Judges for Sale

Federal judges and Supreme Court justices get gifts and perks from vested interests that would cause outrage in any other branch of government.

by Jeremy A. Rabkin

Critics have been warning of an "imperial judiciary" for two decades now. They protested when the Supreme Court struck down the abortion laws of all fifty states in *Roe* v. *Wade*. They pointed to federal district judges taking over the management of public schools, prisons and other institutions in the name of preserving newly discovered constitutional rights. For all these years, apologists for judicial activism have told us that such protests miss the point. Judges, they tell us, are not supposed to be swayed by public opinion. Judges are deliberately insulated from the political pressures faced by other officials, so that they can focus exclusively on what is just and right.

Judges are indeed different from other officials. They are indeed exempt from ordinary forms of public accountability. And it turns out that this arrangement allows judges to indulge themselves in personal conduct that would not be tolerated in other officials.

Take the luxurious amenities federal judges insisted on incorporating into the designs for new courthouses. Last summer, Senator John McCain described the planned new federal courthouse for Boston as a "Taj Mahal." The building design accommodated the demand of judges for a private bathroom (including shower facilities) and a private kitchen and a private library for each judge's chambers. In December, a Senate committee report charged that judges had run "roughshod over cost-efficiency requirements," adding $5 million to the cost of the courthouse by insisting on terrazzo marble tiling rather than the usual carpeting, tasteful wooden file cabinets

Jeremy A. Rabkin is associate professor of government at Cornell University.

rather than the usual metal ones, and elegant English oak paneling rather than plainer American wood.

The judge most responsible for this extravagance was then–Chief Judge of the First Circuit Court of Appeals Stephen Breyer. Questioned about the lavishness of the courthouse plans during his Supreme Court confirmation hearings last summer, Breyer insisted that expenditures for some other new courthouses were even higher. That the claim is correct doesn't make it any less revealing. "They all do it" was not a defense allowed to congressmen in the House Bank scandals.

While Breyer and other Boston federal judges have refused further comment, the Boston press has recently reported that luxury features for the new courthouse are now likely to be scaled back. But even an enterprising muckraker would find it difficult to track the inside pressures brought to bear by the judges in launching this project. The Freedom of Information Act, on which enterprising journalists rely for investigative reports on executive agencies, does not apply to the courts, not even when judges are engaged in nonjudicial actions like redesigning courthouses at taxpayer expense.

Justice Souter professed to be "amazed" that anyone could think there was anything improper in the pattern of conduct documented by the Star Tribune.

When it comes to benefits received from private donors, judges are required by law to provide reports for public inspection. But the federal judiciary has arranged to make these reports "available" under arrangements quite different from those in place for executive officials (who are required to accommodate journalistic requests). Reports by individual federal judges, from anywhere in the country, are available only at the Administrative Office of the judiciary in Washington, D.C.—only between the hours of 1 p.m. and 3 p.m. and then only on days when a court worker is available to retrieve requested files. Each judge is informed of the name and affiliation of any person requesting to see that judge's personal reports.

Researchers with the dedication and temerity to track down the reports may then discover that the reports omit pertinent facts. Justice O'Connor omitted any mention of an expensive trip to a luxury resort in California paid for by a large private firm whose cases might have come before the Supreme Court on several occasions in recent years. Other justices reported on donations of luxury travel without making any effort to calculate their dollar value, simply noting that "travel" and "lodging" expenses were "reimbursed" by a particular private firm. (One judge who did itemize the value of such "reimbursement" calculated that one such trip yielded over $7,500 in "reimbursements.")

What has been discovered by researchers—including industrious associates of Ralph Nader—might well raise eyebrows if found on the forms of any official other than a judge. Justice Kennedy, for example, reports receiving some $20,000 each summer for the past four years for participating in summer seminars on legal topics. When Newt Gingrich accepted a lucrative book deal, angry critics asked how he could have time to write a book while discharging his public duties as Speaker of the House. No one asks why Supreme Court justices have so much extra time for outside earnings. Justices already make $164,000—more than cabinet secretaries or senators—and, unlike politicians, they have no need to maintain a household in their home district.

At least Justice Kennedy's earnings from university lectures were unlikely to influence his official conduct. In other cases, judges and justices have accepted lavish benefits from interests with a direct stake in their judicial rulings. In early March, the *Minneapolis Star Tribune* documented a very extensive pattern of such conduct.

Most startling was the action of Judge John Minor Wisdom, who accepted a $15,000 award from the West Publishing Company at the very time he was serving on a three-judge panel hearing a major case involving the company. Judge Wisdom did not bother to inform the opposing party in the case and his eventual ruling was, in fact, in West's favor. When the *Star Tribune* revealed this conduct some years later, Judge Wisdom scoffed at the idea that such a substantial cash payment could influence his judgment.

It is true that West does not itself pick the winners of this award, now called the Devitt Award (in honor of a deceased Minnesota judge long associated with West). The company recruits a panel of judges to make the selection each year of the federal judge most deserving of recognition. But West has not bothered to distance itself from the award by endowing an independent foundation to administer it. On the contrary, top officials of West host not only the award ceremony but also the selection process. And, as the *Star Tribune* discovered, West has been remarkably generous to favored judges. The company has repeatedly hosted selection committee meetings for the Devitt Award in places like Palm Springs, Palm Beach, and the Virgin Islands. Neither the judges nor the company bothered to pretend that the sites were selected for their conduciveness to professional deliberation. The *Star Tribune* uncovered correspondence in which West Company officials remind their guests that travel and accommodations will all be first class and inquire whether the judges would prefer golf or tennis (and several justices weren't shy about specifying which they preferred).

Is there any reason to think West might want to influence the decisions of federal judges? In a word, yes. West is the major publisher of judicial opinions and is now subject to competition from smaller companies seeking to distribute court decisions by electronic media (through

on-line services or CD-ROM collections). West has tried to suppress competition by claiming that its printed editions of court opinions—which are the standard sources—are copyright-protected or at least that the page numberings are copyrighted. At the same time, the company has lobbied hard to persuade Congress to clarify the law in its favor. A recent bill to this effect was publicly described by a subcommittee chairman as "the West bill." To assure a sympathetic hearing, top officials of the company and their close associates have donated over a quarter of a million dollars to well-placed congressmen in recent years.

It is hard to see how anyone could believe that West's generosity to federal judges was not part of a parallel campaign. Over the past decade, as the *Star Tribune* discovered, seven justices of the Supreme Court (along with numerous lower court judges in the federal system) have accepted invitations to participate in West events at lavish resorts. In this same period, the Court has been asked to review five different cases involving West. In each case, the Court was petitioned by a disappointed opponent of West, seeking to have the high court reassess a West victory in a lower court. In 1986, when the Court had before it a petition for review in a suit by West's competitor Mead Data (publisher of Lexis), the West Company invited two justices not serving on the Devitt Award committee to join other judges for a "special 'advisory committee meeting'" at the Ritz-Carlton in Laguna Niguel. The two justices gratefully accepted. In this as in every other case, the Supreme Court declined to consider the petition—much to West's advantage.

The Supreme Court's practices seem to have encouraged similarly cavalier attitudes in lower courts. In 1991, at the very time he was presiding over two cases involving West, federal judge James Rosenbaum accepted the company's offer of VIP tickets to the U.S. Open Golf tournament. The tickets not only provided access to the tournament, but also secured free meals, transportation, and personal golfing privileges on the side. When the *Star Tribune* discovered the gift, Judge Rosenbaum dismissed its significance: "I took my mother-in-law to this event. I hate golf."

Such dismissive attitudes are not atypical. In a recent suit against West Company in a federal district court in New York, Judge Loretta Preska was asked by counsel for the opposing party (Hyperlaw, a commercial competitor of West) to disclose all her connections to the West Company. She acknowledged personal and family ties to a very recent winner of the Devitt Award, and certain social connections with West Company associates. But she abruptly rejected Hyperlaw's effort to make further inquiries into possible West influence on pending litigation.

Some months ago, Chief Justice Rehnquist participated in ceremonies to acknowledge contributions from the West Company to the Supreme Court Historical Society, presumably one of his favorite charities. More recently, Rehnquist gave a special briefing to a West-sponsored gala for editors of state bar journals—while commercial rivals of West were barred from the briefing. Other judges who have received benefits from West have been even more active on its behalf. Not long ago, several federal judges from Minnesota, where West is located, successfully lobbied Attorney General Janet Reno not to make publicly available an electronic database of court opinions that would have competed with West's offerings (for which it charges $4 a minute). The Judicial Conference of the United States voted not to make judicial opinions directly available to the public electronically. Among those who participated in this decision were several judges who had previously participated in Devitt Award proceedings.

It may be that no judge has actually violated the letter of the law in any of these incidents. But the U.S. Code does make it unlawful for any "member of . . . the executive, legislative, or judicial branch . . . [to] accept anything of value from a person . . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties." The pattern is also hard to square with general standards of judicial ethics. For example, the American Bar Association's Code of Judicial Ethics (which is widely cited, though not binding as law) warns judges not to accept any "gift" or "favor" if "the donor is . . . a party . . . who has come or is likely to come before the judge or whose interests have come or are likely to come before the judge." West is precisely such a "party" for all of the judges who accepted vacation "gifts" and entertainment "favors" from the company.

There is also the question of whether judges and justices may have violated federal tax law by failing to report to the IRS the in-kind benefits they received when they attended posh resort get-togethers in connection with Devitt Award selection meetings. *Tax Notes*, a highly respected publication on tax law, carried an analysis in its April 3 issue concluding that, according to the Supreme Court's own precedents, such benefits would indeed be taxable. But the article also reported that all the affected justices had declined to respond to formal inquiries on whether they had in fact reported this in-kind income to the IRS.

More telling is the contrast with ethics norms imposed on other officials. Commerce Secretary Ron Brown is now under a cloud of suspicion (including formal investigation by the Justice Department; see Byron York's "Money for Nothing," p. 34), in part because of questionable outside income. Imagine the response if Ron Brown had refused even to acknowledge whether he had declared a particular known payment as income. Agriculture Secretary Mike Espy was forced to resign from the Cabinet and now faces an independent counsel investigation because he accepted tickets to the Super Bowl and various travel favors from Don Tyson, whose poultry company is regulated by the Agriculture Department. Only those trained in the mysteries of the judicial craft can discern the ethical distinction between Espy's dereliction and the conduct of so many judges in relation to West Company.

Executive officials must consult officially designated "ethics officers" within each federal agency, who must, in turn, rely on the rulings of the Office of Government Ethics. The latter issues extraordinarily nit-picking regulations to ensure that executive officials do not behave in any way

that might even raise suspicions of improper influence. These regulations emphasize that executive officials cannot accept even token gifts (worth more than $20) from business interests that stand to benefit in any way from their official decisions. A "gift" is defined to include "entertainment, hospitality . . . transportation, local travel, lodgings and meals." The regulations offer, among other illustrative examples, the case of Air Force officials invited to "accept the gift of free attendance" at an aerospace industry seminar: the officials must decline, even if the topic of the seminar is relevant to their work, if the invitations are issued as well as paid for by particular aerospace contractors—which is exactly how the West Company operates with its Devitt Award selection committee shindigs.

The facts so carefully documented by the *Star Tribune* were almost totally ignored by the major media. The *Washington Post* ran a brief summary of the findings. The *New York Times* ignored the story altogether, as did network television and the major news magazines. When Justices Souter and Kennedy appeared before a Senate appropriations subcommittee in early April to present the budget request for the judiciary, they were asked a few desultory questions about West and brushed off the whole business as a misunderstanding. Justice Souter professed to be "amazed" that anyone could think there was anything improper in the pattern of conduct documented by the *Star Tribune*.

Perhaps everyone takes "the appearance of impropriety" so lightly when it crops up among judges because there is little chance that it will be pursued. The statutory provision, requiring appointment of an independent counsel, which has helped to fan so many scandals in the past, applies only to executive officials, not to judges.

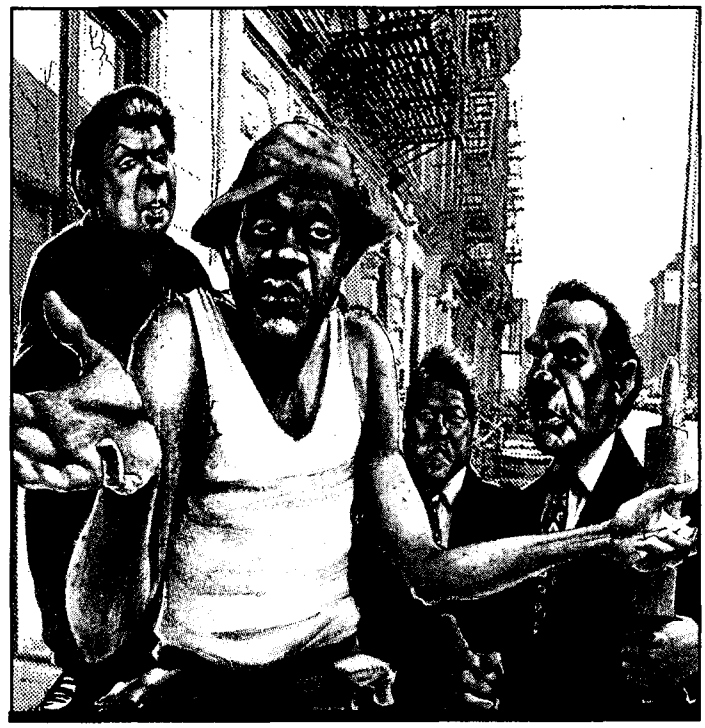
Back in the late 1960s, angry Senate Republicans played a key role in exposing the financial improprieties that drove LBJ crony Abe Fortas to resign from the Supreme Court. For most of the period since then, a liberal-dominated Congress saw little reason to challenge a Supreme Court that continued to drift along in a liberal tide. But a new Congress that seeks to change course in many areas—affirmative action, education, family issues, and crime control, for example—may find an arrogant Supreme Court more of an obstacle. Republicans may thus have a special stake in reminding the justices that they must abide by the same ethical constraints as other public servants.

Ultimately, however, the problem of ethical laxity in the judiciary is not just a partisan challenge. Scandals in Congress over the past decade have generated bipartisan support for recent reform measures (such as the new law making regulatory laws for the private sector binding on Congress as well). Now that Congress has begun to reform its own abusive practices, it might serve the country by turning some scrutiny upon, and considering some ethical reforms for, what remains the smuggest branch—the judiciary. ❐

George Gilder

End Welfare Reform as We Know It

In its zeal to rush welfare moms to work and track down deadbeat dads, the right is just as wrong as the left. Does it make any sense to "reform" welfare in a feminist culture?



When Charles Murray is quoted respectfully by President Clinton, when Bob Dole receives friendly tributes from George McGovern, when the portly conservative Michigan governor Robert Engler rivals Barbra Streisand's standing-room crowds at congressional hearings—then we know that welfare revolution is in the air. The overthrow of welfare is the most popular clause in the Contract with America and the most comely idea of the newest "New Democrat" summits in the halls of the White House.

Yet for all the streams of sulfurous talk and all the seemingly bold proposals, no one is really changing his mind. Today's welfare discussion is bounded by the failed principles of the feckless "workfare" campaigns and bogus welfare crackdowns of the past.

Informing nearly all current debate and legislation on welfare from both parties are ten key principles:

(1) The key welfare problem is single mothers and their illegitimate children.

(2) These mothers should work, or train for employment.

(3) Government can create employment for them, prepare them for jobs, and/or care for their children.

(4) Unmarried "deadbeat dads" bear equal responsibility for the children and should pay up.

(5) For the *deserving* poor—the "truly needy"—benefits can rise.

(6) The undeserving poor should be kicked off the rolls at a date certain.

(7) The government can tell the difference between the deserving and undeserving poor.

(8) Government can support families without requiring marriage.

(9) Tough welfare reforms have worked in California under then–Governor Ronald Reagan and are working in other states.

(10) Welfare, as we know it, can be ended.

These ten principles are all fallacious. The fact is that serious workfare programs are far worse than the existing welfare system. They represent a potentially huge expansion of the welfare state. If welfarist Democrats are smart—and they are—they could use the cover of tough Republican rhetoric to enact most of their socialist and feminist dreams.

The key problem of the welfare culture is not unemployed women with illegitimate children. It is the women's skewed and traumatic relationships with men and boys. In a reversal of the usual pattern in civilized societies, the women have the income and the ties to gov-

George Gilder is senior fellow at the Discovery Institute. Parts of this essay are adapted from the new edition of his book Visible Man, *reprinted this month by ICS Press and the Discovery Institute.*