Kafka in Massachusetts

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FREE SPEECH, fair process, and judicial independence are under assault in Massachusetts. What makes the attack peculiarly insidious is that it is being led by the commonwealth's highest court. Unavoidably, courts must occasionally rule in cases involving alleged judicial misconduct. In such cases, the only protection against suspicions of judicial partiality or overreach is public scrutiny of the judicial process. However, on March 6, the state's Supreme Judicial Court, facing just such a situation, shrouded the judicial process in secrecy. The court's ruling, "In re: Enforcement of a Subpoena," violates a very simple principle: Courts should avoid being both judge and party to a case, and when they can't, they should ensure their own accountability by making their process and their reasoning as transparent as possible. To understand the threat posed to the rule of law by the March 6 ruling, some background is required. In September 2000, Massachusetts trial court judge Maria Lopez came under fire for leniency when she sentenced transsexual Charles Horton to a year of home detention after he pled guilty to attempted rape of a 12-year-old boy. Subsequently, allegations circulated that Judge Lopez, seeking to defend her decision, had participated in a "whispering campaign" against the boy. In response to these allegations, the Supreme Judicial Court appointed a special counsel--Paul Ware, a lawyer with the Boston firm of Goodwin Procter--to lead a Judicial Conduct Commission investigation of Lopez. The commission is an agency of the court, to which it reports. As part of its investigation, the Ware commission issued a subpoena to Stephen Mindich. Mindich is Judge Lopez's

husband, and he also happens to be the owner and publisher of the Boston Phoenix and

an influential Boston media figure. The subpoena covered a wide assortment of Mindich's professional and personal communications with anyone and everyone other than his wife and his lawyers concerning the allegations against his wife. Mindich regarded the subpoena, particularly the request for all of his e-mails in any way touching on the controversy, as wildly overbroad, and refused to comply with it. Claiming that the subpoena infringed his First Amendment free speech and free press rights, and that disclosure of his e-mails would invade his privacy and that of his correspondents, Mindich last summer challenged the subpoena. In October, Supreme Judicial Court justice Francis X. Spina not only ruled that Mindich must comply with the subpoena and turn over his e-mails to the commission, he also took the remarkable step of sealing all the legal papers in the case--all of the briefs, affidavits, motions, and other papers filed by both sides. The only document to escape this blanket of secrecy was Spina's own terse opinion rejecting Mindich's legal arguments. And Spina's opinion was only unsealed as a result of a request that came from the Boston Herald, which had intervened in the case. Hence, the public knows that the court ruled against Mindich and upheld the subpoena, but it has been denied access to Mindich's rejected arguments and to the commission's successful ones. Even worse, and in Orwellian fashion, Spina ordered the sealing of the parties' briefs contesting whether the legal papers should themselves be sealed. So the public cannot see each side's arguments as to whether it is legally permissible in a free society governed by the First Amendment for a high court to keep the public from reading arguments contesting the legality of that court's gag order. On March 6, the full Supreme Judicial Court upheld both of Justice Spina's rulings--the enforcement of the subpoena and the sealing of all legal papers including those contesting the sealing--but it has yet to issue any opinion justifying its actions. WHAT CONCEIVABLE purpose could be served by the Supreme Judicial Court's decision to shroud in secrecy Stephen Mindich's legal arguments, both those challenging the commission on Judicial Conduct subpoena and those challenging

the court's sealing of his legal arguments? Obviously, the purpose is not to protect Mindich himself, who is a witness in the commission's investigation and has fought to have his legal arguments open to public review, believing that public awareness of the court's conduct represents the best way to hold the court accountable and vindicate his rights. Perhaps the court is seeking to protect the boy who was the victim of the sexual assault. But why couldn't it do this by redacting the legal papers, excluding compromising mentions of the victim? Perhaps the Supreme Judicial Court is seeking to protect Judge Lopez's right to privacy by preventing the public disclosure of confidential information in Mindich's brief that was gleaned from the commission's investigation. This can't be the explanation, though, since according to Mindich's attorney Harvey Silverglate, "Not one line from anything in our papers comes from anything we learned from the commission's papers. We went out and did our own investigation and we interviewed witnesses who had been interviewed by the commission and we made allegations about abusive tactics against other witnesses as well as Mindich, and all of this has been sealed along with our arguments for why it should be unsealed" (disclosure: Harvey Silverglate is a friend who has on occasion advised me). In fact, there seems to be only one party that benefits--or might conceive of itself as benefiting--from secrecy in the case of Stephen Mindich's Supreme Judicial Court challenge, and that is the Supreme Judicial Court. Here the court has upheld a subpoena issued by an arm of the court. The court has refused to allow the public to examine any of the opposing parties' advocacy, allowing only its own rulings to be read. Of course, this means that the public cannot determine whether the court's ruling on behalf of its own agent, Special Counsel Paul Ware, is as legally justified as its forthcoming opinion will doubtless claim it to be. Members of the judiciary--that branch of our political system for which impartial, reasoned, and public judgment is most central to its proper functioning--ought to be particularly solicitous of the need to permit public scrutiny of cases in which they function as both judge and party. As

James Madison, giving classic formulation to a cardinal principle underlying the rule of law, argued in Federalist 10, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." Yet instead of embracing the simple measure of transparency to lessen the obvious conflict of interest that afflicted its consideration of the legality of the commission's subpoena of Stephen Mindich, the highest court in the state of Massachusetts has, by sealing all of Mindich's arguments, only aggravated the conflict. Precisely in a case where the court is most in need of public accountability it has evaded accountability. Perhaps one might say on the court's behalf that its reasons for putting all of the legal arguments in the case of Stephen Mindich under lock and key will become clear when it issues an opinion in support of its March 6 ruling. Alas, we will be in a poor position to evaluate the court's reasoning so long as we are unable to read for ourselves the arguments advanced by the parties on both sides of the issue. Of course in ordinary circumstances our system requires some presumption in the court's favor. In ordinary circumstances, however, a state supreme court does not flout the most basic principles underlying the rule of law. Peter Berkowitz, author of "Virtue and the Making of Modern Liberalism," is a research fellow at the Hoover Institution and teaches at George Mason University School of Law.

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