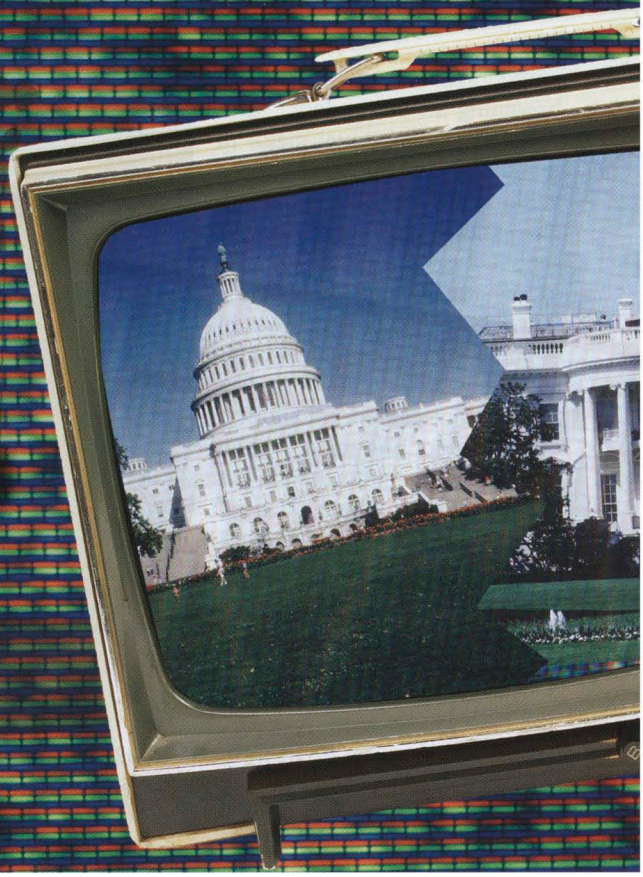
BALANCING JUSTICE

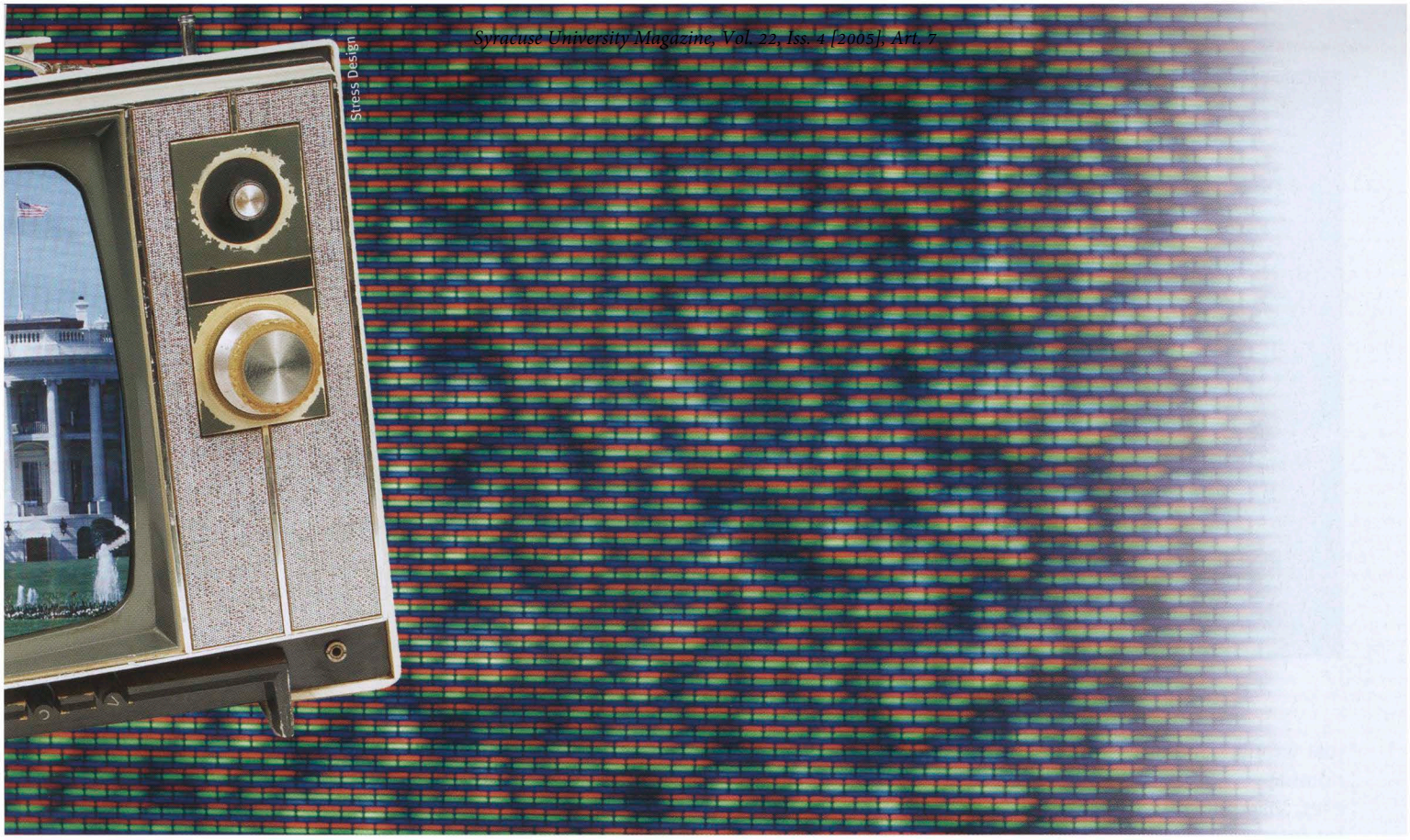


An SU symposium in Washington, D.C., draws together legal experts to debate the impact that media, politics, special interests, and others have on an independent judiciary

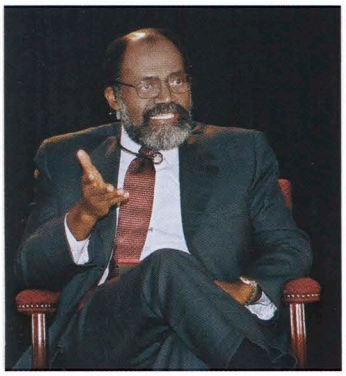
By Mark Bernstein
Photos by Karen Ruckman

As the nation turned its attention to U.S. Supreme Court nominations this past fall, Syracuse University brought together key voices for a two-day symposium in Washington, D.C., to explore the issue of an independent judiciary. The symposium, "Bench Press: The Collision of Media, Politics, Public Pressure, and an Independent Judiciary," provided a multifaceted examination of the topic, including a unique look at the media's influence on the judiciary and politics. "Our increasingly diverse, increasingly fractured society looks to the courts to interpret laws when we cannot agree," Chancellor Nancy Cantor said at the opening of the symposium, which was broadcast on C-SPAN. The resulting pressure on the courts, she suggested, threatens the independence that has been a historic strength of the judicial system. As a consequence, Cantor said, "There is an urgent need for a national conversation between the academy, the courtroom, and the newsroom."

The interdisciplinary event—sponsored by the College of Law, the Maxwell School of Citizenship and Public Affairs, and the S.I. Newhouse School of Public Communications—drew on the schools' combined strengths and brought together leading federal and state judges, law professors, academics, and journalists to take part in four panel discussions addressing the issues. To focus discussion, the symposium coincided with the release of a national survey on public attitudes toward the judiciary, conducted by the Maxwell School.



Insights gathered at the symposium will inform planning for the University's proposed Center for the Study of the Judiciary, Politics, and the Media, to be sponsored by the College of Law and the Maxwell and Newhouse schools. Significantly, the October 17-18 symposium was held shortly after John Roberts was confirmed as chief justice of the Supreme Court and before Harriet Miers withdrew her nomination for a seat on the Supreme Court, prior to confirmation hearings. The session's first panel, chaired by College of Law professor Lisa Dolak G'88, reviewed the health of the confirmation process. Anthony Lewis, the former *New York Times* columnist and Pulitzer Prize winner, called attention to the role of interest groups. "The notion that you should pick justices because of their views on a particular subject," he said, "is really dangerous." A given justice, he added, may serve for decades, ruling on all sorts of matters beyond individual political concerns raised at confirmation. Robert J. Grey Jr., past president of the American Bar Association, noted the general rise of interest-group politics. "They are more vocal; more is at stake; they are more armed with money and votes," he said. This heightened activity is now being applied to the confirmation process. That stronger interest-group focus, suggested New York University law professor Stephen Gillers, reflects the issues now reaching the Supreme Court. Such questions as abortion and gay rights "generate intense feeling," he said. "Everyone knows that the court is likely to have the last word, or at least a very important word, on the subject."



Judge Theodore McKee G'75, a College of Law graduate who serves on the U.S. Court of Appeals for the Third Circuit, discusses media coverage of his court.

Interest-group pressure framed the next question: How is impartial justice to be ensured in a politicized atmosphere? That question was addressed by the symposium's second panel, chaired by John M. Walker Jr., chief judge of the U.S. Court of Appeals, Second Circuit. Walker began by offering his own definition of the judge's role. "To determine what law is out there…and once the law is determined, to apply it to the facts of a case," he said. "This is needed to create a system that is consistent and reliable. Law is grounded in the law, not in the judge, who is an intermediary."

That view brought challenge from George Washington University law professor Jeffrey Rosen. In most cases, Rosen agreed, judges follow the law, but "in a small category of hotly contested cases, there is a relationship between judges' views and their rulings," he said. In those cases, he added, the courts tend to side with popular opinion. Rosen generally approved of this, noting the public was content with courts that followed majority views. Courts, however, got into trouble when they pushed a minority view, he said, citing as an example the 1857 Dred Scott decision that held states could not act against slavery.

Disagreement occurred over whether court nominees should be required to state their views on current issues. Jeffrey Toobin, legal writer for *The New Yorker*, said, "What everybody wants to know is Roe v. Wade. We're not allowed to ask their opinion, and the cat-and-mouse game we play is

Newhouse professor Mark Obbie, right, questions Dahlia Lithwick, a senior editor at *Slate.com*, and Fred Barbash of the *Washington Post* about the media's role in covering judiciary issues.

just wrong." Toobin urged a more demanding questioning of nominees. Alabama Supreme Court Judge Harold See, however, asked the purpose of questioning: "Are senators looking for information on the candidate, or just for more ammunition?" See added that news reporting on court decisions commonly gave the judge's political affiliation; this, he said, encouraged partisanship by "suggesting that the judge is not trying to be objective." Any public *perception* of partisanship was a concern, he said. Here, data from the Maxwell School Poll proved pertinent. One question revealed that 57 percent of respondents believed that, at least at times, judges decided cases based on their personal beliefs.

Still, judges must be selected by some means. What those means should be was addressed by the third panel, moderated by Professor Keith Bybee, the Michael O. Sawyer Chair in Constitutional Law and Politics at the Maxwell School. Noting that 87 percent of the nation's state and local judges are elected, Bybee asked what the respective merits were of elected judges versus appointed ones.

Norman Ornstein, resident scholar at the American Enterprise Institute, stated flatly that "judicial elections are an abomination." There was, he said, great pressure for corruption, not simply from special interests trying to purchase favoritism from judges, but also from judges "shaking down" the lawyers who might, in the future, argue in their courts.

Here, the Maxwell School Poll pointed to public ambivalence. On the one hand, 47 percent thought more judges should be elected, while only 15 percent thought fewer should be. On the other hand, 73 percent said judges should be shielded from outside pressure. This, panelists suggested, was an awkward combination—selecting judges through increasingly contentious judicial elections might make them more vulnerable to the same special interests that the public wished them protected against. "The public believes in elections viscerally, but they are fatigued by the huge number of elections we have in this country," said Thomas Mann, senior fellow at the Brookings Institution. "I study these things as a living, yet I confess I go to the polling place essentially uninformed about judicial candidates."

Justice Harold See, left, of the Alabama Supreme Court emphasizes a point to John M. Walker Jr., chief judge of the U.S. Court of Appeals for the Second Circuit.

On the issue of campaign fund raising and judicial independence, two panel members spoke from direct experience. Warren McGraw, former justice of the West Virginia Supreme Court, described how he was defeated for re-election in 2004 in a campaign that saw corporate interests spend $15 million to unseat him—possibly the most expensive judicial election in history. James Graves, a justice of the Mississippi Supreme Court, was re-elected, despite being outspent by his opponent three-to-one. Both, however, endorsed electing judges. "Whatever the shortcomings of the electoral process, I still believe that a system that connects Americans with their government is the best we could have," McGraw said. Graves offered a similar view. "At some level, I resent the notion that there is a blue ribbon group of experts that is superior [to the general public]," he said.

Once judges are selected, public knowledge of their actions comes primarily from the news media. The day's final panel, chaired by Newhouse magazine professor Mark Obbie,

Chancellor Nancy Cantor addresses the symposium gathering in Washington, D.C. Looking on are Robert J. Grey Jr., left, former president of the American Bar Association, SU College of Law professor Lisa Dolak G'88, and New York University School of Law professor Stephen Gillers.

addressed the quality of that reporting. Dahlia Lithwick, legal correspondent at *Slate.com*, said that on becoming a Supreme Court reporter, she had been "stunned that oral argument is covered so reverently by the media." Little attention was paid, she said, to the judges' personalities or to the dynamics within the court. The consequence was that the court ends up "being the voice passed down from the mountain," she said. "We revere it at our peril." Fred Barbash, staff writer of the *Washington Post* and its former Supreme Court correspondent, disagreed. "The absence of insider knowledge about the court forces reporters to write about the cases," he said.

Panelists acknowledged that, below the level of the Supreme Court, coverage was limited and often poor. Theodore McKee G'75, a College of Law graduate who serves as a U.S. Court of Appeals judge for the Third Circuit, said there was little press interest in his court's work, perhaps because cases of urgent public interest rarely came before it. "In 11 years," he said, "I had two cases related to school prayer, none to abortion, none to capital punishment."

Bruce Collins, general counsel of C-SPAN, acknowledged that media coverage of lower federal and state courts faces problems. Legal reporting does not lend itself to the visual coverage television wants, he said; further, within most media outlets, court reporting is a low priority. "The court beat is almost the lowest of the low," he said. "The turnover among reporters is rapid, so judges are reluctant to put too much time into explaining things to them."

Each panel, in turn, identified areas for possible action. In the panel on media, Professor Thomas Goldstein of the University of California at Berkeley Graduate School of Journalism and the school's former dean, commented, "The court system is not covered particularly well. What we have never done is to cover it as a system or looked at new ways to cover it." In the panel on judicial selection, Thomas Mann of the Brookings Institution said, "The biggest challenge here is to figure out how to recruit able people to serve in the judiciary at every level of government."

Issues such as these—raised in the symposium—will continue to be addressed as the "conversation" initiated by Syracuse University moves forward. "We entrust the judiciary with preserving democracy, and we entrust universities with educating a democratic citizenry," Chancellor Cantor told those attending the conference. "We ask both types of institutions to take on issues and cases for dialogue and deliberation that public debate and politics cannot resolve, matters that are often extremely complex and require extensive—and expensive—investigation."

The Chancellor told the conference that she hopes the University can establish a center where scholars in the fields of public affairs, politics, the law, and public communications can collaborate in examining the pressures on an independent judiciary and then work together to address them.