

Houston Philosophical Society

634th Meeting

Cohen House

January 21, 2010

Under the leadership of President Evelyn Keyes, the Society gathered for a reception and dinner meeting. Following dinner, Vice President Herb Ward assisted in the introduction of both visitors and newly elected members of the Society.

President Keyes introduced Erica Hall, a member, to introduce the speaker of the evening for whom she had previously clerked.

Judge Lee H. Rosenthal, a federal judge for the Southern District of Texas since 1992, moved to that position from a partnership at Baker & Botts in Houston. She received her undergraduate and law degrees from the University of Chicago. As a federal judge, in addition to a heavy docket, she has been appointed to leadership positions in the revision of the rules utilized in the federal court system. She serves on the Rice University Board of Trustees and has twice been named "Trial Judge of the Year" by the Texas Association of Trial and Appellate Lawyers.

Judge Rosenthal indicated that the federal courts are at present in a time of crisis and that for most of the period since the creation of the system in 1789 this has been the case. She cited the decision on campaign financing that was handed down on the day of the meeting.

From her perspective the courts are frequently involved in "bread and butter" issues and these today included reaction to the incredible changes in technology, immigration, terrorism (and balancing the protection of citizens as well as the protection of civil liberties), and the economy.

Technological advances have had a major impact on the courts. As recently as 2002 (the "old" days) all filings with the court were paper while today almost most are electronic. With this development there has been a major concern in balancing the conflicts between openness and privacy. What should be held to be private and confidential (such as trade secrets) and what should be available to the public? Electronic access to the records poses a major new issue and concern.

The judge pointed out that a large number of criminal proceeding result in plea bargain agreements. A major reason for this is that some 50% of the defendants are pro se and seeking resolution of problems including those within prison systems. Sometimes plea agreements are designed to deal with defendants who have cooperated by providing information about various sorts of offenses. While plea agreements are always presented in open court with the defendant present, these agreements are now stored electronically. How is the balance between openness and privacy to be maintained in the light of this?

Immigration has had a major impact on the size of dockets in various parts of the federal system. In both the 5th circuit and the 9th circuit (both of which have large areas of common border with limited Mexico) a significant increase has occurred. From 1990 to 2009 the number of cases nearly trebled. Seven judges are in the Southern District of Texas and the federal system counts 1300 judges. In 2009 81,419 defendants were sentenced and 7,607 (or 9.3%) were in the Southern District of Texas. 7 of 1300 federal judges did 7% of the sentencing. This regional impact has not resulted in any change in the number of authorized judgeships.

National Security also presents basic challenges to federal system. The Southern District of New York in New York City has already had experience with terrorism trials and seems likely to deal with current prosecutions. Judge Rosenthal believes that they are well prepared to preside over such trials. But, what could result from calls for change of venue? How are the issues of privacy vs. public access to be resolved?

The current economic situation also strains the system. There are increasing numbers of regulations and increasing court enforcement of regulations. There has also been a significant, and predictable, surge in bankruptcy filings.

Perhaps the most pressing issue for the judiciary (highlighted by today's decision on campaign financing) is an increasing view of judges as themselves political. This gives rise to concerns regarding the maintenance of judicial independence. Independence is particularly threatened when judges are not only elected, but elected on a partisan basis. Partisanship also plays a role in the appointment and approval of federal judges. There is a natural tendency to seek compatibility of appointees with appointers and this fact adds to the involvement in the political process.

The amazing thing is that we honor judicial decisions as binding even as we may disagree with them. There has been remarkably little need for military enforcement.

How Judges Think is a recent publication of Judge Richard Posner of the 7th circuit (Chicago). Posner views judges as political decision makers. Judge Rosenthal took exception to this position and said this "is not what we do."

Close cases are decided in the light of external and internal constraints. External constraints include (1) facts, (2) trial procedures, (3) interest of clients, (4) opinion writing, (5) size and breadth of docket [not just politically charged], and the appellate process (collegiality). Internal constraints include (1) oaths taken seriously, (2) factors affecting the process and guarding against personal influence, (3) procedures neutralize bias, (4) the academy and the press just don't get it, (5) law faculties especially don't get it. They were once natural allies of the judiciary with a shared commitment to disciplined analysis and not politics. There is a movement back to judges as political activists.

Today's 5-4 ruling on finance will be taught on the basis of who was in the majority and who was in the minority. But judicial work is careful examination of the facts and present and then close analysis.

Judge Rosenthal then took questions including some dealing the process for selection of judges at the state and district level in various places.

Don R. Byrnes

Recording Secretary