

# The Lincoln Index of Government of, by, and For the People

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# THE LINCOLN INDEX OF GOVERNMENT OF, BY, AND FOR THE PEOPLE

*Jack B. Weinstein\**

First, I'd like to say on behalf of the judges how grateful we are to have been invited by DePaul's law school to Chicago. This is a wonderful city; you can get lost and look up to see a street sign that says "Lincoln," and recognize that you're in the homeland of greats of our past.

I particularly enjoy listening to these two very distinguished professors—Richard Abel and Marc Galanter—who have been mentors to me and so many others. Professor Abel was most gracious as a student in my evidence class at Columbia. At the time, I was only a page ahead of the class, and he managed to ask the right questions at the right time. Together we wrote the "One Person, One Vote" brief to the Supreme Court on behalf of suburban counties.<sup>1</sup> This brings me to voting and juries.

We have a Constitution that provides the people with two ways of controlling government. One is through voting. In the last few years, control has been falling out of the hands of the people, because elections have been so strongly influenced by the moneyed. Now, because of technology, through the Internet, with its new ways of raising money from ordinary people, and blogs, where people can communicate readily with large groups at little cost, power over the vote seems to be returning to the people. That change may have an important influence on our law.

The other method of direct control by the people is via the jury. Juries have largely fallen out of use. But, by curious inversion that we see often in the law, a conservative member of the Supreme Court, Justice Antonin Scalia, has pointed us back to colonial times, when juries had an important influence on the government. He has asked in connection with sentencing, "What do the Sixth and Seventh Amend-

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\* Senior Judge, United States District Court, Eastern District of New York. This is an edited transcript of remarks given at the Fourteenth Annual Clifford Symposium on Tort Law and Social Policy, *The Challenge of 2020: Preparing a Civil Justice Reform Agenda for the Coming Decade*.

1. See Brief of Eugene H. Nickerson, Chairman, Board of Supervisors, Nassau County, Appellee, in Support of Appellants, for *W.M.C.A., Inc. v. Lomenzo*, 377 U.S. 633 (1964).

ments mean? What are our juries empowered to do? Are they not intended to control the courts and the executive, to make sure that there is no overreaching, and to protect individual rights?" His and the Supreme Court's answer seems to be that juries are coming back into power, at least in some instances.

Recently, I found it necessary to examine the history of juries. My research was in connection with a case that required a long mandatory sentence for a good family man with some mental problems who was looking at child pornography on the Internet in private. He was faced with a five-year minimum term of incarceration. After the jury found him guilty, I asked the jurors, "What would you have done if you had known that there was a five-year minimum?" "This man should receive treatment, not incarceration," they said.<sup>2</sup>

If you examine the work of juries at the time the first ten Amendments were adopted, you find that they often rejected capital punishment. They utilized verdicts to nullify and make sensible distinctions, so that some defendants received almost no penalty, others were hanged, and others were sent to the colonies. Jurors exercised their power as people who understood how the law worked and did what they thought the community wanted and required, not necessarily what those in power insisted upon.

In advising us today, we have had a superb lawyer and anthropologist, Professor Abel, who follows the great tradition of Karl Llewellyn of Columbia. He has assisted the legal profession with his analyses of the American legal system and that in Kenya and other foreign lands.

We also have a great lawyer and sociologist, Professor Marc Galanter, who I have repeatedly turned to when the precedents and the law were against what I thought was right. I could always go to this Wisconsin guru and find an article that supported the conclusion that justice required.

The people and the legal profession have a vital and critical protection against the injustices and overreaching of government. It is our idealization of what the law and our work as lawyers mean in the continuing contest for the soul of this great country.

What I'll call the "Lincoln Index" is defined by what President Lincoln said at Gettysburg. By his words, he brought together the fundamentals of our nation, the Declaration of Independence and the Constitution—"We the people." He reminded us that our govern-

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2. See *United States v. Polizzi*, 549 F. Supp. 2d 308 (E.D.N.Y. 2008); Jack B. Weinstein, *Finding Facts and Making Judgments*, 38 SETON HALL L. REV. 867, 868-70 (2008).

ment is “of, by, and for the people.”<sup>3</sup> In charting where we are in this struggle, it seems to me, we can use the “Lincoln Index.” Matched against time, its long-term trend is generally upward.

Examining our experiences and history, we see that the Lincoln Index periodically rises and falls. I suppose the period of Chief Justice Earl Warren represented the high point, with “One Person, One Vote,” *Brown v. Board of Education*, and many increased protections of the rights of the disadvantaged. During his tenure, the Court rejected what it had done in the 1890s through the 1930s, when encouraging our developing economy was more important than human rights.

The Lincoln Index plateaued and then began to sink. It may be about to ascend again, depending on our political future.

The “people” concept has been somewhat diluted. Concern for the children, the poor, the disadvantaged, has all been reduced in a variety of ways by the courts—but not necessarily by the legislature.

We have impaired the power of the courts to protect those most in need of help, those whose government it is, and those who are entitled to say to our judges and lawyers: “You are in charge of *our* courts, you control *our* government, and you should protect *our* sovereign right to look to *our* government for help.”

The high point in the 1930s opened up our courts with the Federal Rules of Civil Procedure. Those doors are now being closed to people with grievances against those in and out of government. Instances of this are more difficult pleading rules, more summary judgments—the Supreme Court of the United States looking at a video of a police chase and granting summary judgment for the policeman without letting the lower courts and juries make the determination is an example<sup>4</sup>—and discouraging class actions, a method for permitting the poor and people with limited resources to pool their litigation resources.

Help for the poor by lawyers is grossly inadequate. In New York, few of the poor are represented civilly. In criminal cases, they do get help. In some parts of the country, though, legal help for the poor is dreadful, even in criminal courts.

If you project from where we are now, there is an immediate downward trend of the Lincoln Index.<sup>5</sup> But I do think it will go back up.

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3. See Jack B. Weinstein, *The Role of Courts in a Government Of, By and For the People*, 30 CARDOZO L. REV. 1 (2008).

4. *Scott v. Harris*, 550 U.S. 372 (2007).

5. See WE DISSENT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS (Michael Avery ed., New York University Press 2009) (discussing how Supreme Court decisions

In the legal profession, perhaps more than in any other profession, the sense of what we ought to be—our goals and visions of a just, rule-of-law world—drives us. That profoundly affects the direction of the Lincoln Index curve. It is something that we need to consider in predicting the law's future. What are our aspirations? What do we think the law should be doing in a free democratic society such as ours?

The effect of computers and the like has enormously changed and will modify our lives in and out of the law. Our own sense of one world, of direct responsibility for people here and abroad, whatever their governments say or do,<sup>6</sup> our growing needs for energy and food and less pollution, are important in what will be happening in the law. But it is our sense of our better selves, our ideals as a people, that will, I think, raise the Lincoln Index in the future.

My role now, I suppose, is to call on you to participate. I don't have cards for each of you, so I can't call on you. And I know you haven't read the assignment.

(Laughter)

So, please raise your hand, make a very brief, pithy, brilliant comment, and then ask your question. If it sounds silly, probably that is because it is getting to the heart of the problem. Try to act as if you were a first-year student; be brilliant in your naiveté.

Who would like to start?

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by the Rehnquist Court have diminished equality, access to courts, and other aspects of democracy).

6. See, e.g., PETER SINGER, ONE WORLD (2002).