

PERSPECTIVES ON
STATE COURT LEADERSHIP

THE POLITICS OF RESTRAINT

STATE JUDICIAL LEADERSHIP IN THE 21ST CENTURY

*One in a series from the Executive Session
for State Court Leaders in the 21st Century*

written by:
Jeff Amestoy

 **HARVARD Kennedy School**
Program in Criminal Justice
Policy and Management

NCSC
National Center for State Courts


State Justice Institute

PERSPECTIVES ON STATE COURT LEADERSHIP

This is one in a series of papers that will be published as a result of the **Executive Session for State Court Leaders in the 21st Century**.

The Executive Sessions at the Harvard Kennedy School bring together individuals of independent standing who take joint responsibility for rethinking and improving society's responses to an issue.

Members of the Executive Session for State Court Leaders in the 21st Century over the course of three years sought to clarify the distinctive role of state court leaders in our democratic system of government and to develop and answer questions that the state courts will face in the foreseeable future. Themes addressed include principles for effective court governance, the tension between problem solving and decision making, the implications of social media for court legitimacy, how courts defend themselves from political attack, and the notion of chief justices as civic leaders. Many themes were developed by Session members into papers published in a series by the National Center for State Courts.

Learn more about the Executive Session for State Court Leaders in the 21st Century at:

NCSC's web site:
www.ncsc.org/executivesession

Harvard's web site:
http://www.hks.harvard.edu/criminaljustice/executive_sessions/statecourts

SJI's web site:
<http://www.sji.gov/>

PUBLISHED: APRIL 2014

REPORT AUTHOR

Jeff Amestoy



Jeff Amestoy was Chief Justice of the Vermont Supreme Court from 1997-2004. He was Attorney General of Vermont from 1985-1997. He is a Fellow at the Center for Public Leadership, Harvard Kennedy School.

State court judicial leaders are more than stewards of a branch of government: they are leaders of a democratic society. Like their executive and legislative peers, effective state court leaders are deeply engaged in political tasks essential to the legitimacy of democratic governance. However, for state court leaders, the restrained and prudent use of judicial branch authority is what maximizes their capacity to exercise their broader responsibility as leaders of a democratic society. Court leaders therefore, in contrast to leaders of the other branches, need to carefully limit reliance on their institutional capital for purposes of advocating the budgetary and other institutional needs of the judicial branch.

There is reluctance to ascribe the word “political” to any function of state judicial leadership. Especially when used in its pejorative sense, the word can seem particularly jarring—a call for exalted judges to engage in crass politics—but defined more broadly, “political” should be understood and conceptualized to capture the honorable aspirations of leaders of a democratic society. In fact, state judicial political leadership is critical to the health of American democracy in the 21st century.

Contemporary state judicial leaders well understand that their leadership responsibilities extend far beyond the traditional obligations of opinion writing and case management. Indeed, modern chief judges are so familiar with the consuming tasks of institutional administration, budget negotiations, and legislative and executive relations—to name but a few—that they have described themselves as having a “day job” (in which administrative and management duties are addressed) and a “night job” (in which briefs are read and opinions written).

The day job/night job description captures a reality of state judicial leadership that is largely unrecognized by the public, ignored by scholars of government, and sometimes only dimly perceived by judicial colleagues. Political leadership is part and parcel of any state court leader’s daily role. Yet even those justices attuned to the day and night demands of state court leadership can underestimate the political dimension of their leadership responsibility.

As conceptualized here, the political component of state judicial leadership is one that seeks to strengthen the democratic polity by capitalizing on the unique attributes of state judicial leaders in the American democratic experiment. Unlike their federal counterparts—appointed for life by the president—state court leaders are regularly accountable to the citizenry they serve, often either through direct elections or judicial retention hearings by legislators. Indeed, state judicial initiatives are characterized by accessibility, accountability, transparency, and citizen engagement. Even beyond formal mechanisms like elections and retention hearings, state court leaders are often exposed to informal feedback as well—from litigants to legislators. For state judicial leaders, there’s little anonymity in their work.

On the job, our federalist system immerses state judicial leaders in the thicket of competing political interests. When perceived solely as stewards of the judiciary, successful state judicial leadership is measured by how well one emerges from that thicket with priorities and independence intact. But the public does not evaluate state judicial leadership by asking “how well is the branch managed?” The public measures state judicial leaders—as they should—by the success with which those leaders enhance virtues of a democratic society—fairness, equality, liberty, and integrity.

Contemporary state judicial leaders well understand that their leadership responsibilities extend far beyond the traditional obligations of opinion writing and case management.

How then might one envision a political dimension of state judicial leadership that could enhance the principles and norms that enable us to be a democratic polity? What value might a new conceptualization of the political aspect of state court leadership

The political context of state judicial leadership is distinct from the special interest environment in which executive and legislative branch leaders must operate.

produce for democratic governance? Under what authority could that value be produced?

To paraphrase John Dewey: if civic leadership is calling into existence a public that could understand and act in its own interest,¹ state judicial leaders—free of the special interest politics that constrain executive and legislative leaders—are uniquely positioned to foster the broadest conception of the public good. The political context of state judicial leadership is distinct from the special interest environment in which executive and legislative branch leaders must operate. The familiar litany of perverse incentives (political fund raising, political attack ads, single issue constituencies, etc.) has weakened the capacity of executive and legislative leaders to speak to, and act in, the broader best interest of the social polity.

Chief judges, even if elected, have been relatively insulated from partisan politics, and effective state judicial leadership has been largely unrelated to the method of selection. The move to transform judicial elections into highly partisan political contests indistinguishable from executive and legislative races threatens judicial independence.² It also risks making state judicial leaders, in public perception, “just like politicians.” State judicial leaders derive authority from the citizen’s conception of the judiciary’s role in American democracy. The public consistently places greater trust in the judiciary than in either the executive or legislative branches.³

THE POLITICS OF RESTRAINT

In an age of political excess, restraint is little valued as a source of political authority. By training, temperament, and judicial function, state court leaders rightly conceive restraint as a virtue essential to the branch’s legitimacy. But restraint can provide state judicial leaders the standing to exercise the necessary political dimension of their leadership. The restrained and prudent use of judicial branch authority maximizes the capacity of state judicial leaders to exercise their broader responsibility as leaders of a democratic society.

The affirmative rights that typify many state constitutions (e.g., the right to privacy, the right to adequate education) often compel judicial decisions that prompt public, legislative, and executive branch responses.⁴ The structure of state constitutional law provides legitimate roles for the public, legislature, and executive in responding to judicial opinions.⁵ State constitutional amendments prompted by citizen initiative petitions or a state’s legislative process are often a part of the “constitutional discourse.” Effective state judicial leadership recognizes that judicial authority is not ultimate authority.

The politics of restraint cautions judicial leaders to be equally alert to nuances of political engagement in judicial advocacy of programs and appropriations. Every state judicial leader engaged in the challenges confronted by American society understands the inherent tension between the judicial responsibility to decide cases and the desire to alter the social conditions that give rise to those cases.

“Problem solving courts,” of which “drug courts,” “mental health courts,” and “fathering courts” are but three examples, represent responses of state judicial leaders to the understandable desire to confront “the fierce urgency of now.”⁶ Yet such initiatives—which require interaction with legislators and other stakeholders—must be accompanied by a nuanced calculation of both the cost of that political engagement and the risk of compromising the distinct status of the judiciary as impartial adjudicators.⁷ Restraint provides a value for state judicial leaders who are compelled to navigate the currents of interbranch relations.

If judicial independence is to be found in the freedom to design the architecture of one's own restraint, state judicial leaders must be particularly attuned to how they expend political capital in building the architecture. For example, a state judicial leadership initiative that seeks to marshal legislative support for judicial appropriations by enlisting the lobbying power of the business community could raise questions of its potential effect on the judiciary's reputation for decisional independence. A judicial independence, historically rooted in the capacity to produce case decisions free from influence, cautions restraint in utilizing a state judicial leader's political capital for protecting funding when it may be needed to preserve decisional independence.⁸

A useful framework for envisioning a coherent exercise of state judicial political leadership may be found in a state judicial leader's response to three questions: (1) Who am I? (2) To whom am I speaking? and (3) What do I say? Consistent with the concept of state judicial leadership asserted here, if the answer is: "I am a leader of a democratic society speaking to the citizenry in order to advance the principles and norms of our social polity," one may find the beginnings of a leadership strategy that marshals the authority of chief judges to be a different kind of political leader.

"State of the Judiciary" speeches provide one context in which the distinctive voice of the state judicial leadership may be amplified to address the principles and norms of a democratic society. A governor's "State of the State" address, infused with political self-interest and programmatic agenda, is communicated in the dialect of special interests. State judicial leaders, free from the constraints of interest politics, can speak with a different vocabulary—one focused more explicitly on the citizenry and the ideals of a democratic society. State judicial leaders with a platform and purpose to invoke the broadest, best values of a democratic society must be wary of narrower objectives that can mute their voices.

Every judicial leader who addresses the state of the judiciary makes choices on what to say and how to say it.⁹ Vocabulary matters. State of the judiciary speeches typically fall somewhere on a continuum from those who frame their message in the language of

service delivery, efficiency, and branch management to those who use the platform to call forth a public that can perceive its interest in principles of equality, fairness, and liberty. Of course, a state of the judiciary address seldom allows picking just one end of that continuum. No state judicial leader can avoid the ramifications of a budget crisis, and effective speeches have eloquently related budget choices to the broader societal goals of fairness and access to justice

The political dimension of state judicial leadership can be strengthened by sensitivity to the role of other branches in shaping state constitutional law, an appreciation of the risk of problem-solving courts to judicial authority, and a nuanced response to the negotiation of judicial accountability and independence. The capacity of chief judges to advance the principles and norms of a democratic polity can be enhanced by the power of restraint.

Every judicial leader who addresses the state of the judiciary makes choices on what to say and how to say it.

State judicial leaders have always, and will always, confront a gap between judicial goals and the resources to meet those goals. Ultimately, the judiciary's claim for adequate resources rarely depends solely upon a judicial leader's capacity to manage the branch. Instead, the authority of the judiciary to draw on the limited resources of a democratic society rests upon the extent to which the citizenry endorses the values the judiciary represents. That is why state judicial leaders who seek to fulfill their broader responsibility as leaders of a democratic society must continuously remind themselves that they speak for more than a branch of government, about more than budgets, to more than an audience of interests. In fact, the strongest tool a respected state judicial leader has isn't "branch independence" so much as it is the standing to articulate the values of a democratic society.

The state judicial leadership challenge of 21st-century America will not be limited to protecting and enhancing judicial legitimacy. In a future that will transform today's judiciary, judicial leaders will need more than the authority of their branch. They will need a voice—restrained but persistent—that derives authority from a citizenry that judicial leaders have called into existence to understand and act in its own best interest. A court's ability to “do equal right and justice” doesn't just happen by virtue of words written into constitutions generations ago. Maintaining the power and freedom to accomplish justice is a constant political struggle—as it should be in a democratic society.

In a future that will transform today's judiciary, judicial leaders will need more than the authority of their branch. They will need a voice—restrained but persistent.

REFERENCES

- 1 Stephen Goldsmith, Gigi Georges & Tim Glynn Burke, *THE POWER OF SOCIAL INNOVATION: HOW CIVIC ENTREPRENEURS IGNITE COMMUNITY NETWORKS FOR GOOD* 139 (2010) (referencing JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927)).
- 2 See JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER, & LINDA CASEY, BRENNAN CENTER FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009* (2010).
- 3 Alan Tomkins, *Editor's Note*, 43 *COURT REVIEW* 54 (2006) (“[I]t is no surprise that opinion polls reveal there is greater trust and confidence in members of the judiciary than those they elect to legislatures or state/federal executive positions.”).
- 4 See Robert F. Williams, *State Constitutions and Marriages of Same-Sex Couples*, 43 *B.C.L. REV.*73, 87 (2002) (“This notion of affirmative rights is a very important way to distinguish state constitutional rights from the more familiar negatively-phrased federal constitutional rights.”).
- 5 Those interested in extended discussion of the author’s view of restraint in this context see Jeffrey L. Amestoy, *Pragmatic Constitutionalism: Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 *RUTGERS L.J.* 1249 (2004). For an astute examination of issues relating to state court leadership in public policy, see David J. Barron, *Making Policy Off the Bench: Putting the Role of State Court Leaders in Context*, Presentation at the Pew/National Center for State Courts Conference (May 9, 2008).
- 6 Martin Luther King, Jr., *I Have a Dream Speech* (Aug. 28, 1963), available at http://avalon.law.yale.edu/20th_century/mlk01.asp.
- 7 For a recent perspective on the challenge of maintaining problem-solving courts in the face of competing budget interests, see Gordon M. Griller, *The Quiet Battle for Problem-Solving Courts*, National Center for State Courts (2011), available at <http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/specialized-courts-services/3-1-the-quiet-battle-for-problem-solving-courts.aspx>.
- 8 David J. Barron, *Judicial Independence and the State Court Funding Crisis*, 100 *KY. L.J.* 755 (2012).
- 9 For further exploration of this point, see National Center for State Courts, *Interbranch Relations: State of the Judiciary Messages*, <http://www.ncsc.org/Topics/Court-Management/Interbranch-Relations/State-Links.aspx> (last visited Mar. 7, 2014).

This project was supported by Grant No. 2007-DD-BX-K056 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

MEMBERS OF THE EXECUTIVE SESSION FOR STATE COURT LEADERS IN THE 21ST CENTURY

Jeff Amestoy

*Fellow, Harvard Kennedy School; Chief Justice,
Vermont Supreme Court, Retired,*

David Barron

Professor of Law, Harvard Law School

Daniel Becker

*State Court Administrator, Utah Administrative
Office of the Courts*

Michael Bridenback

*Trial Court Administrator,
Thirteenth Judicial Circuit (Tampa, FL)*

Russell Brown

Court Administrator, Cleveland Municipal Court

John Cleland

Judge, Superior Court of Pennsylvania

Paul DeMuniz

Chief Justice, Supreme Court of Oregon

Christine Durham

Chief Justice, Supreme Court of Utah

Ted Eisenberg

*Henry Allen Mark Professor of Law,
Cornell Law School*

Rosalyn Frierson

*State Court Administrator, South Carolina
Judicial Department*

Thomas Gottschalk

Of Counsel at Kirkland & Ellis

Garrett Graff

Editor-in-Chief, Washingtonian Magazine

James Hannah

Chief Justice, Arkansas Supreme Court

Vicki Jackson

*Carmack Waterhouse Professor of Constitutional Law,
Georgetown University Law Center*

Wallace Jefferson

Chief Justice, Supreme Court of Texas

Margaret Marshall

*Chief Justice, Supreme Judicial Court
of Massachusetts, Retired*

Mary McQueen

President, National Center for State Courts

Mee Moua

*Vice President for Strategic Impact Initiatives, Asian &
Pacific Islander American Health Forum (APIAHF);
Senator, Minnesota Senate, Retired*

Barbara Rodriguez Mundell

*Presiding Judge, Superior Court of AZ, Maricopa
County, Retired*

Judith Resnik

Arthur Liman Professor of Law, Yale Law School

Greg Rowe

*Chief of Legislation and Policy Unit, Philadelphia
District Attorney's Office*

Randall Shepard

Chief Justice, Supreme Court of Indiana

Jed Shugerman

Assistant Professor of Law, Harvard Law School

Christopher Stone

*Guggenheim Professor of the Practice of Criminal
Justice, Harvard Kennedy School*

Michael Trickey

Judge, King County Superior Court

William Vickrey

*Retired Administrative Director,
California Administrative Office of the Courts*

Eric Washington

Chief Judge, District of Columbia Court of Appeals

Julie Boatright Wilson

*Harry Kahn Senior Lecturer in Social Policy, Harvard
Kennedy School*

