect to Bitsky's attempts to cause a false report to be written and to intimidate a colleague.

Shortly before the scheduled trial was to begin before Judge John Shabaz on April 14, 2003, the U.S. Attorney's Office for the Western District of Wisconsin and the attorney for Bitsky reached a plea agreement. Bitsky was to plead guilty to one of the obstruction counts, and the United States was to move to dismiss the remaining charges after sentencing. Under federal procedure, the prosecution does not have the unfettered power to dismiss a criminal charge once it has been brought; it must obtain the approval of the court.[5] Each of the three counts of the indictment carried a maximum penalty of 10 years' imprisonment. However, the Federal Sentencing Guideline range for the obstruction charge was substantially less than the guideline range for the Civil Rights Act violation. Judge Shabaz conditionally accepted Bitsky's plea of guilty to one of the obstruction counts pending receipt of the presentence report. A sentencing hearing was scheduled.

At the sentencing hearing Judge Shabaz rejected the plea agreement, which he had the power to do under U.S. Sentencing Guidelines 6B1.2(a). Judge Shabaz rejected the agreement because it was his view that the plea agreement undermined the sentencing guidelines, since the plea agreement precluded him from imposing the higher sentence he thought was warranted, given Bitsky's conduct. Judge Shabaz's refusal to accept the plea agreement resulted in an adjournment of the sentencing. At the adjourned date Bitsky informed the court that he intended to proceed to sentencing without a plea agreement. Judge Shabaz then sentenced Bitsky to a term of 16 months imprisonment on the obstruction count to which he had pleaded guilty, and scheduled trial on the remaining counts to take place in approximately three weeks.

The following day the government filed a motion under Rule 48(a) of the Federal Rules of Criminal Procedure to dismiss the remaining two counts. Included with the motion was an affidavit of Assistant U.S. Attorney John Vaudreuil that explained that the decision to accept the guilty plea to one count was to satisfy the principal prosecution goal to ensure a felony conviction of Bitsky, which carried with it the certainty that Bitsky would have to resign from his position and no longer work in law enforcement. According to Vaudreuil, this end would be obtained without the risk of a trial, which might result in an acquittal on all counts.

Two days later Judge Shabaz granted the motion to dismiss with respect to the other obstruction count, but denied it with respect to the Civil Rights Act count, characterizing that proposed dismissal as "a sweetheart deal" that was not "a reasonable resolve of this case." Judge Shabaz did not address the standard for dismissal under Rule 48(a) but, rather, relied on the sentencing guidelines, even though the plea agreement was no longer before the court. Judge Shabaz concluded that when the 24-to-30 months Guideline range for the Civil Rights Act count was compared to the sentence on the obstruction count (16 months), it was clear that the obstruction count did not reflect the seriousness of the offence behavior. Judge Shabaz, in denying the Rule 48(a) motion to dismiss, said he would follow the intent of the Guidelines "until so directed otherwise by a higher authority than the Department of Justice." He noted that the government was concerned with the risk of trial and then, with obvious sarcasm, stated that "if that is the case it should withdraw from litigation for all trials have the potential of risk."

The Result

Where are we now? We have one obstruction count under which Bitsky has been sentenced and another has been dismissed. That leaves the most serious charge as the open charge, the Civil Rights Act count, which Judge Shabaz wants prosecuted and which the government wants dismissed.

Judge Shabaz then issued an order that the remaining count be tried, but AUSA Vaudreuil advised the court that the government did not intend to proceed to trial on the open count. The following day, in a hearing before Judge Shabaz, the government reiterated its position and Judge Shabaz stated that the government's request to dismiss the open count was in bad faith:

"The United States Attorney is clearly motivated solely by a desire to usurp the court's sentencing authority. ... That purpose is clearly contrary to the public interest and a bad faith exercise of his authority. Were the government allowed to dismiss count 1 of the indictment the public interest would not be served."

That same day Judge Shabaz entered a one-page order appointing a private attorney as "special counsel to prosecute the defendant on count 1 of

the indictment." Judge Shabaz also ordered the Department of Justice to pay the expenses of the special counsel.

The appointment of an outside special prosecutor raised an entirely separate set of issues. While there have been court-appointed special prosecutors under the Independent Counsel legislation following the Watergate scandal, in each instance in which a special prosecutor or independent counsel was judicially appointed, appointment was pursuant to authority given to the courts by Congress, triggered by the initiative of the U.S. Department of Justice. The constitutionality of this process was upheld by the U.S. Supreme Court in *Morrison v. Olson*.[6] The practical ramifications of a pure outsider being appointed to prosecute are extraordinary. For example, is the executive branch required to turn over its file to this person to assist this person in prosecuting a case that the executive branch has decided should not be prosecuted? To what extent can such a person comply with the requirement to turn over exculpatory evidence if this person has something less than full access to the Justice Department files, and why should such access be given in the first place to implement a prosecution that the department feels should not go ahead? If there is a motion to dismiss or any other litigation, is this person acting on behalf of the United States per the caption or pursuant to his or her personal concept of what the law should be? Finally, of course, the end result is that if there is to be a trial, as was contemplated here, the trial would be before none other than the judge who appointed the special prosecutor in the first place precisely for the purpose of continuing the prosecution. While not a kangaroo court, this is not exactly the traditional setting in which a criminal defendant finds himself or herself.

Had Judge Shabaz not appointed a special prosecutor, the open count simply could have languished until the speedy trial provision of either Rule 48(b) or the Sixth Amendment to the U.S. Constitution would have compelled a dismissal of the charge. With the appointment, however, that option was precluded. The prosecution view that certainty of a felony conviction was essential and the court's view that its sentencing prerogative could not be curtailed were now in a head-on collision. The government brought a writ of mandamus before the Seventh Circuit.

After an initial series of filings, the Seventh Circuit invited either Judge Shabaz or the appointed special prosecutor to respond, if either wished, to the mandamus petition. Judge Shabaz chose to act on his own behalf. Judge Shabaz said that he denied leave to dismiss the open Civil Rights Act count because that dismissal was "a transparent attempt to circumvent the court's sentencing authority." Judge Shabaz continued that the case presented the question of the proper balance of power between prosecutorial discretion and the sentencing authority of the judiciary. He then stated the issue as whether a motion to dismiss pursuant to Rule 48(a) may be denied when advanced for the sole purpose of circumventing the rejection of a plea agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure and the sentencing guidelines. Judge Shabaz saw that a resolution of the issues required a consideration of the relationship between the powers of the two branches of government.

The prosecution, however, did not look at the scenario from the vantage point of sentence, but rather as a simple question as to who could decide whether a prosecution should continue. This question required a focus on Rule 48(a), which on its face is a judicial constraint on the government's ability *not* to prosecute. According to the government, a judge can deny a Rule 48(a) motion only if the government's purpose in seeking the dismissal is to harass the defendant. For example, if the dismissal were granted and the prosecution were reinstated, that continued process would certainly constitute harassment of the defendant, which the court, under its Rule 48(a) power, could prevent by denying the dismissal. Absent such harassment of the defendant, the government claimed, the court has no authority under Rule 48(a) to interfere with the determination to discontinue a case.

As to his appointment of a special prosecutor, Judge Shabaz argued that the authority to deny a Rule 48(a) motion to dismiss inherently had to include the authority to appoint special counsel to compel prosecution, because in the absence of such authority the denial would be meaningless. His only cited authority on this point was *Young v. United States*,[7] a contempt of court proceeding in which the court indeed appointed a special counsel to handle a contempt charge, based on the long-standing principle that courts had the power to protect the integrity of their orders. Judge Shabaz shifted the focus, however, from ensuring the integrity of court orders – the subject of a contempt charge in *Young* – to the ability of the court to defend the integrity of its powers under the Sentencing Guidelines.

Judge Shabaz's submittal was made on Aug. 28, 2003. The court's decision followed on Sept. 16, 2003. A three-judge panel composed of Judges Posner, Easterbook, and Wood considered the government's mandamus petition, in a decision written by Judge Posner. Judge Posner immediately noted why the contempt authority that Judge Shabaz relied on in citing *Young v. United States* was different. The theory permitting the judiciary to prosecute contempt was that the judiciary should not be dependent on the executive to assure compliance with its orders. In this case, however, Judge Posner noted, no judicial order was flouted; rather, the district court was telling the prosecution which crimes to prosecute. And as long as these were not crimes against the judiciary, according to Judge Posner, Judge Shabaz "stepped outside the boundaries of his authorized powers."

Judge Posner observed that under Rule 48(a), the court's permission was required to dismiss a charge. He noted, however, that the rule's principal

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purpose was to protect the defendant from government harassment, something not in issue here. He then went to the heart of the matter: the government wanted to dismiss the civil rights count with prejudice and Judge Shabaz disagreed with that exercise of prosecutorial discretion. Judge Posner acknowledged that Judge Shabaz thought the government had exaggerated the risk of losing trial and, in Judge Shabaz's words, "the evidence was strong and conviction extremely likely." In what is perhaps the most caustic part of his opinion, Judge Posner observed that Judge Shabaz "is playing U.S. attorney. It is no doubt a position that he could fill with distinction, but it is occupied by another person."[8]

Since Judge Shabaz had made a finding that the prosecution was acting in bad faith (namely it was using its executive powers in an effort to circumvent the sentencing powers of the judiciary), Judge Posner then turned to the question of bad faith. He found no appellate decision that actually upheld the denial of a motion to dismiss on the basis of prosecutorial bad faith. Judge Posner was not surprised because bad faith was not a parameter that the court could take into account in assessing the conduct of a cobranch of the government. Judge Posner noted that the prosecutory power of the executive branch in conjunction with the legislative power of Congress assured that no one could be convicted of a crime without the concurrence of all three branches. "When a judge assumes the power to prosecute the number shrinks to two."[9]

Conclusion

The Seventh Circuit Court of Appeals granted the government's mandamus petition and ordered Judge Shabaz to grant the government's motion to dismiss the civil rights count against Bitsky and to vacate the appointment of the special prosecutor.[10] The unambiguous message of this litigation is that when it comes to decisions to drop existing charges, unless the dropping of the charge is part of a harassment scenario, the judiciary must defer to the executive. However, the issue probably will not arise again in the near future.

On Sept. 23, 2003, one week after the Seventh Circuit's decision, U.S. Attorney General John Ashcroft issued a memorandum to all federal prosecutors setting forth departmental policy concerning the charging of criminal offenses and the disposition of charges and sentencing. The crux of the memorandum is that in all federal criminal cases prosecutors must charge and pursue the most serious readily provable offense or offenses that are supported by the facts unless

an assistant attorney general or designated supervisory attorney authorizes otherwise. The most serious offenses are defined as those generating the most substantial sentence under the Sentencing Guidelines. A charge is not readily provable if the prosecutor has a good faith doubt for legal or evidentiary reasons as to the government's ability to readily prove a charge at trial. If that is the situation, the charges should not be filed. Once filed, the most serious readily provable charge may not be dismissed except as permitted by an assistant attorney general or a designated supervisory attorney.

Unless one were to perceive of the relatively minor injuries Bitsky inflicted on Vosen – minor when seen on the spectrum of classical cases under the Civil Rights Act – as taking the case into the realm of the not readily provable, the application of the Ashcroft memorandum to the facts of the Bitsky case would make it impossible for the prosecution to enter into the plea agreement that was entered into here. In this post-Ashcroft memorandum scenario, there never would have been the collision between court and prosecution that led to the mandamus litigation and ensuing decision. So, juxtaposed with great constitutional principles, is the vastly more mundane but often overriding concept that timing is everything.

Endnotes

[1] As captioned by the government in its petition for a writ of mandamus.
[2] *In re United States of America*, 345 F.3d 450 (7th Cir. 2003).
[3] *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).
[4] Frank M. Tuerkheimer, *Prosecution of Criminal Cases: Where Executive and Judicial Powers Meet*, 25 Am. Crim. L. Rev. 251 (1987).
[5] Fed. R. Crim. P. 48(a).
[6] 487 U.S. 654 (1988).
[7] 481 U.S. 787, 801 (1987).
[8] 345 F.3d at 453.
[9] *Id.* at 454.
[10] This result is identical to the outcome in *United States v. Cowan*, cited supra n.3, which I litigated almost 30 years earlier on behalf of the U.S. Department of Justice. There is no intervening precedent to the contrary.

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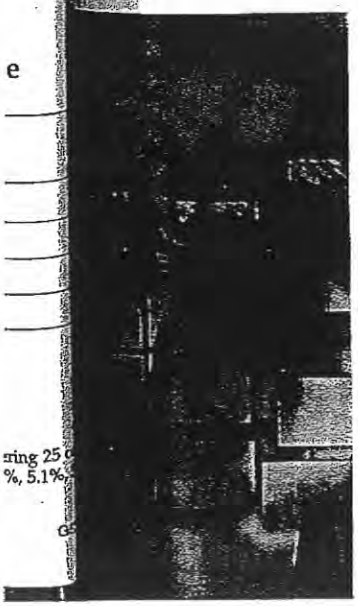
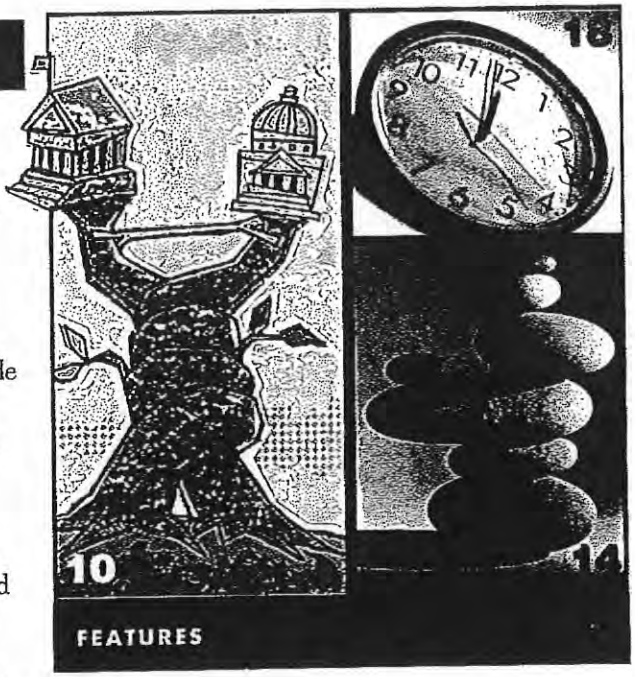
COVER

6 Trouble Ahead: Wisconsin's New Domestic Abuse Laws

The budget repair bill included provisions that expand the coverage of restraining orders to include individuals who are in "dating relationships" and create a new evidentiary privilege that covers communications between domestic abuse victims and victim advocates and the victims' family members. These significant changes to Wisconsin's civil and criminal laws on domestic abuse pose challenges to practitioners and courts alike.

By John A. Birdsall





FEATURES

10 *United States v. Shabaz:* Colliding Branches of Government

The separation of powers into three co-equal branches of government provides us with a system of checks and balances. But what happens when the branches collide? Which branch prevails? Read how the U.S. Court of Appeals for the Seventh Circuit recently made that determination in a case that weighed the powers of the executive and judicial branches.

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14 Balancing Punitive Damages: How Much is Too Much?

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COLUMNS

DEPARTMENTS

FOUR FACES OF STATE CONSTITUTIONAL SEPARATION OF POWERS: CHALLENGES TO SPEEDY TRIAL AND SPEEDY DISPOSITION PROVISIONS

*Neil C. McCabe**

INTRODUCTION

In recent years, separation of powers has become a major theoretical battleground embroiling the three branches of the federal government. The federal courts have decided questions about the constitutionality of such provisions as the Federal Speedy Trial Act ("FSTA"),[1] the federal sentencing guidelines,[2] the one-house congressional override of administrative agency action[3] (otherwise known as the legislative veto[4]), the Balanced Budget Act,[5] and the independent counsel (special prosecutor) provision.[6]

Less noticed has been a similar struggle at the state level, which predated the burst of activity in the federal courts. For example, before the United States Supreme Court considered the congressional veto, state courts[7] and state attorneys general[8] had addressed the question of the constitutionality of the state

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1. *See* United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982) (Speedy Trial Act constitutional); 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

2. *See* Mistretta v. United States, 57 U.S.L.W. 4102, 4107-16 (U.S. Jan. 18, 1989) (federal sentencing guidelines constitutional); UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (June 15, 1988).

3. *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (one-house Congressional override contained within Immigration and Nationality Act held unconstitutional). *But see* Leiserson, *Separation of Powers: A New Approach*, 22 GONZ. L. REV. 423, 477 (1987-88) *Chadha* "says that separation of powers has been violated but makes the decision turn on the constitutional procedures for valid legislative action by Congress, which is not a separation of powers issue at all."

4. Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 351 n.3 (1978) (identifying first use of term).

5. *See* Bowsher v. Synar, 478 U.S. 714, 736 (1988) (Court held powers vested in Comptroller General under Balanced Budget Act violated command of Constitution). *See also* 2 U.S.C. §§ 901-907, 921-922 (Supp. IV 1986) (Balanced Budget Act).

6. *See* Morrison v. Olson, 108 S. Ct. 2597, 2622 (1988) (authority of independent counsel held constitutional). *See also* 28 U.S.C. §§ 591-598 (1982 and Supp. IV 1986) (independent counsel provision).

7. *See* State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 777-79 (Alaska 1980) (statute providing for legislative veto held to violate state constitution); Opinion of the Justices, 121 N.H. 552, 558-59, 431 A.2d 783, 787 (1981) (legislative veto of rule-making authority of administrative agencies not *per se* unconstitutional); General Assembly v. Byrne, 90 N.J. 376, 388, 448 A.2d 438, 444 (N.J. 1982) (legislative veto unconstitutional); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 634-35 (W. Va. 1981) (court held legislative veto violated separation of powers).

8. Schwartz, *supra* note 4, at 367 (two state attorneys general found legislative vetoes unconsti-

legislative veto.[9]

This article will focus on four aspects of a perceived conflict between state constitutional separation of powers principles and statutes or court rules providing for the speedy trial or speedy disposition of cases. The general development of state separation theory will be discussed,[10] and decisions regarding the constitutionality of the FSTA will be examined to provide a basis for the analysis of state court opinions, some of which expressly rely on the FSTA cases.[11]

The remainder of the article will investigate cases involving state speedy trial and speedy disposition acts or rules. Part A of that section will examine whether statutes mandating speedy decision making by the courts impermissibly encroach on the judicial power.[12] Part B will analyze the argument that a court's creation of a speedy trial rule unconstitutionally invades the legislative or executive realms.[13] Part C will examine the claim that a speedy trial statute is an invalid legislative infringement on the power of the courts.[14] Finally, Part D will assess the contention that a speedy trial provision is an unconstitutional intrusion on the prosecutor's power.[15]

I. THE BACKGROUND: HISTORY OF STATE SEPARATION OF POWERS

The state court cases in this area demonstrate an apparent conflict between notions of inherent and exclusive powers of the courts and prosecutors, on the one hand, and the theory of the plenary power of legislatures, on the other. "The view is frequently expressed that state legislatures have inherently all power not denied to them by state and national constitutions."[16] That theory stems from the early history of state constitution making. Before the United

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tutional) (citing 42 Op. Att'y Gen. 350 (Wis. 1954); Letter from Michigan Att'y Gen. Frank G. Millard to Hon. Adrian de Boom (Dec. 17, 1953)).

9. *See* Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 Publius 115, 124-27 (1987) (discussing cases).

10. *See infra* notes 16-74 and accompanying text for a discussion of the general development of state separation theory.

11. *See infra* notes 75-169 and accompanying text for a discussion of cases examining the constitutionality of FSTA.

12. *See infra* notes 170-216 and accompanying text for a discussion of state speedy disposition statutes.

13. *See infra* notes 217-39 and accompanying text for a discussion of court rules mandating speedy trials.

14. *See infra* notes 240-54 and accompanying text for a discussion of whether speedy trial acts impermissibly infringe on the power of the courts.

15. *See infra* notes 255-99 and accompanying text for a discussion of the effects speedy trial statutes have on the prosecutor's power.

16. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 201 (1915). *See also* G. TARR & M. PORTER, STATE SUPREME COURTS IN STATE AND NATION 50 (1988) ("According to traditional legal theory, the state government inherently possesses all governmental power not ceded to the national government, and thus a state constitution does not grant governmental power but merely structures and limits it"); Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983) ("State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power. When the Union was formed, the states retained almost plenary governmental power exercised primarily by their legislatures.")

States Constitution was written, the original states, given their experience with King George III and the "bitter rivalry between governors and assemblies"[17] in most but not all colonies,[18] "reduced the governor to a cipher and vested most power in the legislature."[19]

All of the early state constitutions regarded separation of powers as "an article of faith"[20] and incorporated the theory in some form.[21] Scholars have asserted, however, that those documents treated the separation principle as a "shibboleth"[22] or a "slogan; it meant that power was to be separated from the executive and given to legislatures."[23] According to that view, the framers of the early state constitutions embraced a paradox:[24] they professed the principle of separation of powers but did not practice it.[25]

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17. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 91 (5th ed. 1976).

18. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 7 (1975). The article states: "Connecticut was one of two colonies in which the legislature, representing the interests of the colonists, was not in continued confrontation with a governor representing the colonial proprietors or the English crown." *Id.* (footnote omitted).

19. J.W. COWARD, KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING 2 (1979). Most of the state constitutions prior to 1787 took the anti-Federalist position. *See* Erler, *The Constitution and the Separation of Powers*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 158 (1987) (states' failures to meaningfully separate powers concerned framers).

20. Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 826 (1968) (by time of American Revolution, separation of powers became article of faith with Americans).

21. W.P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 266 (1973) (separation of powers common to early state constitutions). *Cf.* Taylor, *Legislative Vetoes and the Massachusetts Separation of Powers Doctrine*, 13 SUFFOLK U.L. REV. 1, 5-6 (1979) (proposed Massachusetts constitution of 1778 rejected in part because it did not provide for separation of powers).

22. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1045 (1987) (by 1776, separation of powers was shibboleth). *See also* Leiserson, *supra* note 3, at 423 ("separation of powers is to the Constitution what the Trinity is to Christianity"). *Cf.* Wright, *The Modern Separation of Powers: Would James Madison Have Untied Ulysses?* 18 COLUM. L. REV. 69, 72 (1987-88) (separation of powers not "totem").

23. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976) (early separation of powers provisions used as means of controlling executive).

24. A similar paradox has been noted in recent proposals to change the federal constitution:

> If one makes a list of the most frequently proposed alterations in our constitutional arrangements, the odds are high that these proposals will call for a reduction in the separation of powers. . . . It is as if almost everybody were expressing devotion to the Constitution in general but not to the central principle on which it rests.

Wilson, *Does the Separation of Powers Still Work?* 86 PUB. INTEREST 36, 37 (1987).

25. *See* F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, 83-84 (1971):

> [T]he principle of separation of powers was violated in practice by legislative exercise of judic[i]al and executive functions; by the election of the executive councils by and from the legislatures; by the appointment of judicial and executive officers by the legislature; by the presidency and vote of the vice-executive in the upper house; and by the exercise of judicial functions by the governor and his council.

See also Blumoff, *supra* note 22, at 1051-52 ("Separation dogma loomed larger in the rhetoric of those early state constitutions than in the reality of state politics. . . . [F]unctional separation of powers as we have come to know it was more apparent than real"); Howard, *supra* note 20, at 827

> Many states wrote explicit separation guarantees into their constitutions, but the meaning of the concept of separation was so subject to differing interpretations that those provisions were widely misunderstood. Some states (e.g., Massachusetts) had strong separation language competing with equally clear commandments in the constitution authorizing invasions of one branch's power by another branch. Other states had separation provisions in their constitutions which were ignored in practice.[26]

Even though six of the original states included express separation of powers provisions in their early state constitutions,[27] the state constitutions did not control the legislative power. "In all but two states the constitution was written by the legislature and could be altered or abolished by that body if it so chose."[28]

One commentator thus observed that "Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions."[29] That view, however, may have stemmed from an unfavorable comparison of the early state constitutions with the later federal charter and from confusion between the principle of separation of powers and the notion of coequal branches of government. It is true that "functional separation of powers as we have come to know it . . . was more apparent than real," and that "neophyte constitution-makers combined separation tenets with legislative supremacy."[30] The difference in allocation of power, however, merely reflected a divergence in the nature of state and federal governments and variation in views on the nature of legislative power vis-à-vis the other branches. The early state constitutions expressed a belief in an "extreme version of separation of powers"[31] but not in the later myth of three coequal branches, which devel-

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(proposals for Virginia Constitution of 1776 embodied doctrine of separation of powers, but all, including Jefferson's, "created a weak governor, elected by the Legislature and hardly coordinate with it in power or dignity"); A. KELLY & W. HARBISON, *supra* note 17, at 92 (contrast between legislative ascendancy and separation of powers provisions).

26. D. BRAVEMAN & W. BANKS, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 36 (1987). The quotation from Braveman contains more than one erroneous notion. If the constitution gives a "clear commandment" to one branch, the exercise of authority thus conferred cannot be considered an "invasion" of the power of another branch. Furthermore, the fact that a constitutional provision is "ignored in practice" gives no clue to its intended meaning, as shown by the way in which men who voted for adoption of the first amendment to the United States Constitution also supported the obviously unconstitutional Sedition Act of 1798, 1 Stat. 596 (1798) (act expired by its terms in 1801). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (although Sedition Act never tested by Court, attack on its validity has carried day in "court of history"). *See generally* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) (struggle over Sedition Act).

27. Cox, *State Judicial Power: A Separation of Powers Perspective*, 34 OKLA. L. REV. 207, 211 (1981).

28. Belz, *Constitutionalism and the American Founding*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 333 (1987).

29. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 153-54 (1969) (footnote omitted).

30. Blumoff, *supra* note 32, at 1052.

31. Belz, *supra* note 28, at 338.

oped around the federal constitutional scheme.

The fact that, under a state constitution, the legislature might exercise a power that under a later federal or state constitution would be regarded as judicial or executive in nature, does not mean that the earliest state documents paid only lip service to the notion of separation of powers. If a constitution gives a power to the legislature, then by definition the power is legislative in nature.[32] Furthermore, coequality of branches (which, despite the catechism of high school civics books, neither the state governments nor the federal government has ever truly exemplified) is not essential to a system of separated powers. The legislature may be more powerful than, yet "separate and distinct"[33] from, the other branches. Because most students of the federal constitution are accustomed to speaking of separation of powers and coequal branches in the same breath, the combination of separation provisions and the "ascendancy of legislature over executive,"[34] found in the early state constitutional systems, looks like a paradox, to be sure. The paradox, however, is an apparent contradiction, not a real one.[35]

The views of the state framers were to change as they gained greater experience with the excesses and vices of state legislatures,[36] experience many of these same framers brought to the drafting of the federal Constitution,[37] employing a

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32. *Accord* Burns & Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 582 (1987) (president's veto is exercise of executive power, not sharing of legislative power).

33. *See, e.g.*, ARIZ. CONST. art. III ("three separate departments . . . shall be separate and distinct"); ARK. CONST. art. IV, § 2 ("No person or coalition of persons, being one of the departments, shall exercise any power belonging to either of the others, . . ."); CONN. CONST. art. II (three distinct departments); GA. CONST. art. I, § II, para. III ("The legislative, judicial, and executive powers shall forever remain separate and distinct . . ."); KY. CONST. § 27 (three distinct departments); MD. CONST. art. VIII ("The Legislative, Executive and Judicial powers of Government right to be forever separate and distinct from each other . . ."); MISS. CONST. art. I, § 1 (three distinct departments); MO. CONST. art. I, § 1 (same); N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other . . ."); OKLA. CONST. art. IV, § 1 ("The Legislative, Executive, and Judicial departments of government shall be separate and distinct . . ."); TEX. CONST. art. II, § 1 (three distinct departments); VT. CONST. ch. II, § 5 ("The Legislative, Executive, and Judiciary departments shall be separate and distinct . . ."); VT. CONST. art. III, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct, . . ."); W. VA. CONST. art. V, § 1 (same).

34. A. KELLY & W. HARBISON, *supra* note 17, at 92.

35. *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1406 (2d ed. 1987), which defines the word paradox as "a statement or proposition that seems self-contradictory or absurd but in reality expresses a possible truth."

36. For examples of these excesses and vices, *see* Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS 33, 37-39 (1988).

37. *See* Williams, *"Experience Must Be Our Only Guide:" The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 405-06 (1988) (giving names); Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS 380, 417 (1897). The author writes: "From one-third to one-half of the members of the federal convention had been members of the conventions which framed the several state constitutions, and a very large number of the members of the various ratifying conventions had also had a part in the formation of the respective state constitutions." *Id. See also* C.E. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY 249 (1927). Stevens states that the "constitutional movement which transformed individ-

different arrangement of powers adapted from the practice of various states.[38] Their outlook on separation of powers, however, never came to mirror the one reflected in the federal document, nor should it have. The theory of separation of powers as it appeared in many state constitutions before 1787 was entirely different from the British system,[39] and the federal Framers did not copy either the British model or any one state's arrangement.[40] While the federal Framers did reject a proposed amendment that would have included an express separation of powers provision in the Bill of Rights, it is doubtful that they did so because they all agreed which powers belonged to which branch.[41] "Separation meant different things to different theorists at different times, and it is clear that a few very divergent theories concerning separation were influential to our [federal] Framers."[42]

In the decade after the American colonies achieved independence, the largest question being debated by the framers of state constitutions was the proper scope of authority to be accorded the legislative and executive branches and the relationship of those branches to each other.[43] In the nineteenth century, the people developed a "deep distrust" of their legislatures,[44] which began to be seen as a threat to personal liberties. State constitutions thus were rewritten to limit the power of all branches of state government or to "institutionalize" separation of powers for the first time.[45] Still later constitutions addressed problems that were developing in other regions of the nation,[46] by seeking such goals as "a

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ual colonies into States" related to the national constitution in two ways: "[I]t prepared the members of the Philadelphia Convention for their task, and at the same time supplied them with much digested material for the work of construction." *Id.*

38. Webster, *supra* note 37, at 416. The federal constitution was "very largely the product of a wise selection of the best and most generally observed usages of the various states." *Id. But cf.* Williamson, *supra* note 37, at 424-26 (negative influences of state constitutions on federal framers).

39. Rossum, *The Courts and the Judicial Power*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION, 226-29 (1987) (differences between British and American separation of powers theories).

40. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 594-97 (1986) ("separation of powers as adopted by Constitution had no true precedents in either fact or theory).

41. Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 288-89 (1987) (contents of bill of rights reflects struggle between federalists and anti-federalists); Rutland, *Framing and Ratifying the First Ten Amendments*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 310, 315 (1987) (current bill of rights determined through debate and compromise). *But cf.* Leiserson, *supra* note 3, at 449 n.100 (debates at federal convention not informative about role of judiciary because delegates took for granted meaning of judicial power).

42. D. BRAVEMAN & W. BANKS, *supra* note 26, at 33.

43. Williams, *Evolving State Legislative and Executive Power In the Founding Decade*, 496 ANNALS 43, 44 (1988).

44. A. KELLY & W. HARBISON, *supra* note 17, at 90.

45. Kay, *supra* note 18, at 6 (growing sentiment for institutionalizing separation of powers one of various forces that led to convening of Connecticut state constitutional convention in August 1818).

46. *See, e.g.*, J. MAUER, SOUTHERN STATE CONSTITUTIONS IN THE 1870'S: A CASE STUDY OF TEXAS (1983) (shift to restrictive constitution making can be traced to 1840s but spread rapidly after adoption of Illinois Constitution of 1870).

reduction, as much as possible, of all outside control of the state by 'big business' and its pawns; an expansion of individual rights; and a restriction of the power of state government."[47] Each new state had its own historical reasons for limiting the authority of the legislature, sometimes severely.[48] Within a century of the adoption of the federal Constitution, the states held two hundred constitutional conventions,[49] with a common result being the "hamstringing"[50] of the state legislatures. By 1900, state governments had changed radically from the days of "legislative omnipotence."[51] In light of such historical developments, state courts have rejected invocations of legislative plenary power as bases for the resolution of challenges to speedy disposition and speedy trial provisions.[52]

Whether or to what extent state judiciaries have inherent powers is a more difficult question to address historically than is the legislative plenary power issue. Although "English unwillingness to liberate colonial judges from royal and proprietary prerogative . . . gave impetus to the coming implantation of separation theory in the soon to be drafted state constitutions,"[53] the judicial branch did not figure prominently in the debate over separation of powers in early state constitutions.[54] In those documents, the courts were placed directly under the legislature; in colonial times, they had been under the executive.[55] The Framers of the federal Constitution, learning from the mistakes of the earlier state documents, removed the courts from the legislative branch's control, and later state

47. Boughey, *An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation*, 63 N.D.L. REV. 157, 242 (1987). *See also* Friedman, *supra* note 36, at 38 (popular perception of big-business corruption of legislatures).

48. *See, e.g.*, Snyder & Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of L.R.C. v. Brown*, 73 KY. L.J. 165, 206 n.209 (1984-85) (historical reasons why powers of legislature were severely limited by present state constitution, adopting separation of powers provision written by Thomas Jefferson).

49. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 53, 53 (1892). *See also* May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 155 (1987) (more than 230 constitutional conventions held since 1776).

50. J. FORDHAM, THE STATE LEGISLATIVE INSTITUTION 26 (1959) (reality of state constitutional order is that legislatures are hamstrung by numerous limitations on power). *See also* Williams, *supra* note 16, at 201 (transition from early state constitutions granting unfettered legislative power to more recent constitutions restricting legislative power reflects one of most important themes in state constitutional law).

51. C. THATCH, THE CREATION OF THE PRESIDENCY, 1775-1789, at 34, 41 (1923).

52. *See, e.g.*, Meshell v. State, 739 S.W.2d 246, 274 (Tex. Crim. App. 1987) (Miller, J., dissenting) (legislature's power to enact laws is plenary); *id.* at 260 n.5 (Clinton, J., dissenting) (legislature's power to enact such laws as it finds necessary to effectuate constitutional provisions so elementary that constitutional provision giving legislature such power was repealed as being obsolete, superfluous, and unnecessary) (citing TEX. CONST. art. III, § 42 (1876, repealed 1969)); *In re* Grady, 118 Wis. 2d 762, 788-94, 348 N.W.2d 559, 572-73 (1984) (Abrahamson, J., concurring) (complaining that majority ignored plenary power of legislature).

53. Blumoff, *supra* note 32, at 1048-49.

54. *Id.* n.181 (citing J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 97 (1971)). *See* Williams, *supra* note 37, at 420 (judiciary almost forgotten during early revolutionary period).

55. Lutz, *The First American Constitutions*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 75 (1987).

constitutional framers did the same.[56] Just as had occurred federally with *Marbury v. Madison*,[57] however, conflicts erupted in some states over the proper role of the judiciary,[58] and especially over its rule-making power.[59] Those conflicts continue today in the cases involving attacks on speedy trial and speedy disposition provisions.

The impossibility of precisely defining the boundaries separating the three branches of government was recognized even before the federal Constitution was written. Discussing the interpretation of the early state constitutions, Madison observed that

> [e]xperience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[60]

Since Madison's time, courts and commentators have provided some guidance about what is inherently a judicial power.[61] Nonetheless, the student of state separation of powers today can discern little basis, apart from the text and structure of an individual state's constitution,[62] for regarding a particular judicial (or prosecutorial) power as exclusive.[63] As in the federal Constitution, the theory of separation of powers in state constitutions "is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes."[64]

The rule-making issue and other conflicts between the branches of state government have led some courts to hold that explicit provisions for separation of powers, which are found in a majority of state constitutions,[65] "envision a

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56. *Id.* at 80-81.

57. 5 U.S. (1 Cranch) 137 (1803).

58. *See, e.g.*, Note, *Oklahoma's Legislative Veto: Combat Casualty in Separation of Powers War?* 12 OKLA. CITY U.L. REV. 129, 129 (1987) (early definitive decisions in state focused on power of judiciary).

59. *See, e.g.*, Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407 (1985) (thorough review of conflict between legislature and judiciary over rule-making power).

60. THE FEDERALIST NO. 37, at 286 (J. Madison) (J. Hamilton ed. 1904).

61. Cox, *supra* note 27, at 221-29 (history of attempts to define inherent judicial power).

62. *See, e.g.*, State v. Moore, 57 TEX. 307 (1882): "It must be presumed that the constitution, in selecting the depositaries of a given power, unless it is otherwise expressed, intended that the depositary should exercise an exclusive power." *Id.* at 314.

63. *Cf.* Kurland, *supra* note 40, at 602 (early members of federal government decided questions of power allocation among three branches not by asking whether power was legislative, executive, or judicial but by asking where it was allocated in the basic document); Meshell v. State, 739 S.W.2d 246, 270 (Miller, J., dissenting) (cases relied on by majority do not address issues by reference to separation of powers, but rather resolve disputes by referring to some specific power enumerated in Constitution). *See generally* Browde & Occhialino, *supra* note 59 (history and criticism of judicial exclusivity doctrine).

64. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 136 (2d ed. 1983).

65. Cox, *supra* note 27, at 212.

more rigid compartmentalization of the three departments of government than does the [merely implicit[66] principle in the] federal constitution."[67] That finding seems to comport with the wording of state constitutions mandating that the departments of government shall remain "forever separate and distinct."[68] It is also in harmony with the history of state separation of powers theory.

The principle of separation of powers has "evolved along parallel but distinctly different paths on the state and federal levels."[69] The main differences, which make reliance on supposedly analogous federal cases problematic,[70] are that (1) the states have express, and often strongly worded, separation of powers provisions,[71] while the federal principle is implicit;[72] (2) the distribution of power at the state level differs from that at the federal;[73] and (3) the state bias against legislatures is much greater than at the national level.[74] The "parallel but different" character of state/federal separation of powers theory is exemplified by the federal and state court opinions dealing with speedy trial and speedy disposition provisions. The federal cases will be discussed first, because they contained the earliest thorough exploration of the constitutional problems posed by speedy trial acts. The federal decisions provided the backdrop against which much of the state litigation was played out.

II. THE FEDERAL SPEEDY TRIAL ACT

The idea that the FSTA[75] might amount to an unconstitutional infringement by Congress on the federal judicial power found expression in 1976 in an

66. *But see* Burns & Markman, *supra* note 32, at 579 (in federal Constitution powers expressly separated in wording conferring legislative, executive, and judicial powers in separate articles).

67. Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 411 (1984) (citing State v. Hunter, 447 A.2d 797, 799 (Me. 1982) (separation of governmental powers mandated by Maine Constitution much more rigorous than same principle as applied to federal government). *See also* Malone Meekins, 650 P.2d 351, 357 (Alaska 1982) (declining to assume responsibility for ruling on validity of election of legislative officers); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 630 (W. Va. 1981)) (separation of powers must be strictly construed); Powers, *Separation of Powers: The Unconstitutionality of the Arkansas Legislative Council*, 36 ARK. L. REV. 124, 131 (1982) (explicit Arkansas provision has been held to require stronger separation between departments than implicit separation of powers doctrine would) (citing Oates v. Rogers, 201 Ark. 335, 345-47, 144 S.W.2d 457, 462-63 (1940)).

68. *See, e.g.*, Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. REV. 1 (1983) (examination of decisional law of North Carolina and other states).

69. Comment, *Treatment of the Separation of Powers Doctrine in Kansas*, 29 U. KAN. L. REV. 243, 243 (1981).

70. Fisher & Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?* 75 GEO. L.J. 159, 162 (1986) ("state analogy" suffers from serious deficiencies).

71. *See, e.g., supra* note 33 for state constitutional provisions requiring the branches of government to be not only "separate" but also "distinct."

72. *Cf.* Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 715 (1984) (lack of explicit textual reference to separation rule in federal Constitution itself, coupled with other factors, has produced considerable confusion concerning meaning and relevance of separation principle).

73. Fisher & Devins, *supra* note 70, at 162.

74. *Id.*

75. 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

opinion by Tom C. Clark, former United States Supreme Court Justice, sitting on the United States Court of Appeals for the Second Circuit after his retirement from the high court. In that case, *United States v. Martinez*,[76] the trial court had denied a motion, made pursuant to the FSTA,[77] for the release of the defendants from incarceration during trial. The appellate court found at least two grounds for affirmance: "The first is a constitutional one which we will not elaborate further than to note that there is a question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here."[78] The court further remarked in a footnote that, even if one assumes Congress has the power to enact rules of procedure, "[s]ome of the language of the [FSTA] is so sweeping that it might well be construed as more than procedural."[79] Deciding the case on the second, statutory, ground, however, the court reserved the constitutional issue for another day.[80]

The question of the FSTA's constitutional validity surfaced a year later in a federal district court in the Fourth Circuit, in *United States v. Howard*.[81] The court declared the FSTA to be "an unconstitutional legislative encroachment on the judiciary."[82] As in *Martinez*, the defendants in *Howard* unsuccessfully invoked the FSTA in seeking release from custody during trial.[83] The trial court found statutory reasons for denying the motion but nevertheless held the FSTA to be unconstitutional.[84] Judge Young grounded his decision on several bases: (1) Justice Clark's dictum in *Martinez*,[85] (2) the *Federalist* papers,[86] (3) interpretations of the inherent powers of state courts by such courts[87] and commentators,[88] (4) the legislative history of the FSTA,[89] (5) Judge Young's own

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76. 538 F.2d 921 (2d Cir. 1976), *cert. denied*, 434 U.S. 847 (1977).

77. *Id.* at 922. The defendants claimed that they were entitled to release under 18 U.S.C. § 3164 because the trial court had not started the trial before the expiration of ninety days after the beginning of their detention. *Id.*

78. *Id.* at 923 (footnote omitted).

79. *Id.* at 923 n.4.

80. *Id.* at 923. The Second Circuit held that "both Section 3164 [of the FSTA] and Rule 4 of the Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases (Interim) clearly require the exclusion of the time consumed in pre-trial matters." *Id.* at 923. The delay, attributed to the fault of the accused or his counsel, was not to be counted in the calculation of the FSTA time limits. Therefore, the FSTA was not violated, and there was no need to reach the separation of powers issue. *Id.* at 924.

81. 440 F. Supp. 1106 (D. Md. 1977), *aff'd on other grounds*, 590 F.2d 564 (4th Cir. 1979).

82. 440 F. Supp. at 1109.

83. *Id.* at 1107. The defendants relied on 18 U.S.C. § 3164. *Id.* The defendants in *Howard* also relied on the local court rules for the District of Maryland, which specified a time period but mandated release of a defendant only when the FSTA was violated. *Id.* at 1114. They then moved for dismissal of the indictment, which was denied. *Id.* at 1114.

84. *Id.* at 1108-09.

85. *Id.* at 1111 (citing *Martinez*, 538 F.2d at 923 (questioning extent to which Congress exercised judicial authority in passing FSTA)).

86. *Id.* at 1109 (citing THE FEDERALIST NOS. 47-51 (J. Madison & A. Hamilton)).

87. *Id.* at 1111. The court cited decisions from the courts of Oklahoma, Nevada, Arkansas, Indiana, New York, Ohio, and Pennsylvania. *Id.*

88. *Id.* at 1110 (quoting Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958) (certain spheres of activity so

interpretation of *Barker v. Wingo*,[90] and (6) his experience with the "disruption" of criminal and civil dockets caused by the FSTA.[91] The court of appeals affirmed the trial court's holding without reaching the constitutional issue.[92]

Four years after *Howard*, Judge Young again held the FSTA unconstitutional, in *United States v. Brainer*.[93] In *Brainer*, the defendant moved for dismissal of the indictment on the ground that he had not been brought to trial within the time prescribed by the FSTA.[94] The sanction Brainer sought—dismissal of the indictment—was mandatory when the FSTA time limits had been violated.[95]

The government agreed that the FSTA requirements had not been met but argued that the act was "an unconstitutional legislative encroachment on the Judiciary and violate[d] the principle of separation of powers."[96] The stage was set for a decision based not on statutory or other subsidiary grounds, but squarely on the constitutional issue.

In *Brainer*, Judge Young borrowed heavily from his *Howard* opinion. He again relied on the *Federalist* papers, though he buttressed his analysis with citation to the debates at the Federal Convention.[97] The judge admitted that the theory of separation of powers "was never intended, nor has it proven to be, complete,"[98] but maintained that the concept "contemplates a zone of judicial power which must be free from interference by either the Legislative or Execu-

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fundamental and necessary to a court that to divest court of command within those spheres makes phrase "judicial power" meaningless)).

89. *Id.* at 1111-13 (citing various congressional reports).

90. *Id.* at 1111-12 (citing Barker v. Wingo, 407 U.S. 514 (1972)). In *Barker*, the Court declined to announce a precise time limit under the sixth amendment speedy trial provision, but the Court observed that the states were free to prescribe exact standards. 407 U.S. at 523. In *Howard* Judge Young saw *Barker* as not inconsistent with the view that the FSTA was unconstitutional. 440 F. Supp. at 1112.

91. *Howard*, 440 F. Supp. at 1112-13.

92. United States v. Howard, 590 F.2d 564, 568 n.4 (4th Cir. 1979), *cert. denied*, 440 U.S. 976 (1979). The case involved more than one defendant, and the pertinent one was not party to the appeal. 590 F.2d at 568 n.4.

93. 515 F. Supp. 627 (D. Md. 1981), *rev'd*, 691 F.2d 691 (4th Cir. 1982).

94. 515 F. Supp. at 629. Section 3161(c)(1) of the FSTA required the trial to begin within seventy days of the date the accused first appeared before a judicial officer. 18 U.S.C. § 3161(c)(1) (1980). Brainer had been indicted in mid-1980, but he remained a fugitive and was not apprehended until January 1981. 515 F. Supp. at 639. Upon arrest he was taken before a magistrate, at which time bail was set. *Id.* The FSTA clock began running at that point. The court was unable to try Brainer within the statutory seventy days, due to a crowded docket. *Id.* at 630. Therefore, the court dismissed the indictment on June 4, 1981. *Id.* at 640.

95. 515 F. Supp. at 629. Section 3162(a)(2) provides: "If a defendant is not brought to trial within the time limit required by section 3161(c) . . . the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2) (1980).

96. *Brainer*, 515 F. Supp. at 629.

97. *Id.* at 630 (citing THE FEDERALIST NOS. 47-51 (J. Madison & A. Hamilton) (examining theory of separation of powers)).

98. *Id.*

tive Branches."[99] Drawing on the analysis of Professors Levin and Amsterdam, who spoke of an "area of minimum functional integrity of the courts,"[100] Judge Young characterized the core idea of separation of powers as "institutional independence," "administrative autonomy," and a "zone of judicial autonomy."[101]

Judge Young treated the decision regarding when a trial is to begin as a docket control matter. He spoke of such matters as being "purely judicial functions" and "exclusively judicial concerns."[102] In that vein, he denied the validity of congressional attempts to exercise "control over the administration of the judicial function."[103]

Again, as in his *Howard* decision, Judge Young supported his assertion that a zone of "inherent power" exists in the judiciary by citing state court decisions and commentaries. He did so because "the states have historically encountered more instances of actual attempts by the Legislature to intrude upon the Judiciary."[104] The judge pointed to state court opinions invalidating legislative requirements that the judiciary act on civil matters,[105] as well as criminal cases,[106]

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99. *Id.* at 630-31.

100. *Id.* at 632 (citing Levin & Amsterdam, *supra* note 88, at 32 (referring to areas so crucial to efficient operation of courts as to be beyond power of legislature)).

101. *Id.* at 631-33.

102. *Id.* at 631-32.

103. *Id.* Judge Young cited James Madison for the idea that no one branch of government "ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers." *Id.* (quoting THE FEDERALIST No. 48, at 382 (J. Madison) (J. Hamilton ed. 1904)). Judge Young regarded the FSTA as a congressional attempt to exercise the kind of "overruling influence" warned against by Madison. *Id.* at 632.

Although the state and federal opinions discussed in this article often refer to the *Federalist* papers, sometimes for opposing propositions, the reader should be aware of the fallacy of believing that the federal Framers' "public words and actions at the time of ratification and in the early years of the Republic constitute some catalogue of what the document must have meant to them. . . . The point of the criticism is that the wise Framers of the 'Golden Age,' like politicians of every age, had specific policy concerns which were sometimes best addressed by making politically inspired claims about constitutional requirements or prohibitions." Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 740 n.92 (citing THE RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT xiv (C. Woodward ed. 1974)).

104. *Brainer*, 515 F. Supp. at 632.

105. *Id.* at 632-33 (citing Sands v. Albert Pike Motor Hotel, 245 Ark. 755, 762, 434 S.W.2d 288, 291-92 (1968) (state statute which required court to enter order in worker's compensation case was unconstitutional exercise of judicial function by legislative branch of government); Kostas v. Johnson, 224 Ind. 540, 550, 69 N.E.2d 592, 596 (1946) (state statute which deprived court of jurisdiction for failure to determine issue under advisement an unconstitutional legislative interference with judicial functions); Lindauer v. Allen, 85 Nev. 430, 435, 456 P.2d 851, 854 (1969) (legislature that charged time for mandatory dismissal contravened separation of powers provision in state constitution); Riglander v. Star Constr. Co., 98 App. Div. 101, 105, 90 N.Y.S. 772, 774-75, *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905) (mandatory law regulating preference in civil actions unconstitutional infringement upon judicial discretion); Atchinson, Topeka & Santa Fe Ry. Co. v. Long, 122 Okla. 86, 89, 251 P. 486, 489 (1926) (referendum state statute that required court to commence trial within ten days after defendant's pleading usurped judicial power contrary to state constitution)).

106. *Id.* at 633 (citing Scharo v. State, 105 Ohio St. 535, 539, 138 N.E. 63, 64 (1922) (act of general assembly that prescribed time for exercise of judicial function unconstitutional and void)). Judge Young cited cases dealing with the power of the courts to protect court administration in the

within a specified period of time.

Judge Young then cited federal authorities, including Justice Cardozo, to the effect that the courts possess certain inherent powers, including the right to control the judicial docket.[107] None of those cases, however, directly addressed the issue in *Brainer*. Recognizing that the United States Supreme Court rarely had been faced with congressional intrusions upon the judicial power,[108] Judge Young pointed to the 1871 case *United States v. Klein*[109] as the one most on point. The judge assumed, for the purpose of the analysis, that Congress is constitutionally authorized to abolish the lower federal courts.[110] Nevertheless, he interpreted *Klein* to mean that, as long as such courts remain in existence, Congress "cannot unduly interfere with purely judicial functions," such as internal administration, including docket control.[111]

Missing entirely from *Howard* but present in *Brainer* was reference to the Supreme Court's more recent separation of powers analysis, in such cases as *United States v. Nixon*[112] and *Nixon v. Administrator of General Services*.[113] In the first case, Nixon had resisted a subpoena for tape recordings and documents relating to conversations in the President's oval office; in the second case, Nixon had challenged the transfer of presidential tapes and papers to the respondent for eventual public access. From those cases, Judge Young discerned the following balancing test: "The Court's approach . . . requires consideration of the extent to which a branch is prevented from accomplishing its constitutionally

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face of insufficient funds or inadequate quarters supplied by legislatures or county supervisors. *Id.* He also referred to cases involving the "inherent power of the Judiciary to regulate the practice of law," because he saw the zone of judicial independence recognized in such cases as extending to other areas, like court administration and docket control. *Id.*

107. *Id.* at 633-34 (citing Landis v. North American Co., 299 U.S. 248, 254 (1936) (inherent judicial power to control docket); United States v. Correia, 531 F.2d 1095, 1098 (1st Cir. 1976) (same); United States v. Inman, 483 F.2d 738, 740 (4th Cir. 1976) (same)).

108. *Id.* at 634.

109. *Id.* at 631 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (Congress prohibited from prescribing rules of decision to judicial department of government)). In *Klein*, the Radical Republican Congress had attempted to dictate an "arbitrary rule of decision" to govern the outcome of cases in which residents of the southern states were filing claims for compensation for property taken by the federal army during the Civil War. 80 U.S. at 146. By legislation, Congress provided that if the claimant had accepted the general pardon granted by President Johnson in 1868, the pardon was to be taken as proof that the claimant had aided rebellion against the United States. *Id.* at 129. Upon such proof, the courts were required by Congress to dismiss the claim for lack of jurisdiction. *Id.* The Supreme Court held that the legislation unconstitutionally intruded on both the judicial and the executive spheres. *Id.* at 147. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-5, at 50 (2d ed. 1988) (Congress may not force its interpretation of law upon federal courts).

110. *Brainer*, 515 F. Supp. at 631 (citing Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371 (1953) (discussing theory that Congress can divest federal courts of jurisdiction to adjudicate federal constitutional rights).

111. *Id.* at 631. In *Howard*, Judge Young had cited *Klein* only in passing. 440 F. Supp. at 110. In *Brainer*, he placed more emphasis on the century-old case. 515 F. Supp. at 631.

112. 418 U.S. 683 (1974).

113. 433 U.S. 425 (1977). The Fourth Circuit later was to criticize Judge Young's application of the *Nixon* cases. *See Brainer*, 691 F.2d at 698.

assigned functions. When the potential for disruption is present, the Court then requires a balancing of the interest[s] involved."[114]

Proceeding to the final step of the *Nixon* analysis, Judge Young regarded the FSTA as flawed by "a major constitutional shortcoming" in that it infringed on the "independence and flexibility" of the judiciary without adequately taking into account all of the interests involved.[115] According to Judge Young, the FSTA addressed the interest of the defendant and society in speedy trials but ignored other societal interests, such as the effectiveness and efficiency of the federal criminal justice system.[116]

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114. *Brainer*, 515 F. Supp. at 630 (citing Nixon v. Adm'r, 433 U.S. at 442-43 (separation of powers doctrine interpreted to fulfill need for proper balance between coordinate branches of government). In thus stating the test, Judge Young paraphrased and abbreviated the Supreme Court's analysis. 515 F. Supp. at 630. In Nixon v. Adm'r, from which Judge Young drew the test, the Court actually reasoned as follows:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [other] [b]ranch from accomplishing its constitutionally assigned functions. . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overwhelming need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443 (citing United States v. Nixon, 418 U.S. 683, 703-07, 711-12 (absolute executive privilege under Article II of the Constitution conflicts with function of courts provided by constitution)). Judge Young's analysis contained only two steps: (1) evaluating the potential for disruption and (2) balancing the various branches' interests. 515 F. Supp. at 630. The Court's approach in the *Nixon* cases, however, involved three parts: (1) the potential for disruption, (2) the constitutional authority of Congress, and (3) the balancing test. Nixon v. Adm'r, 433 U.S. at 443; United States v. Nixon, 418 U.S. at 711-12. If there is no potential for disruption of the other branch's ability to carry out its constitutionally assigned functions, the analysis stops there, with a holding of the validity of the act in question. If potential for disruption is present, but no relevant grant of congressional power can be found, the analysis stops at that point, with a holding against the constitutionality of the act. Only if both the potential for disruption and the constitutional authority of Congress are found does the reviewing court need to engage in a balancing of interests. Judge Young, by omitting the second step in the *Nixon* approach, actually made it easier on Congress, by not requiring a showing that speedy trials are "objectives within the constitutional authority of Congress." *Id.* (citing United States v. Nixon, 418 U.S. at 711-12). Apparently he skipped the second step because he believed that Congress "certainly possesses authority under our constitutional scheme to take action designed to protect the interests embodied by the Sixth Amendment right to a speedy trial." *Brainer*, 515 F. Supp. at 639.

115. *Brainer*, 515 F. Supp. at 637.

116. *Id.* Judge Young spoke of the FSTA as resulting in misused resources, inadequately prepared cases, dismissals of indictments against guilty persons, forced severances in complicated cases, and excessive costs in dollars—all causing severe disruption, a decrease in the quality of justice, and a heavy burden on federal district courts. *Id.* at 637-40.

Judge Young was not the only federal judge to complain of the effects of the FSTA on the court's calendar. *See* Hibbs v. Yashar, 522 F. Supp. 247, 253 n.7 (D.R.I. 1981) ("The [FSTA's] effect on the calendar of this court has been unprecedented. This effect is largely attributable to the arbitrary time limitations imposed on the judiciary by the Act's terms."). Such effects were anticipated by some while the Act was being considered by Congress. *See* Statement of Joseph T. Sneed, former Deputy Attorney General, Dept. of Justice, later U.S. Circuit Judge, Ninth Circuit, Hearing on S. 754, before Subcommittee on Constitutional Rights of Committee on Judiciary, Senate, 93rd CONG., 1st SESS., 112 (1973).

Regarding civil cases, Judge Young identified the ability of the federal courts to function effectively and efficiently there as a separate societal interest that had been ignored by Congress in passing

After discussing the disruption generally caused by the FSTA, Judge Young criticized Congress's reliance on a 1972 United States Supreme Court case, *Barker v. Wingo*.[117] In *Barker*, the Supreme Court set out general guidelines for the lower courts to use in deciding whether the sixth amendment right to a speedy trial had been violated.[118] The Court declined to impose exact time limits, because "such a result would require this Court to engage in legislative or rule-making activity, rather than in the adjudicative process to which we should confine ourselves."[119] According to Judge Young, that quotation received much attention during the congressional hearings on the proposed FSTA,[120] and Congress interpreted that language as an invitation from the Court to Congress to pass a sweeping speedy trial provision with specific time limits.[121] Only when taken out of context, Judge Young reasoned, could the quotation be regarded as such an invitation to Congress.[122]

Barker arose in the state courts of Kentucky, not in the federal system. When the United States Supreme Court agreed to hear the case, the issue was whether the Court would set speedy trial time periods for state courts to follow as a matter of sixth amendment law. The Court declined to do so but invited the state legislatures to "prescribe reasonable periods."[123] Apparently the Court meant that a state legislature, relying on authority existing under the state con-

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the FSTA. *Brainer*, 515 F. Supp. at 638. With the flexibility of the federal courts reduced by the FSTA, he saw district judges as being hampered in the administration of the civil docket. *Id.* (citing Testimony of Hon. Robert Peckham, U.S. District Judge, Southern District of New York, Hearings on S. 961 and S. 1028, before Committee on Judiciary, Senate, 96th CONG., 1st Sess., 130 (1979)). Judge Young found that the FSTA, "with its myopic concern for rigid time limits in criminal cases, hinders the ability of the courts to focus sufficient resources on the adjudication of . . . important civil matters." *Id.*

117. 407 U.S. 514 (1972).

118. *Id.* at 530. Four factors to be considered are (1) length of delay, (2) reason for delay, (3) defendant's assertion of the right, and (4) prejudice resulting to defendant. *Id.* at 530-33. The four factors, which are to be employed in a balancing test, are not exclusive of others that might be relevant in a given case. *Id.* at 533.

119. *Id.* at 523.

120. *Brainer*, 515 F. Supp. at 638 (citing H.R. REP. No. 93-1508, 93rd CONG., 2D SESS. 1 (1974) reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7401, 7405 (quoting *Barker*); Statement of Congressman Cohen, Hearings on S. 754, H.R. 7873, H.R. 658, H.R. 773, & H.R. 4807, before Subcommittee on Crime of the Committee on the Judiciary, House, 93rd CONG., 2d SESS. at 214, 358 (1974) (referring to wording of *Barker*).

121. *Id. See* H.R. REP. No. 1508, 93rd CONG., 2D SESS. 5 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7405 (Committee noted *Barker* Court's refusal to engage in rule-making activity).

122. *Brainer*, 515 F. Supp. at 539.

123. 407 U.S. at 523. The remainder of the paragraph following the sentence relied on by Congress clearly shows that the Supreme Court was inviting state legislatures, not Congress, to experiment with speedy trial statutes:

> We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

Id.

stitution, could pass a speedy trial act if it did not operate to deprive a person of his sixth amendment right, as defined in guidelines set out by the Court in the *Barker* opinion and elsewhere.[124] As Judge Young noted, the *Barker* language relied on by Congress in passing the FSTA was nothing more than a "general comment on the role of an adjudicating court" and did not invite a congressional attempt to reduce the flexibility of the federal courts in their internal administrative functioning.[125] Judge Young regarded such legislative interference as an unconstitutional disruption of the judicial function of determining guilt or innocence (or presiding over a jury's determination of the issue), as well as an infringement on the courts' inherent power to control their internal administration and their dockets in both criminal and civil cases.[126]

On appeal,[127] the Fourth Circuit, in upholding the FSTA's constitutionality, perceived Judge Young's opinion to be composed of two distinct arguments: (1) The FSTA usurps the federal courts' adjudicative role by determining the "actual substantive outcome of individual criminal cases," and (2) the Act intrudes too far into the realm of judicial administration.[128] In writing for the court, Judge Winter recognized that the district court had gone too far in asserting that the FSTA "attempts to determine the actual substantive outcome of individual criminal cases."[129] Judge Young apparently made that unfortunate statement in an attempt to harmonize his reasoning with the holding of the *Klein* opinion, which regarded as unconstitutional statutes that "prescribe rules of decision to the judicial department of the government in cases pending before

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124. *Id.* at 530-33. Of course, when state legislatures create precise speedy trial time limits to govern trials in state courts, no federal separation of powers problems can result. As we will see later in this article, state constitutional separation of powers provisions could be implicated, but that would not create a federal question for the United States Supreme Court to review. Michigan v. Long, 463 U.S. 1032, 1037-40 (1983) (plain statement in state court opinion that decision is based on state law precludes review by United States Supreme Court). *Cf.* Dreyer v. Illinois, 187 U.S. 71, 77-78 (1902) (federalism bars due process attack on state separation of executive and judicial powers). *But cf.* Note, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675 (1985) (challenging *Dreyer* rule).

125. *Brainer*, 515 F. Supp. at 639. The *Barker* opinion stressed that there is "no constitutional basis" for the notion that the sixth amendment speedy trial right "can be quantified into a specified number of days or months." *Barker*, 407 U.S. at 523.

126. *Brainer*, 515 F. Supp. at 636, 639-40.

127. United States v. Brainer, 691 F.2d 691 (4th Cir. 1982). On appeal the government switched its position and joined *Brainer* in supporting the FSTA's constitutionality. *Id.* at 692. The Court of Appeals appointed an amicus curiae to argue in favor of the district court's opinion. *Id.* at 692 n.5. The circuit court held that it had jurisdiction, despite the government's change in position, and upheld the constitutionality of the FSTA. *Id.* at 693, 699.

One of the amicus curiae was Eugene Gressman, now the William Rand Kenan, Jr., Professor Emeritus at the School of Law, University of North Carolina, Chapel Hill, N.C. As a judge in the 1982 J. Braxton Craven, Jr. Memorial Moot Court Competition, held at Chapel Hill (in which this author competed), Professor Gressman provided the initial impetus to this article.

128. United States v. Brainer, 691 F.2d 691, 694-95 (4th Cir. 1982) (quoting *Brainer*, 515 F. Supp. at 636).

129. *Id.* at 695 (citing *Brainer*, 515 F. Supp. at 636).

it."[130] *Klein*, however, involved a statute that arbitrarily dictated the outcome of a case on the merits, unlike the statute in *Brainer*.

The court of appeals seized on the weakest link in Judge Young's reasoning. By focusing on a single sentence about "substantive outcome," Judge Winter easily rebutted the trial judge's first argument merely by invoking the standard procedural/substantive dichotomy. According to Judge Winter, the FSTA disposes of cases on a procedural basis, much like a statute of limitations.[131] The Act does not dictate the substantive outcome of a particular case; that is, it does not decide the guilt or innocence of the accused. Although Judge Winter saw the FSTA as most closely analogous to a statute of limitations, he also saw "no difference" between the FSTA and other congressional regulations of federal court evidence and procedure, and "statutes prescribing who may sue and where and for what,"[132] which are well accepted.[133]

The appellate opinion did not address whether the FSTA violated the theory of separation of powers by interfering with the judicial function of deciding cases already committed to resolution by the courts.[134] The court apparently misunderstood the first issue to be whether the FSTA, rather than merely prescribing procedures for the courts to follow, actually determined the substantive outcome of Brainer's case.[135] Proceeding to review Judge Young's second point,

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130. United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1871) (congressional attempt to limit jurisdiction upon finding of disloyalty violated separation of powers).

131. *Brainer*, 691 F.2d at 696. Allowing a statute of limitations to prevent cases from being brought to a trial court in the first place, however, does not interfere with the court in its role of deciding cases. It is one thing for Congress to tell the courts which cases should not be filed; it is quite another to order the courts to dismiss cases properly committed to them. Note, *The Federal Speedy Trial Act: A Study in Separation of Powers*, 22 WASHBURN L.J. 299, 316 n.176 (1983) (distinction between deadline before case submitted to judicial process and on operating after that point).

132. *Brainer*, 691 F.2d at 695-96 (referring specifically to Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, and Federal Rules of Evidence).

133. Actually, the validity of legislative control over court procedure has been questioned at both the federal and state levels. *See* Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1928) (under state and federal constitutions, all judicial power except certain parts of jurisdiction and place of criminal trial is in judiciary). Like the FSTA, the evidence and procedure rules govern "cases pending." The latter rules, however, do not create docket nightmares that interfere with the judicial function of deciding cases. If the evidence or procedure rules were shown to cause such problems, they might be subject to the same constitutional attack as the FSTA. The very fact that, because the evidence and procedure rules do not severely hamper the courts and, therefore, are "requirements of unquestioned validity," *Brainer*, 691 F.2d at 696, means that such rules are not analogous to the FSTA. For that reason, citation to them does not support the circuit court's rationale.

134. *Brainer*, 691 F.2d at 695-99. Actually, as shown by the way in which the circuit court divided its opinion with subheadings, the court did not even regard that issue as one involving a claimed separation of powers violation. The circuit court prefaced its discussion of Judge Young's first point with the heading, "Claimed Determination of Outcome." *Id.* at 695. The circuit court entitled the discussion of the Judge Young's second ground of decision, involving the inherent power of a trial court to administer its own docket, "Claimed Violation of Separation of Powers." *Id.* at 696.

135. Judge Young's objection to the FSTA, however, was not limited to Brainer's case in par-

that the FSTA intrudes too far into the internal administration of the federal courts, the court first noted that the trial court had relied on state court decisions.[136] Making no attempt to dispute the inherent power of state courts, the court recognized as a question of first impression "[w]hether or to what extent the federal courts possess a power of self-administration which invokes the separation of powers doctrine. . . ."[137] Raising the possibility that federal courts have the power to make procedural rules only in the absence of congressional action, the court admitted that procedure and internal administration may be two different things, with inherent power in the federal judiciary over the latter.[138] The circuit court assumed for the purpose of its analysis that "federal courts possess some measure of administrative independence" so that interference by Congress would violate the separation of powers requirement "at some extreme point."[139] The fact that a power is inherent, however, does not mean that any degree of intrusion, however slight, constitutes a separation of powers violation.[140] In other words, "inherent" does not mean "exclusive."

Judge Winter criticized Judge Young's opinion for purporting to follow the *Nixon* test for separation of powers but in reality merely attacking the propriety of the FSTA.[141] Ironically, Judge Winter's opinion was even less faithful to the *Nixon* cases than was Judge Young's.[142] This opinion set up a requirement that the congressional interference must be actual and "extreme" in order to create a separation of powers concern, which was not part of the *Nixon* analysis.[143] Nevertheless, the court proceeded to examine the extent to which the FSTA repre-

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ticular or to criminal cases in general, as shown by the fact that the next paragraph in his opinion made the same point about civil cases. *Brainer*, 515 F. Supp. at 636. He observed that the duties of Article III courts also include the trying of civil cases and found that the FSTA interferes with that constitutionally assigned function by "severely hamper[ing] trial courts in their attempts to prepare civil cases for trial, find the time to try them, and assure that well-founded decisions are reached." *Id.*

136. 691 F.2d at 696.

137. *Id.*

138. *Id.* at 697. *See, e.g.*, Morrison v. Olson, 108 S. Ct. 2597, 2611 (1988) (federal courts possess inherent authority to initiate contempt proceedings for disobedience to orders, and authority necessarily includes ability to appoint private attorney to prosecute contempt) (citing Young v. United States *ex rel.* Vuitton Et Fils S.A., 107 S. Ct. 2124 (1987) (long-settled character of authority of courts to appoint private attorney)).

139. 691 F.2d at 697.

140. *Id.* at 697 n.10 (citing Michaelson v. United States, 266 U.S. 42, 65-66 (1924) (inherent contempt power of courts not immune from some regulation by Congress)).

141. *Id.* at 698. In questioning the propriety of the FSTA, Judge Young was not alone. Former Chief Justice Burger and others on the Judicial Council also had done so. *See* Burger, *What the Justices Are Saying*, 62 A.B.A. J. 992, 993 (1976) (passage of FSTA did not make sense because opposed by Judicial Council and no commensurate legislation to increase number of judges).

142. As discussed earlier, the trial court's opinion in *Brainer* did not merely question the wisdom of the FSTA. Judge Young applied *Nixon* in shortened form, skipping only the second step, because he conceded that Congress had some constitutional authority to formulate rules for the federal courts to follow in matters of procedure and evidence. *Brainer*, 515 F. Supp. at 634. *See supra* notes 120-26 and accompanying text for a discussion of *Brainer*.

143. *Brainer*, 691 F.2d at 697-99. The Fourth Circuit repeatedly used the word "extreme" as part of the test. *Id.*

sents such an extreme. In doing so, the court misconstrued the *Nixon* test. Paraphrasing *Nixon v. Administrator of General Services*, the *Brainer* court reasoned that for a separation of powers problem to arise, the congressional enactment in question must prevent the judiciary from "accomplishing its constitutionally assigned functions" and held that the FSTA could not fairly be cast "in such extreme terms."[144]

Judge Winter's interpretation of the *Nixon* test, however, led his analysis astray. The *Nixon* cases do not hold that, before a separation of powers issue can arise, a statute must actually prevent another branch of the government from performing its constitutional role. The threshold issue, and the wording omitted by Judge Winter, is the *extent to which* the statute interferes with another branch's ability to carry out its constitutionally assigned function and whether the statute establishes the "potential for disruption" of the other branch's ability to perform its proper role.[145] Actual and complete disruption is not the initial requirement.[146]

In explaining why it did not perceive a separation of powers violation in *Brainer* the court pointed to four purported aspects of the FSTA as ameliorating any disruption of the "zone of judicial self-administration,"[147] such as docket control: (1) the FSTA provides that the trial court may dismiss an indictment "without prejudice;[148] (2) the FSTA excludes from the time computation specified unavoidable delays;[149] (3) the FSTA arguably provides (in the face of explicit language to the contrary) for a continuance in the interests of justice because of scheduling conflicts,[150] and (4) the Act allows the judicial council of

144. *Id.*

145. Nixon v. Adm'r, 433 U.S. 425, 443 (1977).

146. *Id.* The difference between potential and actual interference is a nuance, to be sure, but an important one, especially in light of the circuit court's admission, later in its opinion, that the FSTA had the potential to disrupt the judiciary's function. *Brainer*, 691 F.2d at 699. Even at that point, however, the court emphasized that it would find a separation of powers violation only "in an extreme case," and the court believed that "that possibility would appear to be remote." *Id.*

147. *Id.* at 698. The court did not examine the actual extent to which the FSTA disrupted the judicial function of deciding or presiding over cases, because, as shown earlier, the court did not regard that issue as one involving serious separation of powers questions. *Id.*

148. *Id.* (citing 18 U.S.C. § 3162(a)(2)). *See generally* Steinburg, *Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation*, 68 J. CRIM. L. & CRIMINOLOGY 1 (1977). The circuit opinion, however, in no way made it clear how dismissal and refiling of indictments is itself anything but a disruption of the trial court's docket.

149. *Brainer*, 691 F.2d at 698 (citing 18 U.S.C. § 3161(h)). Once again, however, that provision is at best irrelevant to the inquiry in *Brainer*, and the opinion did not try to show otherwise. Perhaps that was because Judge Young expressly had found that "there were no periods of delay" that could be excluded under the FSTA in order to comply with the time limit. *Brainer*, 515 F. Supp. 630.

150. *Brainer*, 691 F.2d at 698. The court expressed that idea in the face of explicit FSTA provisions stating that the trial court cannot order a continuance because of "general congestion of the court's calendar," 18 U.S.C. § 3161(h)(8)(C)) even if the trial court finds that the "ends of justice served by [such a continuance] outweigh the best interest[s] of the public and the defendant." 18 U.S.C. § 3161(h)(8)(A). The circuit's reasoning was that the FSTA banned reliance on "general" congestion of the trial court's docket, not on "specific" congestion, which might have been the problem in Brainer's case. 691 F.2d at 698. Understandably, the circuit opinion cited no authority for

a circuit to suspend the prescribed time limits if a district, "due to the status of its court calendars," cannot meet the FSTA deadlines.[151] At least two problems arise from reliance on this last provision. First, such a gross calendar logjam for an entire district would go a long way toward establishing the "extreme case" that the court of appeals required before a separation of powers violation could be found. It seems that Congress could envision the extreme case, even if the court regarded it as "remote." Second, in light of *Immigration and Naturalization Service v. Chadha*[152] and *Bowsher v. Synar*,[153] the veto or suspension of the FSTA by a judicial circuit, subject to congressional oversight,[154] now appears itself to be of doubtful constitutionality.[155]

To buttress its holding, the court observed that the district court might have been able to squeeze Brainer's case into its schedule after all.[156] According to the appellate opinion, the record also failed to establish that the trial court could not have transferred Brainer's case to another court within the district, so that the trial could have taken place within the time limits set by the FSTA.[157]

In the final analysis, neither opinion is particularly persuasive. Judge Young's opinion is weakest when he attempts to analogize to *Klein*'s ban on a statutory rule of decision determining the substantive outcome of a pending case. The circuit court's reasoning is deficient when it attempts to show that the FSTA has built-in "safety valves"[158] designed to allow flexibility. At best, the alternative and safety-valve provisions are irrelevant to Brainer's case; at worst, they are subject to constitutional attack in themselves.

Moreover, neither court effectively employed the *Nixon* analysis. Judge Young attacked the FSTA on the basis that Congress, in passing the Act, did not take into account the interests of both the public and the judiciary in the judicial system's ability to operate effectively and efficiently in both criminal and civil cases. In making that point, the trial court referred to the legislative record at length. Congress, however, is not required to take any particular interest into

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that position, and the cases suggest that the law is to the contrary. *See, e.g.*, United States v. Andrews, 790 F.2d 803, 808 (10th Cir. 1986) (delay caused by heavy criminal docket, several legal holidays, and judge's seminar attendance was attributable to "general congestion" of court's calendar), *cert. denied*, 481 U.S. 1018 (1987); United States v. Crane, 776 F.2d 600, 605 (6th Cir. 1985) (judge's unavailability caused by his presiding over other case attributable to "general congestion" of court's calendar); United States v. Nance, 666 F.2d 353, 357 (9th Cir.) (general congestion), *cert. denied*, 456 U.S. 918 (1982); United States v. New Buffalo Amusement Corp., 600 F.2d 368, 376 (2d Cir. 1979) (general congestion); United States v. Didier, 542 F.2d 1182, 1186 (2d Cir. 1976) (general congestion).

151. 691 F.2d at 698 (citing 18 U.S.C. § 3174).

152. 462 U.S. 919 (1983).

153. 478 U.S. 714 (1986).

154. *See* 18 U.S.C. § 3174(d)(2) (1982).

155. Note, *supra* note 131, at 310-11.

156. *Brainer*, 691 F.2d at 699.

157. *Id.* It would seem, however, that requiring a trial court to transfer a case from its docket is just as much an interference with internal administration as dismissal of an indictment for failure to meet a time limit. Whether the device is dismissal or transfer, the autonomy of a trial court to control its own docket is hampered by forcing the judge to relinquish control of the case.

158. *See Brainer*, 691 F.2d at 699.

account.[159] The balancing-of-interests approach is a method of judicial review, not a constitutional requirement for the legislative process. Congress need not make a record of the interests it considered in passing legislation, in order to withstand a separation of powers attack. Judge Young would have been better advised to concentrate on marshaling evidence for the arguments that (1) the FSTA places a heavy burden on the judiciary and severely disrupts the administration of justice[160] and (2) the interests of the judiciary, the public, and individual litigants in an independent judiciary and effective and efficient administration of justice outweigh the interests of the Congress, the public, and the defendant in speedy trials.

The Fourth Circuit never engaged in the balancing of interests suggested by *Nixon*, because it did not accept Judge Young's assertions that the FSTA severely affected the courts in their internal administration.[161] The court demanded proof of actual and extreme disruption of judicial functions, not merely the "potential for disruption" required by the *Nixon* Court. The circuit's approach, tying the analysis closely to the record, or lack of it, pretermitted the balancing step of the analysis, with the result that we cannot know the relative weight the circuit would have assigned to the interests involved.

In the end, the Fourth Circuit held that the FSTA was not unconstitutional on its face or as applied in Brainer's case. The court left open the "remote" possibility, however, that, given a record showing an "extreme case," in which the judiciary actually was prevented from carrying out its assigned functions, the FSTA could be struck down.[162] Nevertheless, we are not likely to see another

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159. *Cf.* Meshell v. State, 739 S.W.2d 246, 273 (Tex. Crim. App. 1987) (Miller, J., concurring) (whether state speedy trial act employs *Barker* factors irrelevant to question of act's validity under state constitution).

160. As shown by nationwide statistics compiled in the *Annual Report of the Director of the Administrative Office of the United States Courts (Report)*, relatively few dismissals have resulted under the FSTA in recent years. 1987 *Report* 122 (20 dismissals in 1987); 1986 *Report* 121 (14 dismissals in 1986; 12 in 1985); 1984 *Report* 185 (19 dismissals in 1984; 16 in 1983); 1982 *Report* 148 (21 dismissals in 1982; 19 in 1981). A reported high level of compliance with the FSTA may be the result of nothing more than the availability of loopholes, especially in the form of time periods that are excludable from the computation of deadlines. Probably as a result of excludable time periods and "ends of justice" continuances, the processing of criminal cases was not significantly speeded by the FSTA, according to a five-year study. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 CRIMINOLOGY 50, 71-72 (1982).

161. *Brainer*, 691 F.2d at 699. Apparently the circuit court was either not aware that the announced purpose of the FSTA was to cause the court system to be "shaken by the scruff of its neck" or believed that the FSTA had not accomplished that objective. Prepared Statement of the Assistant Attorney General (now Chief Justice of the United States Supreme Court) William H. Rehnquist, 1971 Senate Hearings 107, *reported in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 17 (1980).

162. *Brainer*, 691 F.2d at 699. In other words, if a trial judge could show that none of the FSTA safety valves or other alternatives to dismissal of the indictment were available, or that forcing the available alternatives upon the judge in itself was an unwarranted intrusion upon the judicial power, the FSTA would be unconstitutional as applied in that case. *Cf.* State v. Pachay, 64 Ohio St. 2d 218, 223, 416 N.E.2d 589, 592 (1980) (shortening of time limits, repealing of exceptions, or increasing of case load could result in state speedy trial act invalidity). *See infra* note 252 and accompanying text for a discussion of *Pachay*.

test of the FSTA's constitutionality, unless the government changes its position again and attacks the Act. A defendant will have difficulty persuading a court to reach the issue.[163]

The greatest problem with the Fourth Circuit's analysis of *Nixon v. Administrator of General Services* is that *Nixon* did not establish an all-purpose separation of powers test. Since its decision in that case, the Supreme Court has applied the *Nixon* formulation in one other separation of powers case involving Nixon himself and claims of encroachment on the executive power.[164] However, in *Chadha*[165] and *Bowsher v. Synar*,[166] cases involving clashes between executive and legislative power, the majority made no mention of *Nixon*. In the recent case of *Morrison v. Olson*,[167] the Court referred to the *Nixon* wording only as an afterthought.[168]

The Court has not favored the *Nixon* test for determining the constitutionality of a statute allegedly invading the judicial realm. Instead, the Court has rejected any particular formula in favor of a general balancing of the interests of the respective branches. In a clash between Congress and the courts, for example, the Supreme Court has balanced legislative interests, such as convenience and efficiency, against the judiciary's interest in judicial independence.[169] Because the Fourth Circuit in *Brainer* did not balance the interests involved, its method of analysis is not in harmony with the one developed later by the Supreme Court. Although the FSTA cases have been cited in the state decisions discussed below, the state courts have applied neither the *Nixon* analysis nor the later general balancing test to separation of powers issues. Instead, they have attempted to forge independent paths through the separation of powers thicket.

III. State Statutes and Rules Mandating the Speedy Disposition and Trial of Cases

A. State Speedy Disposition Statutes

The trial judge in *Brainer* analogized to state court opinions that invali-

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163. *See, e.g.*, United States v. Buonos, 730 F.2d 468, 471-72 (7th Cir. 1984) (separation of powers argument need not be addressed because, if successful in attacking dismissal/reindictment provision of FSTA, defendant would be left with reliance on sixth amendment speedy trial principles, which were not violated by dismissal/reindictment procedure).

164. *See* Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982) (jurisdiction can be exercised over President, but must be balanced with separation of powers doctrine).

165. 462 U.S. 919 (1983). For discussion and criticism of the analysis in the *Chadha* opinion, *see* Leiserson, *supra* note 3, at 475-81; L. Tribe, *supra* note 109, at 214-18.

166. 478 U.S. 714 (1986). For discussion and criticism of the analysis in Bowsher v. Synar, *see* Carter, *supra* note 103, at 797-98.

167. 108 S. Ct. 2597 (1988).

168. *Id.* at 2621.

169. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245 (1986) (applying balancing test in case concerning claim of intrusion on judicial power). *See also* Mistretta v. United States, 57 U.S.L.W. 4102, 4108 (U.S. Jan. 18, 1989) (citing *Nixon* cases for claims of intrusion on executive power, but *Schor* for "cases specifically involving the Judicial Branch"). The *Mistretta* Court seemed to prefer the *Schor* balancing test for cases dealing with the judiciary. *See id.* The Court also addressed the *Nixon* analysis because the petitioner urged that standard. *Id.* at 4115.

dated legislation requiring courts to decide cases or otherwise to act within specified time periods.[170] Since then, three state supreme courts—Oregon, Montana, and Wisconsin—have decided major "speedy disposition" cases, and each has referred to *Brainer*. Each of those cases, however, dealt with statutes mandating not speedy commencement of trials but speedy decisions by courts. In *State* ex rel. *Emerald People's Utility District v. Joseph*,[171] the Oregon Supreme Court upheld, against a state constitutional separation of powers challenge,[172] a statute requiring an appellate court to hear and determine a case within three months from the time the appeal was taken. The appellate court had ignored the statute, regarding it as an act that violated the state constitution's separation of powers provision.[173]

The state supreme court enunciated the separation of powers test as whether "legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions."[174] Recognizing that the highest courts in other jurisdictions, with "constitutional provisions regarding the separation of powers similar to those of Oregon,"[175] had invalidated similar statutes, the Oregon court nevertheless found no violation of its state constitution, because the statute on its face did not unduly burden or unduly interfere with the judiciary. The court defined "undue" in such a way that no separation of powers violation would be found unless the legislative act made it impossible for the courts to carry out their constitutionally assigned functions.[176] The supreme court noted that it was possible for the lower appellate court to have a case briefed, submitted, and decided in the time remaining between the delivery of the supreme court's opinion and the statutory deadline.[177] Even so, the

170. *Brainer*, 515 F. Supp. at 632-33.

171. 292 Or. 357, 640 P.2d 1011 (1982).

172. Article II, § 1 of the Oregon Constitution reads as follows:

> The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

173. *Joseph*, 290 Or. at 359, 640 P.2d at 1012.

174. *Id.* at 359, 640 P.2d at 1013 (quoting Ramstead v. Morgan, 219 Or. 383, 399, 347 P.2d 594, 601 (1959) (legislation affecting judicial power upheld)).

175. *Id.* at 360, 640 P.2d at 1013 (citing State *ex rel.* Kostas v. Johnson, 224 Ind. 540, 547, 69 N.E.2d 592, 595 (1946) (three departments of government independent and, unless otherwise provided for, no department can be controlled or embarrassed by another department); Schario v. State, 105 Ohio St. 535, 538, 138 N.E. 63, 64 (1922) (legislature cannot tell judiciary when it can hear or determine any case within its lawful jurisdiction); Atchinson, T. & S.F. Ry. Co. v. Long, 122 Okla. 86, 92, 251 P. 486, 492 (1926) (legislative branch may not usurp constitutionally mandated powers of judicial branch)).

176. *Id.* at 362, 640 P.2d at 1014. According to the majority, "unduly" should be taken to mean "that it is impossible in the individual case, within the statutory deadline, for counsel to complete proper briefing or other documentation adequate for a responsible judicial decision, and for the court to arrive at a reasoned decision consistent with the judicial responsibility imposed by Art VII [of the Oregon Constitution]." *Id.* The court declined to "infer in the abstract" whether or not the act interfered with the judiciary in its constitutional function. *Id.*

177. *Id.* at 363, 640 P.2d at 1014. The Oregon Court thus employed the same "undue interference" wording that the *Brainer* trial court had drawn from state decisions. *See Brainer*, 515 F. Supp.

supreme court declined to order the lower court to comply with the statute, because the deadline would fall only six days from the supreme court's decision, and such an order "might well interfere unduly with the court's well-considered and responsible decision of the cases involved here."[178]

Justice Peterson, concurring, noted that "virtually every court which has considered this problem holds that such legislative action is prohibited"[179] and apparently would have adopted a stricter test, invalidating any legislative intrusion into areas that are purely judicial functions.[180] He seemed to envision an area of exclusive judicial power into which the legislature could not intrude at all without violating the state constitution's separation of powers provision. Along with Levin and Amsterdam, Justice Peterson regarded the generation of policy about when and how cases should be heard and decided as "a realm of proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power."[181] In articulating that principle, his opinion presaged decisions in Montana and Wisconsin, to be discussed later in this article.[182] He also reasoned that the mere fact that it was possible for the lower appellate court to hear and decide a case within the prescribed time period was "largely irrelevant"[183] to the question of the statute's constitutionality: "[E]ven though the Court of Appeals could *possibly* hear and determine the appeal in this case within the statutorily prescribed time, the intrusion by the legislative branch into affairs which are peculiarly the responsibility of the judicial department violates the separation of powers clauses of the Oregon Constitution."[184] Justice Peterson's line of reasoning paralleled Judge Young's in *Brainer*, in mak-

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at 636. But the *Joseph* court employed the extreme requirement of actual and complete disruption of another branch's function—impossibility—which the *Brainer* appellate court later imposed before a violation of separation of powers could be found. *See Brainer*, 691 F.2d at 698. The *Joseph* decision, issued during the time between the district and circuit opinions in *Brainer*, noted the former in the appendix. *Joseph*, 292 Or. at 371, 640 P.2d at 1019.

178. 292 Or. at 363, 640 P.2d at 1014. The "undue interference" wording here appears to echo the separation of powers test the court was applying to the legislation in question. Presumably, however, the Oregon Supreme Court shied away from the possibility of undue interference with the lower court's decision-making process as a matter of prudence and did not purport to apply separation of powers principles between itself and another court in the same branch of state government.

179. *Id.* at 368, 640 P.2d at 1017 (Peterson, J., concurring). The appendix to the opinion collected prior cases from other jurisdictions, many of which appeared in Judge Young's *Brainer* opinion. *Id.* at 371-72, 640 P.2d at 1019. The concurring judge recognized two state court opinions upholding the validity of speedy trial acts, and noted that they stood in contradistinction to the trial court's decision in *Brainer*, but he regarded them as distinguishable in that they "turn upon the constitutional guarantee of a speedy trial." *Id.* at 368 n.6, 640 P.2d at 1017 n.6 (citing State v. Warren, 224 Kan. 454, 456, 580 P.2d 1336, 1338 (1978) (state has obligation to ensure that defendant enjoys speedy trial and legislature may enact statute to codify obligation); State v. Pachay, 64 Ohio St. 2d 218, 223, 416 N.E.2d 589, 592 (1980) (speedy trial statute is rational way to enforce constitutional speedy trial requirement)). What constitutional difference that distinction makes he did not say.

180. *Joseph*, 292 Or. at 366, 640 P.2d at 1018 (Peterson, J., concurring).

181. *Id.* at 370, 640 P.2d at 1018 (quoting Levin & Amsterdam, *supra* note 88, at 31-32).

182. *See infra* notes 186-214 and accompanying text for this discussion.

183. *Joseph*, 292 Or. at 366, 640 P.2d at 1016 (Peterson, J., concurring).

184. *Id.* (emphasis in original).

ing the point that the effect of the time limit in one case could spill over to undermine the effective and efficient administration of justice in other cases.[185]

One year after the Oregon decision, the Montana Supreme Court struck down a similar scheme in *Coate v. Omholt*.[186] Two Montana statutes placed time limits on district and supreme court cases and imposed sanctions on judges for failure to comply. The penalties included withholding a judge's salary. A district court declared the statutes unconstitutional, and the supreme court agreed.[187] Addressing the time limits as an issue separate from the withholding of pay, the court concluded that, based on the separation of powers clause of the state constitution,[188] "the question of when cases shall be decided and the manner in which they shall be decided is a matter solely for the judicial branch of the government."[189] The court regarded the authority to determine when a judicial decision is made to be an inherent and exclusive power of the judiciary, not one shared with the legislature.[190]

Noting Judge Young's opinions in *Howard* and *Brainer*,[191] and the fact that the decision of the Oregon Court in *Joseph* stood as the lone exception to the otherwise "virtual unanimity" among state courts,[192] the Montana court held

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185. *Compare id.* at 370-71, 640 P.2d at 1018 (Peterson, J., concurring) ("Permitting the legislature to tell [the judiciary] when and how to hear and determine cases will impermissibly affect judicial functions—the manner in which cases are prepared, argued, considered and determined") *with Brainer*, 515 F. Supp. at 638 (FSTA "severely hamper[s] trial courts in their attempt to prepare civil cases for trial, find the time to try them, and assure that well-founded decisions are reached").

186. 203 Mont. 488, 622 P.2d 591 (1983).

187. The district court held that the pay forfeiture provisions of the statutes violated two provisions of the Montana Constitution: Article VII, § 7(1), barring diminution of judicial salaries during a term of office, and Article II, § 31, prohibiting the impairment of contracts. *Omholt*, 203 Mont. at 493, 662 P.2d at 593. The supreme court agreed. *Id.* at 497, 662 P.2d at 597.

188. MONT. CONST., art. III, § 1 provides:

> The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

189. *Omholt*, 203 Mont. at 492, 662 P.2d at 593. The court also held that, even if the two statutes did not violate state constitutional provisions regarding separation of powers, diminution of judicial salaries, and impairment of contracts, the statutes would be invalidated for another reason. The legislature simply lacked authority to enact the statutes, because, although Article VII, § 2(3) of the Montana Constitution confers on the legislature a veto power over procedural rules promulgated by the courts, it does not empower the legislature to generate such rules. *Id.* at 505, 662 P.2d at 600.

190. *Id.* at 492, 662 P.2d at 593.

191. *Id.* at 496, 662 P.2d at 596. The Montana court did not note the Fourth Circuit opinion in *Brainer*.

192. *Id.* at 494-96, 662 P.2d at 594-96 (citing Sands v. Albert Pike Motor Hotel, 245 Ark. 755, 762, 434 S.W.2d 288, 291-92 (1968) (state statute requiring court to enter order was unconstitutional exercise of judicial power); Vaughan v. Harp, 49 Ark. 160, 163, 4 S.W. 751, 753 (1887) (legislature does not have authority to compel judiciary to write out records for every decision); Houston v. Williams, 13 Cal. 24, 28 (1859) (unconstitutional to require state supreme court to produce written opinion in every case); State *ex rel.* Kostas v. Johnson, 224 Ind. 540, 547, 69 N.E.2d 592, 595 (1946) (three departments of government independent); State v. Merialdo, 70 Nev. 322, 328-29, 268 P.2d 922, 926 (1954) (statute requiring trial judges to submit affidavits that they have no cases pending before receiving salary unconstitutional); Waite v. Burgess, 69 Nev. 230, 233, 245 P.2d 994, 996

that the power to determine when a case would be decided is in "the essential nature of a constitutional court," a matter "that the courts alone determine," and not one over which "the courts and the legislature have concurrent rule-making power."[193] In positing not only inherent but also exclusive authority in the judiciary, the Montana court went further than Judge Young had gone in *Brainer* and expressly held what Justice Peterson in Oregon had only implied in the *Joseph* case: the area of internal administration of the courts is one in which any intrusion by the legislature is invalid. With that rule, no balancing test is used; no weighing of competing interests is done.

Relying on the Montana Supreme Court's opinion in *Omholt*,[194] the Wisconsin Supreme Court took the same approach the following year, in *In re Grady*.[195] Like *Omholt, Grady* involved a separation of powers challenge to a statute imposing time limits on judicial decisions and monetary penalties for noncompliance.[196] The court's per curiam opinion expressly rejected the Fourth Circuit's argument in *Brainer*[197] that the legislature shared power with the judiciary to set such time periods:

> [T]he separation of powers doctrine does not render every power conferred upon one branch of government a power which may be shared by another branch and as to which the undue burden or substantial interference standard is applicable. There are zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, the unreasonable burden or substantial interference test does not apply; *any* exercise of authority is unconstitutional.[198]

The argument was made that the legislature has the authority to enact laws to advance public confidence in the judicial system,[199] but the *Grady* court perceived the issue to be whether establishing time limits within which judges are to decide cases lay in "an area of exclusive judicial authority."[200] The court was "not concerned with the reasonableness or substantiality of legislative interfer-

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(1952) (legislation intended to require judicial action within fixed period of time unconstitutional); Schario v. State, 105 Ohio St. 535, 538, 138 N.E. 63, 64 (1922) (legislature cannot tell judiciary when it can hear case within its lawful jurisdiction)).

193. *Id.* at 494, 662 P.2d at 594. The Montana court, like most courts discussing such issues, relied heavily on Levin & Amsterdam, *supra* note 88.

194. 203 Mont. 488, 662 P.2d 591 (1983).

195. 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

196. *Id.* at 768 n.3, 348 N.W.2d at 562 n.3. Unlike most state constitutions, Wisconsin's does not contain an express separation of powers provision, but, like the federal constitution, it implicitly provides for separation of powers by vesting three different departments with the legislative, executive, and judicial powers, respectively. State v. Holmes, 106 Wis. 2d 31, 42, 315 N.W.2d 703, 708 (1982).

197. 691 F.2d 691 (1982).

198. *Grady*, 348 N.W.2d at 566 (emphasis by the court) (citing Thoe v. Chicago M. & St. P.R. Co., 181 Wis. 456, 465, 195 N.W. 407 (1923) (statute prohibiting directed verdict held invalid as intrusion on judicial power)).

199. *Grady*, 118 Wis. at 777-78, 348 N.W.2d at 567.

200. *Id.* at 776, 348 N.W.2d at 566.

ence; the sole question was whether the statute at issue was a legislative regulation of an area reserved exclusively to the judiciary."[201]

The *Grady* court saw the Fourth Circuit's opinion in *Brainer* as acknowledging that "not all governmental power is 'shared power' " and as turning on the finding that trial rights were an area of proper congressional action.[202] According to the Wisconsin Supreme Court, however, the generation of time limits for judicial decisions, unlike trial rights, involves the efficiency and effectiveness of the court system,[203] matters of internal court administration. "The legislature does not have the power to promulgate rules of court administration. . . . The setting and enforcement of time periods for judges to decide cases lies within an area of authority exclusively reposed in the judicial branch of government."[204] Furthermore, the *Grady* court saw the statute in question as being worse than an intrusion upon exclusive judicial power over court administration. The court condemned it as "an attempt to coerce judges in their exercise of the essential case-deciding function of the judiciary."[205]

In a concurring opinion, Justice Abrahamson wrote separately to express her disagreement with the majority holding that the statute violated the state constitution's separation of powers provision. Justice Abrahamson also exposed a gap in the majority's reasoning:

> While the majority opinion discusses the existence of areas of shared power in which both the legislative and judicial branches may act, it does not examine whether each branch has power to regulate the time in which decisions are rendered. In a quantum leap and with no explanation, it moves from recognizing that some areas of authority are exclusively reposed in the judicial branch to asserting that [the statute] falls within such an area.[206]

Justice Abrahamson correctly observed that merely applying the label "administrative" to certain issues concerning the efficiency and effectiveness of the court system does not explain why those matters are within the court's exclusive authority.[207] Beginning what was to become a recurrent theme of hers,[208] Justice

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201. *Id.*

202. *Id.* at 781, 348 N.W.2d at 569.

203. *Id.* at 782, 348 N.W.2d at 569. The Wisconsin court apparently believed that the protection of trial rights was a proper subject of legislation but that the public interest in effective and efficient court systems was not a matter within the legislature's authority. *See id.* at 781-82, 348 N.W.2d at 569. The Fourth Circuit, however, seemed to think that Congress had the power to pass statutes designed to advance or protect the public interest in the efficiency and effectiveness of the judicial system. *See Brainer*, 691 F.2d at 698.

204. *Grady*, 118 Wis. at 782-83, 348 N.W.2d at 569.

205. *Id.* at 782, 348 N.W.2d at 569. The mention of interference with the "case-deciding function" recalls to mind the opinion of Judge Young in United States v. Brainer, 515 F. Supp. 627, 636 (D. Md. 1981), and that of Judge Peterson in State *ex rel.* Emerald People's Util. Dist. v. Joseph, 292 Or. 357, 640 P.2d 1011, 1018 (1982) (Peterson, J., concurring).

206. *Grady*, 118 Wis. at 795, 348 N.W.2d at 575 (Abrahamson, J., concurring).

207. *Id.* at 799, 348 N.W.2d at 576-77 (Abramson, J., concurring). *Cf.* Carter, *supra* note 105, at 721 (U.S. Supreme Court opinions generally seem justifications for results reached, rather than explanations of analytical pathways that led Justices to conclusions).

208. *See, e.g.*, Abrahamson, *Criminal Law and State Constitutions: The Emergence of State*

Abrahamson called for state constitutional law decisions to be made on historically sound, principled bases.[209]

She pointed out that the majority, in holding that the legislature does not have the power to promulgate rules for the efficient and effective functioning of the court system, was forgetting that the legislature has plenary power to act for the general welfare.[210] Finding nothing in the state or federal constitution or federal law proscribing the legislature from so acting, Justice Abrahamson concluded that "the regulation lies within the zone of authority shared by the legislature and the judiciary,"[211] because the statute was in "[t]he overlap of . . . the court's power to adopt measures necessary for the due administration of justice and the legislature's power to protect the public welfare by promoting the efficient and impartial administration of justice."[212]

Justice Abrahamson further argued that, even if the regulation fell within the judiciary's exclusive power, the court should have chosen not to strike it down,[213] because the statute did not interfere with the court in its exercise of that power. Apparently conceding part of her point, the majority recognized the desirability of a reasonable time limit for judicial decisionmaking. Ironically, while declaring the statute to be unconstitutional, the court adopted as an appendix to the *Grady* opinion a similar rule with the same time period but without the monetary sanction.[214]

The speedy disposition cases analyzed here, while containing some of the clearest assertions of the exclusivity of judicial power, were not the first of their kind. As the opinions show, the question of the constitutionality of the legislature's attempt to dictate the actions of the judiciary was litigated as far back as the previous century.[215] The FSTA cases and the state speedy disposition cases are important not only in themselves, but also because they prompted attacks on

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Constitutional Law, 63 TEX. L. REV. 1141, 1179-80 (1985) (highlighting need for well-reasoned, not result-oriented, decision making).

209. *Grady*, 118 Wis. at 792, 348 N.W.2d at 572 (Abrahamson, J., concurring). *See also* State v. Jewett, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985) (decisions must be principled, not result-oriented); Whitten & Robertson, *Post-Custody, Pre-Indictment Problems for Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 247-48 (1988) (state constitutional law a response to arbitrary, result-oriented decisions of federal constitutional jurisprudence).

210. *Accord* Meshell v. State, 739 S.W.2d 246, 260 n.5, 274 (Tex. Crim. App. 1987) (Clinton and Miller, J.J., respectively, dissenting) (legislature has plenary power).

211. *Grady*, 118 Wis. 2d at 792, 348 N.W.2d at 572 (Abrahamson, J., concurring).

212. *Id.* at 795, 348 N.W.2d at 575 (Abrahamson, J., concurring).

213. *Id.* at 800, 348 N.W.2d at 577-78 (Abrahamson, J., concurring). *Accord* Browde & Occhialino, *supra* note 59, at 474 (court should not override procedural statutes not necessary to protect essential judicial functions or when court rule is better than inefficient statutory procedure). *But cf.* Carter, *supra* note 103, at 748 ("It is unclear what constitutional warrant the courts have for permitting the Congress free aggrandizement of its own authority in the guise of exercising its judgment on what institutional arrangements new problems require"); Note, *Eroding the Separation of Powers: Congressional Encroachment on Federal Judicial Power*, 53 BROOKLYN L. REV. 669, 690-91 (1987) (acquiescence by one branch in intrusion by another is inconsistent with system of checks and balances).

214. *Grady*, 118 Wis. at 786-87, 348 N.W.2d at 571.

215. *See, e.g.*, Houston v. Williams, 13 Cal. 24, 25 (1859) (invalidating statute requiring California Supreme Court to render written opinion with reasons).

the constitutionality of state speedy trial acts and rules.[216] Some of the same arguments advanced in the state and federal cases discussed above reappeared in the state speedy trial cases.

B. Court Rules Mandating Speedy Trials

Even before state speedy trial statutes were being attacked as legislative intrusions on judicial power, speedy trial rules promulgated by the courts were challenged as judicial incursions into the domain of the legislature or the executive. In such cases, the usual contention was that the courts, in promulgating rules setting speedy trial time limits, were creating a substantive right to a speedy trial, which was a power residing in the legislature. Nevertheless, the universal ruling in those cases was that such rules merely prescribed procedures by which the constitutional or statutory right to a speedy trial was obtained in a judicial proceeding.

In *State ex rel. Uzelac v. Lake Criminal Court*,[217] decided in 1965, the Indiana Supreme Court held that a time limit set by the court was within the court's constitutional authority, even though the legislature had attempted to fix different time limits based on terms of court.[218] The Arkansas Supreme Court took a similar position in 1981, upholding a court rule that permitted a delay longer than that allowed by a former statutory limit.[219] During the 1970s, the Florida Supreme Court decided a pair of cases establishing the court's authority to promulgate speedy trial rules. First, in 1973 the court reversed a trial court ruling that had held the speedy trial rule unconstitutional.[220] Two years later, the court reiterated and explained its earlier holding as based on the difference between substantive and procedural law: "Therein this Court declared that the questioned rule merely provides the procedures through which the constitutional right to a speedy trial is enforced in this state and is a proper exercise of this Court's constitutional power to promulgate rules of practice and procedure."[221]

During the 1980s, the attacks on speedy trial rules broadened to include the contention that the rules infringed on the power of the executive, as well as the

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216. *See, e.g.*, State v. Pachay, 64 Ohio St. 2d 218, 219, 416 N.E.2d 589, 589-90 (1980) (question of constitutionality of state speedy trial act prompted by holdings in previous cases where attempts by general assembly to dictate judicial action within specified time struck down or ignored as legislative invasions of judicial power).

217. 247 Ind. 87, 212 N.E.2d 21 (1965).

218. *Id.* at 91, 212 N.E.2d at 23.

219. Cassell v. State, 273 Ark. 59, 69-70, 616 S.W.2d 485, 490-91 (1981). The court held that, like a speedy trial statute or a statute of limitations, the court rule was procedural, even though it had a substantive effect. *Id.* The Fourth Circuit took a similar approach in *Brainer*, 691 F.2d at 695-96 (speedy trial act only proscribes rules of practice and procedure).

220. State *ex rel.* Maines v. Baker, 254 So. 2d 207 (Fla. 1971) (court has constitutional power to promulgate rules governing practice and procedure).

221. State v. Lott, 286 So. 2d 565, 566 (Fla. 1973), *cert. denied*, 417 U.S. 913 (1974). *But cf.* Fulk v. State, 417 So. 2d 1121, 1125 (Fla. Dist. Ct. App. 1982) (Cowart, J., concurring) (just as legislature/judiciary boundaries breached in creation of rule, executive/judiciary boundaries breached in scope of rule).

legislature. In *State v. Edwards*,[222] the Washington Supreme Court faced both challenges. The state's first contention was that the court's speedy trial rule created a "substantive 'statute of limitations' " that infringed on the legislative function. The court held that it had the inherent authority, independent of any statutory grant of power, to make rules of practice and procedure.[223] It then invoked the familiar substantive/procedural distinction and held that the speedy trial rule was "clearly within the power and necessary to the operation of the courts."[224] The court also responded to the state's argument that the rule, which included a mandatory provision for dismissal with prejudice upon failure to comply, interfered with the prosecutor's constitutionally granted discretion in charging persons with crimes. Observing that the rule did not begin to operate upon the prosecutor until he or she had exercised the discretion to arrest or charge a person, the court concluded that the rule did not violate the state's right to prosecute.[225]

Four years later, the Alaska Supreme Court, in *State v. Williams*,[226] relied heavily on the Washington Supreme Court's decision in *Edwards*. The contention in *Williams* was the standard one, that the court's rule violated separation of powers principles,[227] intruding on the legislative power by creating a substantive right to a speedy trial. While recognizing that "the line between substance and procedure is an elusive one,"[228] the Alaska court, like the Washington court in *Edwards*, nevertheless invoked the substance/procedure dichotomy.[229] The state alleged that the court's speedy trial rule usurped the legislature's authority by affording the accused protections greater than those provided by the federal and state constitutions.[230] The court concluded, however, "that any additional protections which [the rule] arguably confers upon criminal defendants are justified by the fact that these are incidental to the efficient implementation of the

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222. 94 Wash. 2d 208, 616 P.2d 620 (1980).

223. *Id.* at 213, 616 P.2d at 623.

224. *Id.*

225. *Id.* at 213, 616 P.2d at 623. As will be shown later, the Texas Court of Criminal Appeals was to reach the opposite conclusion regarding a statute mandating that the prosecution be ready for trial within specific time limits. *See* Meshell v. State, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (act guaranteeing dismissal with prejudice when County Attorney delayed, deprived County Attorney of prosecutorial discretion).

226. 681 P.2d 313 (Alaska 1984).

227. *Id.* at 315. Like the Federal Constitution, and unlike most state charters, the Alaska Constitution had no express separation of powers provision. *Id.* at 315 n.2. The court reiterated earlier holdings that the principle of separation of powers is implicit in the Alaska Constitution. *Id.* Unlike the Washington Constitution, the Alaska Constitution expressly vests procedural rule-making power in the state supreme court, so the Alaska court did not have to rely on the notion of inherent power. *Id.* at 315 (Alaska constitution vests power to make and promulgate rules governing practice and procedure in supreme court of Alaska) (quoting Thomas v. State, 566 P.2d 630, 637 (Alaska 1977)).

228. 681 P.2d at 316 n.4 (quoting Smiloff v. State, 579 P.2d 28, 33 n.19 (Alaska 1978)).

229. *Id.* at 315.

230. *Id.* at 316. The Fourth Circuit, in *Brainer*, rejected a similar notion that Congress could not accord an accused "more protection than the [federal] Constitution requires." 691 F.2d 691, 698 (4th Cir. 1982).

constitutional right to a speedy trial,"[231] which the court discerned as one of the two purposes to be served by the rule. In reaching that ruling, the *Williams* court borrowed the reasoning of the Indiana Court in the *Lake Criminal Court* case,[232] mentioned earlier.[233] The *Williams* court also employed the Washington court's reasoning in *State v. Edwards*[234] to counter the argument that the rule established a substantive statute of limitations, an infringement on the power of the legislature.[235]

The rule's other purpose, according to the *Williams* court, was to advance the societal interest in speedy prosecution. The court saw that goal as "a matter of calendaring, a function generally considered to be within the judiciary's domain."[236] After reviewing cases from eleven jurisdictions, including some of the opinions discussed herein,[237] the court concluded that its speedy trial rule was a valid exercise of its constitutionally granted authority over rules of practice and procedure and did not infringe on the powers of the executive or legislative branches.[238]

Taken as a whole, the state decisions dealing with court rules mandating speedy trials, turning as they did on the obscure distinction between substantive law and procedural rules (as did the *Brainer* appellate opinion, in part)[239] provided little guidance for the resolution of the question of the constitutionality of speedy trial legislation. The cases were resolved through a definitional approach that displayed only superficial analysis. Once it was determined that the courts had the authority to promulgate procedural rules and the rule was pronounced procedural, not substantive, the result followed automatically. Perhaps because the cases lacked significant analysis, they played little or no part in the decisions regarding state speedy trial acts, despite the surface similarity of issues.

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231. 681 P.2d at 317 (footnote omitted).

232. 247 Ind. 87, 212 N.E.2d 21 (1965).

233. *See supra* note 217 and accompanying text for a discussion of the *Lake Criminal Court* case.

234. 94 Wash. 2d 208, 616 P.2d 620 (1980).

235. 681 P.2d at 318-19. The reliance of the Alaska and Washington state governments, in attacking the rule, on a purported resemblance between the court-created speedy trial rules and statutes of limitations, is ironic in light of the Fourth Circuit's use of the same analogy to uphold the FSTA in *Brainer*, 691 F.2d at 696.

236. 681 P.2d at 317-18.

237. *Id.* at 319 n.19 (citing Cassell v. State, 273 Ark. 59, 70, 616 S.W.2d 485, 491 (1981) (court can supersede speedy trial statute by procedural rule permitting longer delay); State v. Lott, 286 So. 2d 565, 566 (Fla. 1973) (same); State *ex rel.* Maines v. Baker, 254 So. 2d 207, 208 (Fla. 1971) (same); State *ex rel.* Uzelac v. Lake Criminal Court, 247 Ind. 87, 91, 212 N.E.2d 21, 23 (1965) (same); State v. Edwards, 94 Wash. 2d 208, 213, 616 P.2d 620, 623 (1980) (same)). The Alaska court also analogized to State v. Estencion, 63 Haw. 264, 268, 625 P.2d 1040, 1043 (1981) (court's speedy trial rule valid and distinct from constitutional right to speedy trial). *See Williams*, 681 P.2d at 317 n.12 (purpose of Hawaii rule to increase efficiency of criminal process).

238. 681 P.2d at 318.

239. United States v. Brainer, 691 F.2d 691, 695-96 (4th Cir. 1982). *See supra* notes 131-33 and accompanying text for a discussion of the *Brainer* court's substantive/procedural distinction. *But see* Mistretta v. United States, 57 U.S.L.W. 4102, 4110 (U.S. Jan. 18, 1989) (separation of powers analysis does not turn on whether activity is substantive or procedural).

C. Speedy Trial Acts and the Courts

A year after Judge Young ruled on the constitutionality of the FSTA in *United States v. Howard*,[240] the Kansas Supreme Court, in *State v. Warren*,[241] dismissed the contention that its state speedy trial act constituted a legislative encroachment on the judiciary, in violation of state separation of powers principles. Without engaging in any analysis, the *Warren* court stated that it found the *Howard* opinion unpersuasive, noting that no other state or federal court had followed it.[242]

Taking the issue (and the *Howard* opinion) more seriously, while ignoring the Kansas Supreme Court's *Warren* opinion, the Ohio Supreme Court, in *State v. Pachay*,[243] examined the question of whether the state speedy trial statutes violated the state constitution by encroaching on judicial power. As early as 1977, the Ohio court had begun to suggest that the state speedy trial statutes could be viewed as an invasion of judicial autonomy.[244] In the later case of *State v. Pachay*,[245] the court stayed its hand and declined to invalidate the act as a usurpation of judicial power.[246]

The court recognized a line of its own cases striking down or ignoring legislative attempts to dictate judicial action within a specified time.[247] It also admitted that "[c]ogent arguments" had been made in *United States v. Martinez*,[248] *United States v. Howard*,[249] and elsewhere against the validity of the FSTA and other such acts.[250] As the Fourth Circuit later would do in *Brainer*, however, the *Pachay* court failed to find persuasive evidence in the record to establish that the statutes usurped judicial power. Even so, the court, invoking the spirit of judicial exclusivity, hinted that the procedural area in question might be "solely

240. 440 F. Supp. 1106 (D. Md. 1977).

241. 224 Kan. 454, 580 P.2d 1336 (1978).

242. *Id.* at 457, 580 P.2d at 1339. The *Warren* court did not mention the fact that no other court could have followed *Howard* because no other court had addressed that issue yet.

243. 64 Ohio St. 2d 218, 416 N.E.2d 589 (1980). The Ohio Constitution contains no separation of powers provision. In *Pachay*, the Ohio court interpreted article IV, § 1, which vested judicial power in the courts. *Id.* at 219 n.2, 416 N.E.2d at 589 n.2.

244. *See* State v. Ladd, 56 Ohio St. 2d 197, 201, 383 N.E.2d 579, 582 (1978) (court will not apply such statutes when judicial autonomy will be derogated by enforcement), *cert. denied*, 441 U.S. 926 (1979); State v. Singer, 50 Ohio St. 2d 103, 105-06, 362 N.E.2d 1216, 1218 (1977) (legislative time limit upheld as rational, although different from court rule). State v. Ladd, 56 Ohio St. 2d 197, 383 N.E.2d 579 (1978) (court will not apply such statutes when judicial autonomy would be derogated by enforcement).

245. 64 Ohio St. 2d 218, 416 N.E.2d 589 (1980).

246. *Id.* at 222, 416 N.E.2d at 592.

247. *Id.* at 220-21, 416 N.E.2d at 590.

248. 538 F.2d 921, 923 & n.4 (2d Cir. 1976) (sweeping language of act may be more than procedural).

249. 440 F. Supp. 1106, 1109 (D. Md. 1977) (speedy trial act an unconstitutional legislative encroachment on judiciary).

250. *Pachay*, 64 Ohio St. 2d at 221, 416 N.E.2d at 591. *See also* State v. Pugh, 53 Ohio St. 2d 153, 156, 372 N.E.2d 1351, 1352 (1978) (Herbert, J., concurring) (questioning constitutionality of state speedy trial time limits).

within the domain of the judiciary."[251] The *Pachay* court also put the legislature on notice that the issue would be reexamined if the burdens on the trial courts were to increase because of (1) legislative shortening of the time periods, (2) legislative elimination of existing exceptions to the application of those limits, or (3) an increase in the number of cases.[252] The *Pachay* decision thus cannot be taken as a general ruling on the constitutionality of the Ohio speedy trial statutes.[253]

To date, no state supreme court has held that a speedy trial statute constitutes a legislative infringement on the power of the courts[254] in violation of state constitutional separation of powers principles. The Kansas court, which upheld a statute against such a challenge, left nothing to examine because it provided no analysis. The Ohio Court, while showing evidence of research into analogous cases from its own and other jurisdictions, in the end left the question open and gave little indication of the test it would apply in the future.

D. The Effect of a Speedy Trial Statute on Prosecutors

The final case to be examined in this exploration of state constitutional separation of powers challenges to speedy trial and speedy disposition statutes and rules is the most recent one, and is the only case involving a successful attack on a state speedy trial statute. In 1987, after struggling for nearly ten years to interpret the state's speedy trial statute, the Texas Court of Criminal Appeals,[255] in *Meshell v. State*,[256] held that the statute violated an express separation of powers provision in the state constitution,[257] by encroaching impermissibly on the prosecutorial discretion of the county attorney.[258] Curiously, that encroachment constituted an infringement on the judicial branch, not the executive, be-

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251. *Pachay*, 64 Ohio St. 2d at 222, 416 N.E.2d at 591.

252. *Id.* at 223, 416 N.E.2d at 592.

253. *See* State v. Hatcher, 2 Ohio Misc. 2d 8, 9, 436 N.E.2d 557, 558 (1982) where the court stated:

> . . . *Pachay* did not rule generally on the constitutionality of the speedy trial statutes, but rather simply elected to enforce them at that time in that particular case. The Court held with the facts before it that the statutes represented a rational effort to enforce the constitutional guarantee of a speedy trial.

Id.

254. *But see* State v. Meshell, 739 S.W.2d 246, 252-54 (Tex. Crim. App. 1987) (statute invades judiciary by infringing not on courts but on prosecutor, member of judicial branch).

255. Texas (like Oklahoma) has two courts of last resort. The court of criminal appeals handles criminal cases; the supreme court decides civil cases. Tex. R. App. P., Secs. 15 & 9, respectively.

256. 739 S.W.2d 246 (Tex. Crim. App. 1987).

257. *Id.* at 257. The Texas Constitution devotes an entire article to the separation of powers:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one, of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

258. 739 S.W.2d at 257. The court noted that "the usurpation of power will not receive sanction by reason of a long and unprotested continuation." *Id.* at 252 n.8 (citing Immigration & Natu-

cause the Texas Constitution places the office of county attorney within the judicial department.[259] Although some of the duties of the county attorney appear executive in nature,[260] *Meshell* involved a conflict between the legislative and judicial branches.[261]

The constitutionality of the state statute was questioned soon after it was adopted. In 1979, Judge Clinton[262] suggested that the statute could be viewed as violating the state constitution's separation of powers provision because it "deprives prosecuting attorneys of their right to exercise judgment and discretion in performing their exclusive prosecutorial functions."[263] Judge Clinton also suggested that the speedy trial statute encroached on the authority of the courts to control their dockets,[264] the claim that had been made in *United States v. Howard*[265] two years earlier. No claim based on docket control was made in *Meshell*, and the majority focused instead on legislative interference with the prosecutor's discretion in preparing for trial.[266] That concentration was dictated by the fact that the statute itself "focused upon prosecutorial readiness for trial rather than actual commencement of trial."[267]

The statute required that the state be ready for trial within 120 days after commencement of a felony criminal action.[268] Otherwise, the trial court would have to dismiss the indictment with prejudice.[269] In Meshell's case, the criminal

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ralization Serv. v. Chadha, 462 U.S. 919, 944 (1983) (provision providing Congressional veto declared unconstitutional)).

259. *Id.* at 253 (citing TEX. CONST. art. V, § 21 (*controlling legislative creation of prosecutor's office*)). Texas is not alone in placing the prosecutor's office in the judicial article of the state constitution. *See, e.g.*, Fulk v. State, 417 So. 2d 1121, 1126 n.2 (Fla. App. 1982) (Cowart, J., concurring) (constitutional provision for state attorneys and public defenders provided by FLA. CONST. art. V, §§ 17-18, denoted as judiciary article).

260. *Meshell*, 739 S.W.2d at 253 n.9.

261. *Id.* at 253. One member of the court expressed doubt that the county attorney had standing to speak for the judiciary. *Id.* at 269 (Teague, J., dissenting).

262. Members of the Texas Court of Criminal Appeals carry the official title of "Judge," not "Justice." Rule 201(a), TEX. R. APP. P. Any comments in this article regarding the opinions of Judge Clinton should be read in light of the fact that the author was a briefing attorney (law clerk) for Judge Clinton during the 1982-83 term.

263. Ordunez v. Beam, 579 S.W.2d 911, 915 (Tex. Crim. App. 1979) (Clinton, J., concurring).

264. *Id.*

265. 440 F. Supp. 1106 (D. Md. 1977).

266. 739 S.W.2d at 254-57. Presumably, because the prosecutor is a member of the same branch of government as the courts, a judicially created rule requiring the prosecutor to be ready for trial within a specified time could not be held to violate the separation of powers provision of the state constitution, at least not on the basis that the rule was an infringement on prosecutorial discretion.

267. *Id.* at 255-56 n.15.

268. The statute provides: "A court shall grant a motion to set aside an indictment . . . if the state is not ready for trial within . . . 120 days of the commencement of a criminal action if the defendant is accused of a felony. . . ." TEX. CODE CRIM. PROC. ANN. Art. 32A.02, § 1(1) (Vernon 1983).

269. *Meshell*, 739 S.W.2d at 250. In this respect, the Texas act differs from the FSTA, which allows dismissal without prejudice to the government's ability to seek another indictment for the same offense. *See supra* note 148 and accompanying text for the FSTA provision permitting dismissal without prejudice.

action commenced when he was indicted, but for more than twelve months the state failed to arrest or try him.[270] The trial court agreed with Meshell that the state had failed to comply with the statute, but, without stating its reason, the court held the statute unconstitutional.[271] In an unpublished opinion, the appellate court summarily rejected the contention that the statute violated separation of powers principles but held it unconstitutional on other grounds.[272] Despite problems with the procedural posture of the case, the court of criminal appeals decided to address the separation of powers issue.[273]

As noted above, the government argued that in passing the speedy trial statute, the legislature had intruded on the judiciary by restricting the prosecutorial discretion of the county attorney, a member of the judicial branch.[274] Although the legislature had treated some counties differently by establishing the office of district attorney or criminal district attorney,[275] in the jurisdiction in question only the county attorney had the constitutional "duty to represent"[276] the state in criminal cases. As a member of the judicial branch, the county attorney was entitled to the protection of the separation of powers precept contained in the state constitution. Previously, the legislature had been unable to remove or limit the duties of county attorneys unless an express provision of the constitution authorized it to do so.[277]

The court of criminal appeals regarded prosecutorial discretion in the preparation of the government's case for trial as an "obvious corollary" to a county

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270. 739 S.W.2d at 249. Although an arrest warrant had issued, it stated the wrong home address. Unaware of the warrant or indictment, Meshell continued to reside at his usual address until he was arrested. *Id.*

271. *Id.*

272. *Id.* at 251. The court of appeals held that, when the bill proposing the act was before the legislature, the caption or introduction to the bill failed to provide the legislature with sufficient notice of its contents, in violation of Article III, § 35 of the Texas Constitution. *Id.* Meanwhile, however, Section 35 had been amended to prevent the courts from invalidating legislation on that basis and leaving such questions in the hands of the legislature alone. *Id.* The issue thus became moot. *Id.*

273. *Id.* at 248 n.3. The high court's justifications for reaching that question, despite procedural obstacles, were criticized by Judge Clinton at one point as "utterly fatuous" and elsewhere as "a masterly bit of disingenuousness." *Id.* at 259, 260 n.3 (Clinton, J., dissenting). Another dissenter agreed that Judge Clinton was "technically correct" in objecting to the exercise of discretionary review over the separation of powers issue but believed that to refrain from reaching the question would amount to "judicial wheelspinning." *Id.* at 261 n.1 (Teague, J., dissenting).

274. *Id.* at 253. *But cf.* People v. Guenther, 740 P.2d 971, 977 (Colo. 1987) (statute authorizing court to order pretrial dismissal of criminal charges does not impermissibly encroach on executive prosecutorial function in violation of state constitution).

275. *Meshell*, 739 S.W.2d at 253 n.10 (citing 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 463-467 (G. Braden ed. 1977) (explaining manner in which Texas Constitution controls legislative creation of prosecutor's office)).

276. TEX. CONST. art. V, § 21 (county attorney shall represent state). *But see Meshell*, 739 S.W.2d at 271 (Miller, J., dissenting) (doubting that stated "duty to represent" is actually "power" protected from infringement by other departments because of separation of powers clause).

277. *See* Hill County v. Sheppard, 142 Tex. 358, 364, 178 S.W.2d 261, 264 (1944) (unconstitutional for legislature to place criminal duties of county attorney in office of criminal district attorney).

attorney's constitutional duty to prosecute criminal cases.[278] Thus, without express constitutional authorization, the legislature could not restrict the county attorney's ability to prepare for trial.[279] The Court rejected the argument that the legislature's constitutionally granted power to make rules for the courts operated as express authority to infringe on the prosecutor's discretion in preparing for trial.[280] The rule-making authority presupposed the existence of a substantive right of the defendant for which the legislature was merely to provide procedures. The legislature was not given "unlimited power to infringe upon the substantive power of the Judicial department under the guise of establishing 'rules of court,' thus rendering the separation of powers doctrine meaningless."[281]

The right for which the statute was meant to provide procedural guidelines was the constitutional right to a speedy trial.[282] The flaw in the plan was that the Act did not provide for the speedy commencement of trial but merely directed the prosecutor to be ready for trial within a certain time period. "[T]he Act is directed at speeding the *prosecutor's preparation and ultimate readiness for trial*."[283] The federal and state constitutional provisions, the court noted in contrast, were "directed at assuring a speedy *commencement of trial*."[284]

Furthermore, the statute did not take into account that well-established constitutional speedy trial doctrine regarded as major factors to be considered in determining whether the right to a speedy trial had been abridged: (1) the reason for the delay; (2) the defendant's assertion of his or her right; and (3) prejudice to the defendant.[285] Under the Texas speedy trial statute, it made little

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278. *Meshell*, 739 S.W.2d at 254. *But see id.* at 272 (Miller, J., dissenting) (express wording of constitution and cases relied on by majority speak of power to represent state, not prosecutorial discretion in preparation of cases for trial).

279. *Id.* at 254-56. *But see id.* at 272. (Miller, J., dissenting): "[S]imply because a power is specified in the Constitution, and is therefore subject to protection . . . does not imply that any incident to that power is also accorded the same protection. . . . Absent an articulable power, the enumerated powers doctrine . . . and the separation of powers clause . . . are irrelevant." *Id.* (Miller, J., dissenting).

280. *Id.* at 255. The Texas Constitution "clearly intends that the Legislature have ultimate control over establishment of procedural rules of court." *Id.* (quoting TEX. CONST. art. V, § 25 ("The Supreme Court shall have power to make and establish rules of procedure *not inconsistent with the laws of the State* for the government of said court and the other courts of this State to expedite the dispatch of business therein") (emphasis added)).

281. *Id.* The court noted that "the Legislature could establish a new right under its general plenary power if that right did not infringe upon another department's separate power." *Id.* at 255 n.13.

282. *Id.* at 255. For background to the statute, *see* Clinton, *Speedy Trial—Texas Style*, 33 BAYLOR L. REV. 707, 743-46 (1981) (act has not induced pace of speedy trial which serves public policy of Act); Cohen, *Senate Bill 1043 and the Right to a Speedy Trial in Texas*, 7 AMER. J. CRIM. L. 23, 24 (1979) (liberal provisions for extending intervals likely to result in litigation to determine meaning of provisions).

283. *Meshell*, 739 S.W.2d at 255 (emphasis by the court). A caption to an amendment described the provision as "[a]n Act relating to the time limits *for the state to be ready for trial*. . . ." *Id.* at 255 n.15 (emphasis by the court).

284. *Id.* at 256 (emphasis by the court).

285. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972) (deprivation of right to speedy trial deter-

difference what reason the state had for the delay, and it made no difference whether the defendant had been prejudiced by the delay or had requested a speedy trial before seeking dismissal.[286] The legislature's failure to incorporate those factors, combined with its focus on the prosecutor's readiness for trial rather than the commencement of trial, caused the court to conclude that the statute infringed on the prosecutor's discretion, while failing to ensure a defendant a speedy trial.[287] The dissenters regarded the effectiveness or efficiency of the statute,[288] as well as the factors discussed above, to be irrelevant, and they saw no practical difficulties being imposed on prosecutors by the act.[289] Finding no other express provision of the state constitution authorizing the statute, however, the majority held that the legislature had "exceeded its authority to protect appellant's substantive right to a speedy trial through procedural legislation."[290]

Although the *Meshell* opinion is open to criticism,[291] it is significant in several respects.[292] It was the first decision to hold a state speedy trial act unconstitutional. The *Meshell* majority did so in a way that provided an example of truly independent state constitutional analysis: without reference to federal separation of powers decisions, to federal cases dealing with the constitutionality of the FSTA, or even to the decisions from other jurisdictions concerning speedy trial or speedy disposition provisions,[293] despite the similarity of the Texas separation of powers provision to those of other states.[294] Unlike most of the deci-

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mined by *ad hoc* balancing test). A fourth factor, the length of delay, is taken into account by the statute. The federal and Texas constitutions provide the same speedy trial right. *Meshell*, 739 S.W.2d at 255 n.14.

286. *Id.* at 256. *See* TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 3 (Vernon Supp. 1988).

287. *Meshell*, 739 S.W.2d at 256. *But see id.* at 275 (Miller, J., dissenting) (whether statute accords defendant speedy trial in most efficient way is irrelevant).

288. *Meshell*, 739 S.W.2d at 263 (Teague, J., dissenting) (Speedy Trial Act governed by statutory interpretation and legislative history, while Supreme Court's analysis in Barker v. Wingo, applies only to assertion by defendant of federal constitutional speedy trial right); *Meshell*, 739 S.W.2d at 274 (Miller, J., dissenting) (whether Speedy Trial Act adequately addresses four factors set out in *Barker* wholly irrelevant to determination of viability of Act vis-à-vis separation of powers clause).

289. *Id.* at 739 (Teague, J., dissenting) (Act is so easy for prosecutor to comply with that failure to do so "closely resembles an attorney losing an uncontested divorce case. It can be done, but it is awfully hard. . . .").

290. *Meshell*, 739 S.W.2d at 257.

291. Because the dissenting opinions cited herein did such a thorough job of it, this article will not elaborate on the possible shortcomings of the majority opinion.

292. *See* Rose v. State, 752 S.W.2d 529, 538 (Tex. Crim. App. 1988) (opinion on reh'g) (Miller, J., concurring) (*Meshell* must be most important separation of powers opinion in recent times).

293. One dissenter, however, discussed federal separation of powers decisions in general: United States v. Brainer, 691 F.2d 691, 698 (4th Cir. 1982) (FSTA not unconstitutional encroachment on judiciary); and a similar act in Ohio considered in State v. Pachay, 64 Ohio St. 2d 218, 222, 416 N.E.2d 589, 591 (1980) (speedy trial provisions are rational effort to enforce constitutional right to speedy trial). *Meshell*, 739 S.W.2d at 264-68 (Teague, J., dissenting).

294. *See supra* notes 33, 172, 188 for examples of state separation of powers provisions similar to that of Texas. *See also supra* note 257 for the Texas provision. States often have borrowed from one another constitutional provisions and legal reasoning in a form of "horizontal federalism." Tarr & Porter, *Introduction: State Constitutionalism and State Constitutional Law*, 17 *Publius* 1, 9 nn.17-18 (1987). For other discussions and examples of horizontal federalism, *see* Elazer, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 18-22 (1982) (suggests six constitu-

sions from other jurisdictions, the *Meshell* majority and dissenting opinions displayed the results of extensive debate about the text, structure, and function of the state constitution and the statute in question.[295] Perhaps most significant, as a sweeping victory for the state, which also promises to clear many cases from the appellate dockets,[296] the *Meshell* opinion demonstrated that far-reaching[297] and activist[298] state constitutional decision making was not the province of only liberal or defense-oriented judges.[299]

CONCLUSION

As noted in some of the opinions discussed above, vigorous scholarly debate over the question of inherent judicial control over rule making has spanned several decades.[300] Although some form of inherent judicial power is a widely,

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tional patterns among states based, *inter alia*, on regional differences); Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS 27, 43 (1982) (written constitutions express existing political cultures and reflect respective values); McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions"*, 13 VT. L. REV. 179, 191 (1988) (some states copied from other state constitutions rather than from federal fourth amendment); Sturm, *Development of American State Constitutions*, 12 PUBLIUS 57, 74 (1982) (survey of current development of state constitutions).

295. The majority and dissenting opinions fill more than thirty pages in the reporter. A single footnote in one of the dissenting options covers four full pages. *See Meshell*, 739 S.W.2d at 276-80 n.2 (Miller, J., dissenting).

296. On a single day, May 25, 1988, the Texas Court of Criminal Appeals disposed of eight speedy trial cases, merely by citing *Meshell*. Some of the cases had been pending for three or four years. *See* Ballenger v. State (No. 632-84); Beddoe v. State, 752 S.W.2d 564, 565 (Tex. Crim. App. 1988) (No. 589-84); Garcia v. State, 751 S.W.2d 507, 508 (Tex. Crim. App. 1988) (No. 1118-85); Hoffman v. State, 751 S.W.2d 512, 512 (Tex. Crim. App. 1988) (No. 448-85); Massey v. State, 751 S.W.2d 505, 506 (Tex. Crim. App. 1988) (No. 1111-86); Orn v. State, 753 S.W.2d 394, 395 (Tex. Crim. App. 1988) (No. 466-87); Stevenson v. State, 751 S.W.2d 508, 509 (Tex. Crim. App. 1988) (No. 928-85); Wright v. State, 751 S.W.2d 506, 507 (Tex. Crim. App. 1988) (No. 1217-85). The last two digits of the case number denote the year in which the high court received the petition for discretionary review.

297. *See Meshell*, 739 S.W.2d at 262 (Teague, J., dissenting): ("[T]he majority opinion is a mere step away from holding that the prosecuting attorneys of the State, which presently number at least 1,085 . . . can never be subject to *any* procedural laws promulgated by the Legislature of this State"); *id.* at 275 (Miller, J., dissenting) ("[W]hat act of the legislature regulating the prosecution is ever safe from our attack?") *Id.*

298. *See id.* at 258 (Clinton, J., dissenting) (majority of court demonstrates will and determination to cast aside carefully drawn rules for orderly procedure to reach result that law and procedural circumstances have previously put beyond its reach); *id.* at 269 (Teague, J., dissenting) (referring to "aggressive and assertive majority team").

299. *See* Miller, *Separation of Powers: An Ancient Doctrine Under Modern Challenge*, 28 ADMIN. L. REV. 299, 324-25 (1976) (separation of powers is profoundly conservative device to block innovations). *But cf.* Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 433 (1988) (overwhelmingly liberal impact of state court activism). For an idea of the Texas Court of Criminal Appeals' activism (from a court about evenly divided between liberal and conservative judges), *see* Rose v. State, 752 S.W.2d 529, 536-37 (Tex. Crim. App. 1987) (parole law jury instruction violates separation of powers and due course of law); Long v. State, 742 S.W.2d 302, 319 (Tex. Crim. App. 1987) (admission of videotape of child witness violates right of confrontation and due course of law).

300. *See* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal*

though not universally,[301] accepted concept,[302] some observers have argued that control of court administration is the only truly inherent power of the judiciary.[303] Virtually every state now allows judicial control over the rules of practice and procedure, but the source of that authority is often a statute by which the legislature has expressly delegated the power.[304] Alternatively, rule-making authority is now explicitly granted to the courts in many state constitutions,[305] though often with legislative oversight.[306] Constitutional authorization for legislative and judicial sharing of control over rules of procedure, however, does not settle the question of whether the legislature can dictate the internal administration of the courts or impede the discretion of the prosecutor.[307]

Because state constitutions expressly vest the judicial power in the judiciary,[308] some commentators have suggested that the real questions involve not whether a power is inherent, but whether it is judicial in nature and exclusively so.[309] Unfortunately, the typical state court opinion leaps from the premise that some judicial power is exclusive to the conclusion that the power in question is

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of Winberry v. Salisbury, 65 HARV. L. REV. 234, 239 (conflict between N.J. legislature and supreme court) (1951); Levin & Amsterdam, *supra* note 88, at 30 (some powers of courts must be free from legislative control); Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 37-40 (1952) (judicially established rules of procedure bring speed and efficiency to administration of justice); Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 601-02 (1926) (procedure of courts belong to courts, not legislature); *see generally* Wigmore, *supra* note 133 (claiming all legislative rules for judicial procedure are unconstitutional).

301. *See* Dodd, *supra* note 16, at 201 (political philosophy of 1776 did not recognize existence of inherent governmental power); Burns & Markman, *supra* note 32, at 581 (denying existence of inherent powers in branches of federal government).

302. In re Clerk of Court's Compensation v. Lyon County Comm'rs, 308 Minn. 172, 177, 241 N.W.2d 781, 784 (1976) (doctrine of inherent judicial power is established law in virtually all American jurisdictions).

303. Cox, *supra* note 27, at 229.

304. Kay, *supra* note 18, at 28.

305. *See* Levin & Amsterdam, *supra* note 88, at 5 (recent history of constitutional drafting in this country reflected consistent concern with rule making by judiciary, with new constitutions expressly granting power to courts).

306. Williams, *supra* note 10, at 208-09 (citing for examples and further discussion A. KORBAKES & C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS—A COMPENDIUM (1978); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 639-42 (1957); Kay, *supra* note 18, at 28; Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442, 458 (1980)).

307. Coate v. Omholt, 203 Mont. 488, 497-98, 667 P.2d 591, 596 (1983) (legislative power to regulate procedure does not include control of court dockets); *In re* Grady, 118 Wis. 2d 762, 782, 348 N.W.2d 557, 569 (1984) (efficient and effective administration of court is matter within exclusive authority of judiciary); State v. Meshell, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (authority of legislature to regulate procedure is not authority to encroach on power of prosecutor in trial preparation).

308. *See, e.g.* KY. CONST. § 27: "The powers of the government . . . shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another; and those which are judicial to another . . . ."

309. *See* Williams, *supra* note 16, at 211 ("State constitutions . . . place the judicial power in the judiciary; consequently, rather than debating whether a court's power is inherent, the inquiry should focus on whether the claimed power is properly a judicial function").

(or is not) exclusive.[310] In the ordinary case, however, it does not matter whether the power in question is inherently or exclusively judicial, as long as the legislature demonstrates that it is exercising some other authority of its own.[311]

If the power in question is judicial, and the legislature cannot demonstrate that it has independent authority of its own, then any legislative exercise of that power should be regarded as a violation of separation of powers principles. The undue interference test should not apply.[312] If the power at issue is judicial, but the legislature is not actually exercising that power[313] and merely is using its own constitutional authority to affect how the court exercises judicial power, the inquiry should be whether the legislation unduly interferes with the judicial branch's power.[314]

In every challenge to a speedy trial statute, the legislature can point to its authority to implement the constitutional right to a speedy trial as a power source independent of both the judiciary's authority over rule making and the prosecutor's authority over case preparation.[315] The legislature is authorized to effectuate the constitutional right by creating a statutory right to a speedy trial. In speedy trial statute cases, therefore, the question of inherent or exclusive power of the courts or prosecutors becomes irrelevant. Because the legislature has its own power source independent of the authority of the other branches, the only question is whether the speedy trial act unduly interferes with the other branches in the exercise of their power.

Similarly, unless the state constitution indicates otherwise, the legislature has general policymaking authority to pass statutes designed to protect or advance the interests of the public and litigants in an effective and efficient system of justice, including the speedy disposition of cases.[316] No state has a provision expressly limiting the legislature in this regard. To the contrary, most states

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310. *See, e.g., Grady*, 118 Wis. 2d at 795, 348 N.W.2d at 575 (Abrahamson, J., dissenting) (in areas of shared powers, majority does not examine whether each branch has power to regulate time in which decisions are rendered).

311. *But cf.* Morrison v. Olson, 108 S. Ct. at 2627-31 (Scalia, J., dissenting) (emphasizing importance of exclusivity).

312. *See Grady*, 118 Wis. 2d at 776, 348 N.W.2d at 566 (areas of authority exclusive to judicial branch are free from intrusion by other branches of government).

313. Some state constitutions contain express wording, not only calling for separation of powers, but also forbidding a member of one branch of government from exercising the powers of another branch. *See, e.g.*, OR. CONST. art. II, § 1, *supra* note 172; MONT. CONST. art. III, § 1, *supra* note 188; TEX. CONST. art. II, § 1, *supra* note 257. The argument can be made that such provisions prohibit only the actual exercise of one branch's power by another branch, not actions by one branch that affect other branches.

314. *See* State *ex rel.* Emerald People's Util. Dist. v. Joseph, 292 Or. 357, 362, 640 P.2d 1011, 1013 (1982) (statute imposing three month time limit for appeals court to hear and determine cases did not unduly interfere with exercise of judicial functions). A similar approach could be taken to shared powers. If the power is not exclusive but is shared by the legislature and another branch, the question should be whether the statute unduly interferes with the proper exercise of authority shared with the other branch.

315. *See, e.g.*, Meshell v. State, 739 S.W.2d at 255 (recognizing, *inter alia*, legislature's authority to effectuate right to speedy trial).

316. *See, e.g., supra* notes 199, 210-11 and accompanying text for a discussion of the legislative ability to establish new rights.

have legislative/judicial sharing of rule-making power.[317] Therefore, when the legislature enacts a statute directing internal administrative procedures for the courts, it is exercising either independent legislative policymaking power or shared legislative/judicial rule-making authority, not exclusive judicial power. For that reason, it does not matter whether the power that the courts are concerned with protecting is inherently or exclusively judicial, because, again, the legislature is exercising power of its own.

The action of the legislature may still be unconstitutional, however, if it unduly interferes with the judiciary's power. Even interference with the judiciary's exercise of shared authority can be a separation of powers violation, should that interference become too substantial or extensive.[318] As long as the legislature is exercising authority of its own, the standard of undue interference should be applied to a claim of legislative interference, whether or not the judicial power at issue is exclusive or inherent.

For example, in *Meshell* the power to prepare the state's criminal cases for trial was viewed as the exclusive province of the prosecutor, a judicial officer. Had a legislative committee undertaken to prepare a criminal case for trial, it would have been exercising an exclusive prosecutorial power, thus violating the separation of powers provision.[319] The legislature in *Meshell*, however, was not exercising a prosecutorial power. The Texas legislature undoubtedly has the constitutional authority to effectuate the state constitutional right to a speedy trial.[320] It merely passed a statute that, while creating a statutory right in order to implement the constitutional speedy trial right, affected the prosecutor in the exercise of case preparation. Because the statute did not amount to an exercise of prosecutorial power, but had an effect on that power, it should be evaluated on an undue interference standard.[321] "Undue interference" or "undue burden" should not be defined to include only a result that completely prevents a branch from carrying out its constitutionally assigned function,[322] or makes it impossible for the other branch to perform its constitutional role.[323] Rather, the standard should be broadly read to invalidate any threat to the independence of another branch that is not justified by a constitutionally assigned power and an overriding need of the acting branch to protect or advance constitutionally

317. *See supra* notes 302-03 and accompanying text for a discussion of authority shared by legislature and judiciary.

318. *See In re* Grady, 118 Wis. 2d 762, 776, 348 N.W.2d 559, 574 (Abrahamson, J., concurring) (in area of shared authority, legislation constitutional unless unduly burdens or substantially interferes with judicial branch).

319. *See* Meshell v. State, 739 S.W. 246, 277-78 n.2 (Tex. Crim. App. 1987) (Miller, J., dissenting) (separation of powers violation might occur if legislative investigating committee undertook to dismiss prosecution, rather than creating conditions under which court must dismiss indictment after legislative grant of statutory transactional immunity).

320. *See supra* notes 52, 281 (plenary power of Texas legislature).

321. *Compare Meshell*, 739 S.W.2d at 267 (Teague, J., dissenting) (advocating undue interference standard) *with* Morrison v. Olson, 108 S. Ct. at 2620 (using "undue interference" wording but not as well-defined test).

322. *Brainer*, 691 F.2d at 698.

323. *Joseph*, 292 Or. at 362, 640 P.2d at 1014.

rooted interests.[324]

The approach proposed here draws from the state cases the undue interference language and from the federal cases elements of the *Nixon* analysis and the later general balancing test. It takes the middle ground between those who would seek rigid compartmentalization and those who would find no separation of powers violation until one branch completely disrupted another branch's ability to function. The rigid compartmentalization theory undermines the efficiency of government and undervalues the availability of checks and balances.[325] The other extreme looks only for the completed coup and underestimates the incremental effect of interbranch intrusions. As Justice Frankfurter warned, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[326]

The theory of separation of powers, "variously decried as vaguely foolish or praised as truly fundamental,"[327] continues to be a source of contention among the branches of both the state and federal governments. At both levels of government, it remains true that "there is no fruitful rule or test which governs decisions relating to separation of powers."[328] No commentator seriously believes that the courts are even attempting "to follow a consistent set of interpretive rules."[329] The lack of "analytical coherence"[330] in the opinions has led

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324. Arguably, only interests with roots in the federal or state constitution should figure in the balance. Whether or to what extent, in the face of separation principles, the federal Constitution embodies an interest in governmental efficiency, which the United States Supreme Court has thrown into the balance before, has been a much debated topic. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting) (legislative interest in efficiency should not be weighed against judicial independence). *Compare* United States v. Brown, 381 U.S. 437, 443 (1965) (separation of powers obviously not instituted with idea that it would promote governmental efficiency) *and* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (doctrine of separation of powers adopted by Convention of 1787 not to promote efficiency, but to preclude exercise of arbitrary power) *with* Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 717 (1984) (record reveals that efficiency tells half or more of tale leading to separated powers in Constitution) *and* Miller, *An Inquiry into the Relevance of the Intention of the Founding Fathers, with Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 587 (1973) ("powers separated in 1787 as much to promote efficiency as anything else). Some state courts have recognized that separation of powers advances efficiency in government. *See, e.g.*, Redmond v. Ray, 268 N.W.2d 849, 858 (Iowa 1978) (efficient functioning of government depends on adherence by each branch to delicate balance that must be maintained under separation of powers precept); Galloway v. Truesdell, 83 Nev. 13, 22, 422 P.2d 237, 244 (1967) (separation of powers necessary to most efficient functioning of governmental system).

325. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 481 (1985) (separation of powers makes sense only when combined with checks and balances); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (in most cases rigid compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances).

326. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

327. L. TRIBE, CONSTITUTIONAL CHOICES 67 (1985) (footnotes omitted).

328. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 64, at 137.

329. Carter, *supra* note 103, at 781 n.248.

some commentators to suggest radical solutions, such as regarding almost all separation of powers issues as "political questions," to be resolved through the checks and balances available to the executive and legislative branches.[331] Declaring an issue to be a political question, however, and thereby allowing the courts to refrain from deciding it, would be little more than "the judicial equivalent of throwing up one's hands in despair."[332]

In the final analysis, it may be said of state constitutional separation of powers theory, as is true of federal, that two centuries "of partisan debate and scholarly speculation [yield] no net result but only [supply] more or less apt quotations from respected sources on each side of any question."[333] Without the benefit of coherent or consistent guidance by the federal courts,[334] lacking a history of truly independent analysis,[335] and faced with different constitutional frameworks, the state courts must struggle to develop separation of powers theories that rest on principled bases.[336] The state decisions regarding speedy trial and speedy disposition statutes and rules provide useful starting points for such an endeavor.

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330. *Id.* at 721.

331. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). Choper regards legislative encroachment on individual rights or on the power of the judiciary as proper reasons for judicial intervention. *Id.* at 60-128, 380-415.

332. Carter, *supra* note 103, at 806.

333. *Youngstown Sheet & Tube*, 343 U.S. at 634-35 (Jackson, J., concurring).

334. *Cf.* Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U.L. REV. 143, 168 n.115 (1986-87) (in area of inherent power of judiciary over internal court administration "there is no analogous federal doctrine to complicate matters").

335. *See* McCabe, *supra* note 294, at 217 (even when purporting to engage in independent analysis, state courts often seem unwilling or unable to analyze independently).

336. *See* Abrahamson, *supra* note 208 (calling for principled decision-making). One reason why some opinions interpreting state constitutions have been poorly reasoned may be that most practitioners, because they lack experience in formulating state constitutional arguments, have given the courts little aid. *See* Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 638 (1987) (failure of litigators to make state constitutional claims). The federal decisions also have been criticized as unprincipled:

> *Chadha* must remain something of a mystery. Neither the near unanimity with which the Court decided *Chadha*, nor the breathtaking sweep of the Court's holding, are easily explained by anything in the Constitution's text, history, or structure; by the force of the Court's own logic; or by the thrust of any analysis thus far advanced, at least to my knowledge, in the decision's defense.

L. TRIBE, *supra* note 327, at 76.

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE CHRISTINE SINICKI

FROM: Anne Sappenfield, Senior Staff Attorney, and Anna Henning, Staff Attorney

RE: 2013 Assembly Bill 161, Relating to Injunctions Suspending or Restraining the Enforcement or Execution Statewide of a Statute of This State

DATE: May 1, 2013

This memorandum responds to your request for a description of 2013 Assembly Bill 161 ("the bill"), relating to injunctions suspending or restraining the enforcement or execution of a statute of this state, and an analysis of constitutional implications with respect to the bill. Under the bill, an injunction, restraining order, or any other final or interlocutory order[1] issued by a circuit court or the Court of Appeals that suspends or restrains the enforcement of any Wisconsin statute is stayed if a petition is filed with the Wisconsin Supreme Court or the Court of Appeals within 10 days. For reasons discussed in greater detail below, it appears possible that portions of the bill could be found unconstitutional under the Separation of Powers Doctrine.

CURRENT LAW

Under current law, a final judgment or a final order of the circuit court may be appealed as a matter of right to the Court of Appeals, unless otherwise expressly provided by law. [s. 808.03 (1), Stats.] The Supreme Court of Wisconsin may take jurisdiction of an appeal or any other proceeding pending in the Court of Appeals if the Supreme Court does one of the following:

- Grants direct review upon a petition to bypass filed by a party.
- Grants direct review upon certification from the Court of Appeals prior to the Court of Appeals hearing and deciding the matter.

[1] An interlocutory order is an order that relates to some intermediate matter in the case or any order than a final order. [*Black's Law Dictionary*, 1130 (8th ed. 2004).]

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- On its own motion, decides to review the matter directly

[s. 808.05, Stats.]

A judgment is the determination of a legal action. It may be final or interlocutory. [s. 806.01 (1) (a), Stats.] A judgment in an action for an injunction[2] may not be stayed[3] during the period after its entry and until an appeal is taken or during the pendency of an appeal, unless the court orders otherwise. When an appeal is taken from a judgment or an appealable order granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon the terms as it considers proper for the security of the rights of the adverse party. [s. 806.08 (1) and (3), Stats.]

Current law further provides that an appeal does not stay the execution or enforcement of the judgment or order appealed from except as otherwise provided in law. This section specifies that, during the pendency of an appeal, a circuit court or an appellate court may do any of the following:

- Stay execution or enforcement of a judgment or order.
- Suspend, modify, restore, or grant an injunction.
- Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

[s. 808.07 (1) and (2), Stats.]

Under current law, circuit courts also have the discretion to issue temporary injunctions under certain circumstances. Specifically, current law provides that a temporary injunction may be granted to restrain an act: (a) when it appears from a party's pleading that the party is entitled to judgment and any part of the judgment consists of restraining some act, and the commission or continuance of that act would injure the party; or (b) when it appears during the litigation that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done, in violation of the rights of another party and tending to render the judgment ineffectual. [s. 813.02 (1) (a), Stats.]

THE BILL

Under the bill, if a circuit court or the Court of Appeals enters an injunction, restraining order, or any other final or interlocutory order suspending or restraining the enforcement of any statute of this state, the injunction, restraining order, or other final or interlocutory order is immediately appealable as a matter of right.

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[2] An injunction is a court order commanding or preventing an action. [*Black's Law Dictionary*, 800 (8th ed. 2004).]

[3] To stay a proceeding or a judgment means to postpone or halt it. [*Id.*at 1453.]

The bill provides that any injunction, restraining order, or other final or interlocutory order that is appealable under this provision must be automatically stayed upon the filing of an expedited petition for interlocutory review with the Supreme Court or with the Court of Appeals. The bill permits the Supreme Court to take jurisdiction of the proceeding if it grants direct review upon an expedited petition for interlocutory review of an action pending in the Court of Appeals. In addition, the Supreme Court, under the bill, may take jurisdiction of a proceeding pending in a circuit court if it grants direct review of such a petition. A petition for interlocutory review filed no later than 10 days after the entry of the order suspending or restraining the enforcement of a state statute is an expedited petition for interlocutory review under this provision.

If an expedited petition for interlocutory review is filed, the automatic stay remains in effect until one of the following occurs:

- The Supreme Court or the appellate court with which the expedited petition for interlocutory review is filed grants the petition for interlocutory review and subsequently orders that the automatic stay be lifted.

- The Supreme Court or the appellate court with which the expedited petition for interlocutory review is filed denies the petition for interlocutory review and simultaneously orders that the automatic stay be lifted.

- Entry of a final and unappealable order disposing of the entire case.

The bill provides that a court may not otherwise modify or restore an injunction that is stayed as required in the bill during the pendency of an appeal.

The Supreme Court or the appellate court is permitted, under the bill, to enter such orders as are necessary and proper to the resolution of the petition for interlocutory review, including orders directing the preparation and filing of the record and the submission of briefs, appendices, and other materials by the parties.

The bill specifies that the newly created provisions do not require a party to seek an expedited petition for interlocutory review as provided in the bill and do not modify or otherwise affect the rights of any party to appeal from, or seek Supreme Court review of, an order otherwise subject to these provisions under the general statutes governing appellate review.

The bill would first apply to an injunction, restraining order, or other final or interlocutory order issued by a circuit court or by an appellate court on the effective date of the legislation.

ANALYSIS OF POTENTIAL CONSTITUTIONAL IMPLICATIONS

Separation of Powers Doctrine

The Wisconsin Constitution provides that the legislative power is vested in a Senate and Assembly. [Art. IV, sec. 1.] The judicial power is vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the Legislature may create by law, and a municipal court if authorized by the Legislature. [Art. VII, sec. 2.] Under the Wisconsin Constitution, the Supreme Court shall have superintending and administrative authority over all courts. [Art. VII, sec. 3 (1).]

The Wisconsin Supreme Court has held that the state's three branches of government exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. Further, an attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court made the following comments:

> The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "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."
>
> Each branch has a core zone of exclusive authority into which the other branches may not intrude....
>
> The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." ...The undue burden or substantial interference must be proven beyond a reasonable doubt....
>
> [*Id.*, 531 N.W.2d at 36-40; footnotes and citations omitted.]

In another case involving an alleged intrusion of the legislative branch into judicial functions, the Wisconsin Supreme Court stated:

> ...To determine whether legislation unconstitutionally intrudes upon judicial power and therefore violates the separation of

> powers doctrine, this court developed a three-part test. We must first determine whether the subject matter of the statute is within the powers constitutionally granted to the legislature. The second inquiry is whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. If the subject matter of the statute is within the judiciary's constitutional powers but not within powers constitutionally granted to either the legislature or executive branch, the subject matter is within the judiciary's core zone of exclusive power. Any exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers doctrine. The judiciary may recognize such an exercise of power but only as a matter of comity and courtesy, not as an acknowledgement of power.
>
> If the subject matter of the statute is within the powers constitutionally granted to the judiciary and the legislature, the statute is within an area of shared powers. Such a statute is constitutional if it does not unduly burden or substantially interfere with another branch.
>
> [See *State v. Horn*, 226 Wis. 2d 637, 644-645 (1999); citations omitted.]

Statutory Relationship Between the Legislative and Judicial Branches

Section 751.12 (1), Stats., provides that the Supreme Court must, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the proceedings and promoting speedy determination of litigation. The power of the Supreme Court in these matters extends to its ability to affect the work product of the Legislature; that is, the rules of the Supreme Court may modify or suspend existing statutes. [See s. 751.12 (2), Stats.]

However, the statutes reflect the shared power and interests of the judicial and legislative branches in these matters. Section 751.12 (4), Stats., provides that the authority of the Supreme Court to affect the statues does not "abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."

Separation of Powers Analysis

It appears that the bill affects an area of the law over which the legislative and judicial branches exercise shared power, and that aspects of the bill could be found by a court to be under the exclusive power of the judicial branch or to unduly burden or substantially interfere with the judicial branch. If a statute is found, beyond a reasonable doubt, to be under the exclusive power of the judiciary or to be a power that is shared by the judiciary and the

Legislature but that unduly burdens or substantially interferes with the judicial branch, the court may rule the statute to be unconstitutional and overturn it. If a statute is found to be a shared power but is not found to unduly burden or substantially interfere with the judicial branch, the statute is not unconstitutional, but the judiciary may overturn the legislative action through future amendments.[4]

As noted above, courts use a three-part test to determine whether a statute is within the powers constitutionally granted to the Legislature or the judiciary, or is within an area of shared powers. As described above, the powers of the branches are not delineated in the Constitution, but there is guidance in case law.

Because the bill would affect court practice and procedure by requiring, in general, certain orders to be stayed, it likely would be difficult to persuade a court that it falls squarely within the powers granted the Legislature. However, whether the bill affects an exclusive judicial power or a power shared by the Legislature and the judiciary is less clear.

It should be noted at the outset that statutes enjoy a presumption of constitutionality, and a challenge on constitutional grounds must be proven beyond a reasonable doubt. [*Wisconsin Retired Teacher's Ass'n v. Employe Trust Funds Bd.*, 207 Wis. 2d 1 (1997); *Employers Health Ins. Co. v. Tesmer*, 161 Wis. 2d 733 (Ct. App. 1991).]

Arguably, the provision of the bill that would most likely be subject to legal challenge is the provision automatically staying a circuit or appellate court order that suspends or restrains the enforcement of any state statute. The circumstances under which an injunction may be granted by a court are currently set forth in case law and statute, as discussed above. In general, an injunction may be issued to preserve the status quo when there is no other adequate remedy at law and a showing that there will be irreparable harm without the injunction.

If the court views the power to stay a court order as exclusively within the power of the judicial branch, the court may rule the provision unconstitutional. The fact that the bill affects a circuit court's or appellate court's adjudication of a case may cause a court to find that the bill affects a core power of the judiciary. The Supreme Court stated in one separation of powers analysis:

> It is well established that this court has express, inherent, implied and incidental judicial power. Judicial power extends beyond the

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[4] See, for example, legislative and judicial activity regarding ch. 756, Stats., relating to juries. In 1990, the Legislative Council established the Special Committee on Jury Service to review jury selection practice. The committee's deliberations resulted in the enactment of 1991 Wisconsin Act 271, relating to jury service as a civic duty, exemptions and excuses for jury service, jury commissioners, sources for jury lists, juror qualification forms, forfeitures for failure to attend as a juror, length of juror service, and periods of juror eligibility. The Supreme Court, apparently not satisfied with the decisions made by the Legislature, significantly amended ch. 756, Stats., in Supreme Court Order No. 96-08, 207 Wis. 2d xv (1997). The Legislature did not respond to the amendments effected by the Supreme Court.

> power to adjudicate a particular controversy and encompasses the power to regulate matters related to adjudication.
>
> [*State v. Holmes*, 106 Wis. 2d 31, 44 (1982).]

A court may also find that the provision automatically staying circuit court orders is unconstitutional if it finds that this provision violates the judiciary's independence in the fulfillment of its constitutional responsibilities. The Supreme Court of Wisconsin has held that "a truly independent judiciary must be free from control by the other branches of government." [*In re Grady*, 118 Wis. 2d 762, 782 (1984).] A law automatically staying a court order based upon the filing of a petition, without taking into account the purposes of injunctions currently recognized by the courts and in statute, may be found to violate the judiciary's independence.

The bill could also be found to govern an area that is within the judiciary and the Legislature's shared power. However, the provision could still be found unconstitutional on the basis of unduly burdening or substantially interfering with the judiciary. The Supreme Court of Wisconsin has described the power of the Legislature to regulate the courts as follows:

> In Wisconsin jurisdiction and power of the court is conferred not by act of the legislature but by the constitution itself. While the legislature may regulate in the public interest the exercise of the judicial power, it cannot, under the guise of regulation, withdraw that power or so limit and circumscribe it as to defeat the constitutional purpose.
>
> [*John F. Jelke Co. v. Beck*, 208 Wis. 650, 660 (1932).]

Because the bill would allow a circuit court or appellate court to enjoin a statute, under the requirements of current law, but would not permit the court system, as a whole, to enforce the order unless the Supreme Court or Court of Appeals lifts the stay, as provided in the bill, the court may find that this provision of the bill substantially interferes with the judiciary.

The same analysis may apply to the provisions of the bill relating to bypass of the Court of Appeals by the Supreme Court and specifying that appeals of relevant injunctions are appeals "as of right." Although the provision regarding bypass appears discretionary, the "appeal as of right" language suggests that the bill could be interpreted to *require* the Supreme Court to review a petition appealed under the bill. In addition, this might be viewed as a matter over which the Supreme Court has superintending and administrative authority under Art. VII, section 3 (1) of the Wisconsin Constitution.

On the other hand, courts have recognized that the Legislature has a role in assuring the fairness, and appearance of fairness, of the judicial system. For example, in cases relating to trial rights, such as speedy trial for criminal defendants and judge substitution, the court has held that the Legislature shares with the judiciary the authority to guarantee such rights. [See,

e.g., *State v. Holmes*, 106 Wis. 2d 31 (1982), upholding a statute requiring substitution of a trial judge.] On this point, the Supreme Court has stated:

> While the legislature has no constitutional power to compel the court to act or, if it acts, to act in a particular way in the discharge of the judicial function, it may nevertheless with propriety, and in the exercise of its power and the discharge of its duty, declare itself upon questions relating to the general welfare...The court, as has been exemplified during the entire history of the state will respect such declaration and, as already indicated, adopt them so far as they do not embarrass the court or impair the constitutional functions.
>
> [*Id.* quoting *Integration of Bar Case*, 244 Wis. 8 (1943).]

In conclusion, it is difficult to predict with certainty how a court may rule regarding the bill's constitutionality. However, because the bill limits the effect of a remedy issued by a circuit court or court of appeals in the state, and because it could be interpreted to require the Supreme Court to review orders over which its review is ordinarily discretionary, there appear to be credible arguments under the Separation of Powers Doctrine that the bill affects an exclusive power of the judiciary or at least falls within the shared powers of the judiciary and the Legislature. It is possible, therefore, that portions of the bill could be overruled by the court and it appears likely that the Supreme Court could overrule provisions of the bill by amending the statutes affected.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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