

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

FAREWELL 2023

Based on a review of my social media feeds, it seems that many of my friends and professional colleagues are happy to see the end of 2023. I understand. While parts of 2023 were great fun for my family,¹ it is hard to ignore the global conflicts happening around us. In addition to global conflict, 2023 saw strife on college campuses, economic uncertainty, and increasing distrust in political institutions. According to a Pew Research Center poll, only 16% of Americans trust the federal government “to do the right thing just about always or most of the time.”² This rating “is among the lowest in more than 70 years of polling.”³ Americans’ views of Congress continue on a downward spiral, with 72% of Americans stating that they “have an unfavorable view” of Congress.⁴ This

1. I highly recommend vacationing in the Black Hills of South Dakota.

2. *Americans’ Dismal Views of the Nation’s Politics*, PEW RESEARCH CENTER (Sep. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/views-of-the-us-political-system-the-federal-government-and-federal-state-relations/>.

3. *Id.*

4. *Americans’ Dismal Views of the Nation’s Politics*, PEW RESEARCH CENTER (Sep. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/how-americans-view-congress-the-president-state-and-local-political-leaders/>.

“unfavorable rating is now among the highest in nearly four decades of polling.”⁵

Judges have not been immune from the negative polls. According to Pew’s poll, “the share of Americans with a favorable opinion of the U.S. Supreme Court has declined to its lowest point in public opinion surveys dating to 1987.”⁶ While Pew attributes the low rating to the Court’s rulings in high-profile cases, I suspect that high-profile news stories on ethics issues has played a role. In fact, in late 2023 the Court adopted a code of conduct.⁷

As readers of the *Journal* know, I like to identify a thread that pulls together the various articles in each issue.⁸ In reflecting on this issue of the *Journal of Appellate Practice and Process*, I see a common thread related to judicial behavior and the impact of that behavior on the practice of law and precedent.

First, Professor Sarah M. R. Cravens looks at how gaps in judicial misconduct cases could potentially be filled by more regular recording of judges in state court. While the topic of recording judges can be controversial, Professor Cravens makes a compelling argument that recording more official judicial conduct will protect not only those who complain about judicial misconduct, but also the judges who are accused of misconduct. Professor Cravens also offers thoughtful solutions to potential challenges in recording judicial conduct.

Next, Professor Bryan Lammon addresses the distinction between final decisions and final judgments. As Professor Lammon explains, litigants and judges are less than precise in how they talk about these two court actions, which can “create needless procedural detours

5. *Id.*

6. Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RESEARCH CENTER (July 21, 2023), <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/>.

7. *Statement of the Court Regarding the Code of Conduct*, UNITED STATES SUPREME COURT (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

8. Tessa L. Dysart, *A Common Thread*, 23 J. APP. PRAC. & PROC. v (2023).

that add complexity to the already-messy law of appellate jurisdiction.”⁹ Using the circuit split over dismissals with leave to reinstate as an example, Professor Lammon explains the separate roles that final decisions and final judgments play.

Anders K. Newbury looks at a fascinating constitutional crisis in Montana that led to a showdown between the state legislature and the state supreme court—a showdown that could occur in other states and that could have implications for judicial independence. In the name of securing judicial accountability, these showdowns raise significant judicial independence concerns. Newbury explores the best mechanisms to balance these two important interests.

Our final article strays a bit from our theme, but it holds another distinction—it is the first responsive article that we have published since the *Journal* came to the University of Arizona James E. Rogers College of Law. Thankfully, we were able to squeeze it in at the last minute into this issue. In the article Gregory R. Hargis, who has served as an active or reserve Judge Advocate in the Navy since 2015, addresses Professor Eugene R. Fidell’s article¹⁰ from the previous issue about terminating the United States Court of Appeals for the Armed Forces. While Hargis agrees with much of what Professor Fidell wrote, he makes his argument by addressing a gap in Professor Fidell’s piece—namely the question of why military justice deserves separate treatment.

Finally, I review a legal biography about a veteran appellate attorney in the New Jersey Attorney General’s office who had the once in a lifetime opportunity to handle a case before the U.S. Supreme Court. The story of the case, and the attorney’s trials and triumphs through the process, are remarkable. They certainly make me grateful for technology like email, online legal

9. Bryan Lammon, *Final Decisions & Final Judgments*, 24 J. APP. PRAC. & PROC. 59 (2024).

10. Eugene R. Fidell, *The Case for Termination of the United States Court of Appeals for the Armed Forces*, 23 J. APP. PRAC. & PROC. 263 (2023).

research, and home computers with excellent word processing capacity.

I hope that you enjoy the issue. I also hope that your 2024 is off to an excellent start.

TLD

Tucson, AZ

February 1, 2024