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## PRESERVING JUDICIAL INDEPENDENCE— AN EXEGESIS

*Alfred P. Carlton, Jr.\**

When the English landed in Jamestown in 1607, they brought to our shores their language, their government, their commercial system, and their courts.<sup>1</sup> We kept the first three but threw the fourth one back. The court system, at least in the colonies, was badly flawed.

Over the seventeen days in which Thomas Jefferson wove the Declaration of Independence, he carefully selected the threads of twenty-seven specific grievances against the King to make his case for American independence.<sup>2</sup> In that document, Jefferson declared that the King had “made Judges dependent on his Will alone, for the tenure of their Offices, and the Amount and Payment of their Salaries.”<sup>3</sup>

When the signers of the Declaration united behind the pen of Jefferson, they literally pledged “our Lives, our Fortunes and our sacred Honor” to the principle of judicial independence.<sup>4</sup> James Madison, the principal author of the Constitution, considered judicial independence an indispensable component of a democracy.<sup>5</sup> If a declaration of rights was “incorporated into the constitution,” he observed, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in

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1. CARL BRIDENBAUGH, *JAMESTOWN 1544-1699* 153 (1980); EARL SCHENCK MIERS, *BLOOD OF FREEDOM* 40-47 (1958).

2. *THE DECLARATION OF INDEPENDENCE* paras. 3-30 (U.S. 1776).

3. *Id.* at para. 11.

4. *Id.* at para. 33.

5. *THE FEDERALIST*, No. 51 (James Madison), *reprinted in THE CONSTITUTION OUR WRITTEN LEGACY* 60-2 (Joseph A. Melusky ed., 1990).

the legislature or executive . . . .”<sup>6</sup> These words came from one who had experienced the abuses of a judiciary whose authority derived more from kings than principles.

Our early state constitutions also acknowledged the importance of judicial independence by providing for appointed judges serving within an independent branch of government.<sup>7</sup> Indeed, the Massachusetts Constitution’s provisions for life tenure, insisted upon by John Adams,<sup>8</sup> may well have been the model for Article III of the Federal Constitution.<sup>9</sup>

Despite the early sentiment in favor of an independent judiciary, it was not fully realized in the early years of the Republic. In 1802, Congress, controlled for the first time by Jeffersonian Republicans, repealed the Judiciary Act of 1801.<sup>10</sup> This repeal essentially handed pink slips to the federal judges created by the Act and appointed by lame duck Federalist John Adams.<sup>11</sup> Resolution of the legitimacy of judges appointed under the Act was delayed when the 1802 Supreme Court term was cancelled by the Republican Congress.<sup>12</sup> *Marbury v. Madison* was put off until 1803,<sup>13</sup> when the authority of the Supreme Court of the United States to declare federal acts unconstitutional was established, citing the North Carolina case of *Bayard v. Singleton* as precedent.<sup>14</sup>

6. 1 ANNALS OF CONG. 457 (1789); James Madison, Speech to the House of Representatives (June 8, 1789) [hereinafter Speech of James Madison], reprinted in 12 THE PAPERS OF JAMES MADISON 198, 207 (Robert A. Rutland et al. eds., 1977).

7. See U.S. INFO. AGENCY, U.S. DEPT. OF STATE, AN OUTLINE OF AMERICAN HISTORY (Howard Cincotta et al eds., 1994) (“[A]ll the constitutions paid allegiance to the three-branch structure of government—executive, legislative and judiciary—each checked and balanced by the others.”). For a full review of the complete text of early state constitutions, see YALE LAW SCHOOL, THE AVALON PROJECT: COLONIAL CHARTERS, GRANTS AND RELATED DOCUMENTS, <http://www.yale.edu/lawweb/avalon/states/statech.htm> (last visited Jan. 17, 2002).

8. Margaret H. Marshall, *Foreword*, 44 BOSTON B.J. 4 (2000).

9. U.S. CONST. art. III.

10. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, 275 n.314 (1997); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 57-58 (1971); CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, 227-30 (1944); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835, 206-07, 217-18 (2d ed. 1926).

11. ELLIS, *supra* note 10, at 61-62; HAINES, *supra* note 10, at 259-62; WARREN, *supra* note 10, at 206.

12. ELLIS, *supra* note 10, at 59.

13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

14. *Bayard v. Singleton*, 3 N.C. (Mart.) 5 (1787).

Still not having exorcised its pique with the judiciary, the Republicans impeached Supreme Court Justice Samuel Chase in 1804.<sup>15</sup> Since “high Crimes and Misdemeanors”<sup>16</sup> were then, as now, in the eyes and anger of the beholder,<sup>17</sup> Chase was called to account for voiding part of a congressional act while “riding circuit” as a trial judge.<sup>18</sup> Chase must have stood uneasy in the Senate for two reasons: first, the charges themselves and, second, the presiding officer was Vice President Aaron Burr who had only recently shot and killed the Federalists’ intellectual leader Alexander Hamilton in their notorious duel.<sup>19</sup> Chase was nevertheless acquitted and served as an effective and distinguished member of the Court until his death.<sup>20</sup>

These early excursions into the minefields of our uniquely American brand of judicial independence remind us of the need for constant vigilance. Judicial independence endures because it is not a distant ideal; it does not go in and out of fashion with public opinion; it is not forfeited through the occasional indiscretions of judges or judicial candidates seeking a seat on the bench. It is as indispensable for a justice of the peace as a Justice of the Supreme Court.

Judicial independence is precious to our way of life. Judicial independence is a fundamental principle upon which our country was founded and for which Americans have died, not only at Yorktown<sup>21</sup> and Valley Forge,<sup>22</sup> but at the Alamo,<sup>23</sup> Iwo Jima,<sup>24</sup> Inchon,<sup>25</sup> Khe Sanh,<sup>26</sup> and, now, Mazar-E-Sharif.<sup>27</sup>

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15. Several of the articles of impeachment against Chase are reproduced in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* 229-31 (3d ed. 1995).

16. U.S. CONST. art. II, § 4.

17. See generally Laurence H. Tribe, *Defining “High Crimes And Misdemeanors”*: *Basic Principles*, 67 GEO. WASH. L. REV. 712 (1999).

18. PRESSER & ZAINALDIN, *supra* note 15, at 229-31 (stating the reasons for bringing impeachment proceedings against Chase).

19. FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 359-61 (1979) (describing the practice of dueling and the circumstances surrounding Hamilton’s death).

20. ELLIS, *supra* note 10, at 101-02 (reporting the vote breakdown in the Senate for Chase’s impeachment proceedings).

21. McDONALD, *supra* note 19, at 25.

22. John Marshall stated, “At no period of the war . . . had the American army been reduced to a situation of greater peril than during the winter at Valley Forge.” LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW* 45 (1974).

23. LON TINKLE, *13 DAYS TO GLORY: THE SEIGE OF THE ALAMO* 220-21 (1958).

24. KARAL ANN MARLING & JOHN WETENHALL, *IWO JIMA* 221 (1991).

25. STEVEN HUGH LEE, *THE KOREAN WAR* 47 (2001).

Our responsibility to the founders who instituted judicial independence and the patriots who protected it, is constant vigilance against those who would undermine it. Our democracy will not function without independent courts. Trying to maintain our experiment in self government without a truly independent judiciary is like trying to push a rope. It just won't work.

It will work, however, and work best, when the courts enjoy the public's approbation and support. After all, the courts are dependent on the public's perception that the courts are impartial and independent of manipulation or control by the two political branches of government and narrow special interests. If the courts are co-opted through pressure, coercion, or intimidation, we lose the necessary checks that the courts provide in our democratic republic. To my way of thinking, then, judicial independence is the most critical barometer of the health of a democratic republic.

In some ways, the judicial branch is the one most accessible and responsive to the people. Structurally and practically, the executive and legislative branches are more suited to respond to majorities or large minorities.<sup>28</sup> Only the courts are equipped to respond immediately to petitions and redress the grievances of individuals. If powerful interest groups and campaign contributions corrupt the courts, where is the check on the wealthy and the powerful against the general welfare and those without the power of what Madison characterized as factions?

The courts are the last lines of defense of the Constitution and individual rights. They are the country's protection against an over-reaching government, official corruption, and the mood swings of popular opinion. They are the ballast of democracy that keeps the ship upright through bad weather, shifting loads, and poor seamanship—the bulwark of the republic.<sup>29</sup>

How important is it that our courts be perceived as impartial and fair? The public expects the executive and legislative branches to

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26. ENCYCLOPEDIA OF THE VIETNAM WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 206 (Spencer C. Tucker ed., 1998).

27. Carla Anne Robbins & Greg Jaffe, *Counterattack: U.S. Launches Strikes On Taliban, bin Laden With Aid of British*, WALL ST. J., Oct. 8, 2001, at A1.

28. THEODORE J. STEIN, SOCIAL POLICY AND POLICYMAKING BY THE BRANCHES OF GOVERNMENT AND THE PUBLIC-AT-LARGE 96-97 (2001) (explaining the way a voting majority can influence the policymaking process).

29. THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). At a conference titled *Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice*, held December 4-5, 1998, in Philadelphia, this vision of judicial independence was discussed. See Conference, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 1 (1998).

be biased toward an agenda and the groups that support it. But if the public ever perceives that the court bases its decisions on factors other than the evidence, the laws, and the Constitution, it will lose its respect for the law. And when the public loses its respect for the law, we lose the centripetal force that binds us to our nationhood.

Thus far we have spoken about the necessity for judicial independence, but what exactly is it and what are the problems associated with maintaining it?

Judicial independence only exists when judges base their decisions on a good faith interpretation of the laws, the Constitution, and the facts of an individual case. Any external pressure or influence that causes a judge to deviate from such an interpretation diminishes judicial independence.

In 1997, the ABA's Commission on Separation of Powers and Judicial Independence issued its report, *An Independent Judiciary*.<sup>30</sup> The Commission acknowledged several thorny problems in the federal judiciary system.<sup>31</sup> But by and large, the Commission concluded that "Without denying its faults, our federal judges administer impartial justice of unparalleled quality."<sup>32</sup> Not so in the states. The Commission concluded that the greatest threats to judicial independence lie in the state courts.<sup>33</sup> There are a number of reasons why.

Sheer numbers is one reason. State courts handle more than ninety-seven percent of all litigation in the United States.<sup>34</sup> There are more cases, more courts, more judges, and more opportunity for mischief. Second, unlike federal judges, most state judges have no lifetime tenure. Judges must stand for either election or retention in thirty-eight states.<sup>35</sup> Indeed, some eighty percent of all state court judges stand for election at some point in their careers.<sup>36</sup> Judges must campaign for their office and raise increasingly large

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30. ABA, *AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE* (1997).

31. *See id.* (including the increase in judicial criticism and legislative control over the judiciary's financial resources).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. COMM. ON JUDICIAL INDEPENDENCE, ABA, *COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS* (2001) [hereinafter ABA REPORT].

amounts of money—usually from lawyers and narrow interest groups—to gain or retain their seats.<sup>37</sup>

Voters may not like a federal court ruling, but, because of life tenure, they can be certain that it was not made to secure contributions or votes. State judges, fairly or not, do not enjoy the same benefit of the doubt and, indeed, forfeit it through questionable campaign behavior or the acceptance of campaign contributions that present the appearance of impropriety. As judges are increasingly thrust into public policy debates, either through election campaigning or from the bench, this perceived impropriety has reared its ugly head across the country. Public opinion surveys in Ohio,<sup>38</sup> Pennsylvania<sup>39</sup> and Texas<sup>40</sup> tell us that citizens are concerned about the impact of campaign fundraising on the impartiality of justice. A survey of judges in Texas incredibly reveals that almost half of the judges polled indicated some impact on decision making from campaign contributions.<sup>41</sup>

These developments result from the nature of the judicial process. The young French noble Alexis de Toqueville observed some 175 years ago that every political debate in America would find its way to the courts as a legal dispute.<sup>42</sup> We know today that this is true as we ask our judges to resolve not just disputes between businesses or neighbors, but the most difficult issues facing our society—from who should be president of the United States to how our liberties should be defined during a time of national emergency. We know that unpopular judicial decisions are inevitable, as illus-

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37. See *id.* at 11 (reporting the ABA commission's finding that "to cover their election costs, judges must accept funds from contributors many of whom may be interested in the outcomes of cases before them").

38. See *id.* at 22 (citing T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, CLEVELAND PLAIN DEALER, Feb. 15, 2000, at 1A) (reporting that "nine out of ten residents believed that campaign contributions influences judicial decisions").

39. SUPREME COURT OF PA., REPORT OF THE ADMINISTRATIVE OFFICE OF THE PENNSYLVANIA SUPREME COURT (1998); Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11 (discussing the growing problem of judicial contributions). See also Rich Henson & Robert Zausner, *Survey Finds Cynicism About Pa. Judiciary Rampant Among Public*, PHIL. INQUIRER, Apr. 17, 1998, at B01 (reporting that "nine out of ten voters believed that judicial decisions were influenced by large campaign contributors").

40. SUPREME CT. OF TEXAS, STATE BAR OF TEX. & TEXAS OFFICE OF CT ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS—THE INSIDER'S PERSPECTIVE (1999) (reporting that the vast majority of Texas adults believe campaign contributors influenced judicial decisions).

41. *Id.*

42. ALEXIS DE TOCQUEVILLE ON DEMOCRACY, REVOLUTION, AND SOCIETY: SELECTED WRITINGS (John Stone & Stephen Menell eds., 1980); TOCQUEVILLE'S AMERICA: THE GREAT QUOTATIONS (Frederick Kershner ed., 1983).

trated by Justice Frankfurter's observation, "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."<sup>43</sup> Judges inevitably must bear the brunt of this, and judicial independence is the cloak that allows them to do it.

In this increasingly contentious atmosphere, our courts have gradually become the new battleground for conflicts over policy. More and more special interest groups are involved in state judicial races. Presumably, it is easier to help elect a few strategically placed judges than scores of legislators, especially if the fate of the legislation will be decided by the courts, as it often is.

State courts face other challenges as well, among them inappropriate criticism. Criticizing judges is one of the ways in which we hold the judiciary accountable in our democracy. But that criticism should be limited to questions of integrity, competence, or knowledge of the law, not whether a decision is compatible with a political philosophy, ideology, or special interest. If we disagree with a decision, we can appeal and if we remain dissatisfied when the appeal is concluded, it may well be that we need to change the law—but not the judge.

Intemperate, inaccurate, and emotional criticism that is designed to intimidate with the threat of impeachment or election defeat undermines public confidence in the impartiality of the judiciary and hence its independence. Often such criticism is generated by disagreement with a single decision that goes against the interests of one group or another. The resulting criticism often delivers the message, justice is for sale to the highest bidder. Is such criticism protected speech? Of course it is. Is it irresponsible? Of course it is.

This state of affairs has led many interested citizens and organizations to rally to the defense of the American judiciary. We do not do so because we agree with every decision issued by every court—as a lawyer with a healthy practice, I can name a few decisions I wish went the other way. We do so because of our commitment to the rule of the law based on an independent judiciary with the ability to make hard decisions to protect the rights and liberties of all.

As president-elect of the American Bar Association, I am proud to be in the leadership of an organization that has taken the preservation and enhancement of judicial independence seriously. As

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43. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).



many of you know, the American Bar Association has a long history of support for judicial independence. In fact, our support is as long as our history. When the ABA was established in 1878, we began with three fundamental purposes that remain the foundation for everything that we do:

1. To establish and maintain the world's best system of legal education;
2. To act as a responsible representative of the legal profession; and
3. To protect, maintain and insure the independence and quality of the American judiciary.

Who other than those who love the law to such an extent that they make it their lives' work are better equipped and more obligated to defend the barricades of judicial independence?

That task is not always easy because there has always been an inner tension between two principal characteristics of the American judiciary: independence and accountability. The reflex of the American citizen is to hold government officials directly accountable to the American electorate. Given the choice, Americans seem inclined to elect everyone from the president to the dogcatcher.

The obvious need here is for organized, substantial, and sustained public education, not just for the general public, but for policymakers and other civic leaders. Many of the threats to judicial independence arise from interference or intimidation by the executive and legislative branches of government, and neglect by others in positions of authority and influence.

Although the ABA has defended judicial independence for 123 years, until four years ago we had no permanent program to promote it. We now have a Standing Committee on Judicial Independence that has developed an ambitious program to support the judicial institution around the country.<sup>44</sup>

We are responding to the need for public trust and confidence in the judiciary. A 1999 public opinion survey for the ABA showed only twenty-six percent of respondents could be termed "highly knowledgeable" about the American justice system.<sup>45</sup> When asked how they would prefer to learn about the justice system, seventy-

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44. The ABA Standing Committee on Judicial Independence's home page is <http://www.abanet.org/judind/home.html>.

45. DIV. FOR MEDIA RELATIONS AND PUB. AFFAIRS, ABA, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM, 10 (1999), available at [www.abanet.org/media/perception/perceptions.pdf](http://www.abanet.org/media/perception/perceptions.pdf).

five percent wanted to learn directly from judges.<sup>46</sup> What clearer mandate could we have been given?

So we at the ABA, alone and with others, have established programs encouraging judges to get out in the community and reach out to national and local civic and community organizations.<sup>47</sup> But our work has not stopped there. Over the past four years, we have developed a number of reports and policies designed to improve state judicial processes and combat perceived improprieties.

In 1998, the ABA established a plan to respond to inappropriate criticism of judges.<sup>48</sup> It generally is considered inappropriate for a judge to respond to such criticism because it reduces the dignity of the administration of justice, risks an intemperate or emotional response to criticism, and may have an undesirable effect on pending litigation or litigants. It is explicitly within the bar's role to step into the void and set the record straight when appropriate.<sup>49</sup> The ABA plan sets guidelines indicating when intervention is appropriate and how it should be done.<sup>50</sup> No one has a greater stake in the integrity and dignity of the courts, so it is reasonable that attorneys should defend them from inappropriate criticism.

In 1999, the ABA House of Delegates amended the Model Code of Judicial Conduct to limit judicial campaign contributions and provide for recusal of judges when excessive campaign contributions occur.<sup>51</sup> In 2000, the ABA House of Delegates established standards for state judicial selection that encourage a form of "merit election" to diminish the worst effects of partisanship.<sup>52</sup> In

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46. *Id.* at 11.

47. DAVID MATHEWS, *POLITICS FOR PEOPLE: FINDING A RESPONSIBLE PUBLIC VOICE* (1994) (summarizing the approach of the National Issues Forum in facilitating small group discussion of issues); Jack L. Brown, *The Judges Network*, *JUDGES' J.*, Spring 2001, at 33 (describing the conception and goals of the Judges Network); Amy Goldstein & Charles Lane, *At D.C. School, Justice Kennedy and Teens Explore U.S. Values*, *WASH. POST*, Jan. 29, 2002, at A7 (explaining that the ABA sponsored "Dialogue on Freedom" was "intended to foster thinking about such fundamental questions as what it means to be an American, to live in a pluralistic "melting pot," and to value freedom and civil liberties).

48. ABA JUDICIAL DIV. LAWYERS CONFERENCE AND SPECIAL COMM'N ON JUDICIAL INDEPENDENCE, *ABA, RESPONSE TO CRITICISM OF JUDGES* (1998).

49. *Id.*

50. *Id.*

51. Press Release, ABA, American Bar Association Changes Model Judicial Ethics Rules To Reform Election Campaign Funding (Aug. 24, 1999).

52. Press Release, ABA, American Bar Association House of Delegates Approves Standards for State Judicial Selection (Aug. 16, 2000). See generally Larry Aspin, *Campaigns in Judicial Retention Elections: Do They Make a Difference?*, *JUST. SYS. J.* 1998, at 1-15; Leon S. Cohan, *Surprise! A Merit Selection Process that Works*, *MICH. B.J.*, Sept. 1996, at 914; Kevin M. Easterling, *Judicial Elections the Right Way:*

February of 2002, the House of Delegates will consider adopting the report of the ABA Commission on Public Financing of State Judicial Campaigns, which recommends the use of public financing for state judicial campaigns.<sup>53</sup>

These projects and programs are part of the ABA's multi dimensional approach to support judicial independence in the states. They have been building blocks of a sort that lead to my service as president of the American Bar Association. As president, I intend to undertake a comprehensive review of twenty-first century state judiciaries by convening a high profile commission of leaders in American law and policy. This group will be led by Abner Mikva, former US representative from Illinois, chief judge of the DC Circuit and counsel to the President, and William S. Sessions, former FBI director and US district judge.<sup>54</sup> My expectation is that this group will establish a set of neutral principles to provide a standard for impartial and accountable judges and fair administration of state judicial systems. It is an ambitious project, but one that is necessary if we are to diminish the increasing partisan battles being fought over our state courts.

Finally, we arrive at the core of the problem. By far the most troubling threats to judicial independence are those associated with judicial elections. These fall into two categories: campaign practices and campaign finance.

First, campaign practices. Sometimes a judicial candidate just cannot help acting like a political candidate despite judicial canons expressly forbidding it. Or perhaps we are finding that the regulatory restrictions on judicial candidates are being eliminated, as has

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*Official Performance Evaluations Help the Electorate as Well as the Bench*, JUDICATURE, March/April 1999, at 206-215; Charles W. Fleming, *Election, Appointment, Merit Selection of Judges*, CT. REV., Fall 1993, at 10-12; John Gibeaut, *Bench Battle: Trial Judges Often Keep Their Seats Without Facing Election*, ABA J., Aug. 2000, at 42-50, 111.

53. On February 5, 2002 the ABA recommendation for public financing was adopted. Press Release, ABA, American Bar Association Adopts Recommendation Calling for Public Financing of Judicial Campaigns; Cites Need to Minimize the Role of Money in Electing Judges (Feb. 5, 2002).

54. Abner Mikva served as Counsel to President Bill Clinton from October 1, 1994 until November 1, 1995. He was a United States representative from Illinois' Second District from 1969-73 and Tenth District from 1975-79, and began service as chief judge of the U.S. Court of Appeals for the D.C. Circuit on January 12, 1991. William S. Sessions was a United States district judge from 1974-87 and FBI director from 1987-93.

occurred in North Carolina.<sup>55</sup> It is noteworthy that just this week, the Supreme Court of the United States has agreed to review a case from the Eighth Circuit that involved a challenge to restrictions imposed on judicial candidates in Minnesota.<sup>56</sup> I hope that the Supreme Court recognizes once and for all the unique factors that distinguish the judiciary from the legislature and executive branch, which provide a sufficiently compelling state interest to justify regulations in the judicial campaign context. In any event, this case provides a rare opportunity for the Supreme Court to offer some guidance in this area.

In order to garner votes or curry favor with influential interest groups, judicial candidates are sometimes pressured to declare in advance how they would decide a particular case. This is like asking an umpire to call a pitch before it is thrown. Each case is different and must be decided on its merits, not on some pre-announced politically opportunistic position. As John Marshall warned, "I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."<sup>57</sup>

Far more troubling are ads and statements that are misleading or unfair. Often this tactic is employed through the use of "issue advocacy," which enjoys First Amendment protection under the Supreme Court's 1976 ruling in *Buckley v. Valeo*.<sup>58</sup> The effect of such ads is a clear erosion of the dignity of the courts. Because of the special trust and role of the judiciary, judicial candidates must take responsibility for all campaigning done on their behalf and condemn any that is unfair or misleading. We must take great care to ensure that "express ads" do not masquerade as "issue ads." Those who have sponsored them must be called publicly into account for them. These ads undermine public trust and confidence in the

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55. For a discussion of the backlash to judicial campaign deregulation see William Glaberson, *States Taking Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at A1.

56. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001), cert. granted, 122 S. Ct. 643 (2001) (upholding constitutionality of "announce clause" in code of judicial conduct restricting judicial candidates from announcing how they would resolve and issue likely to come before them); Tony Mauro, *Judge Election on Court Debate*, LEGAL TIMES, Dec. 10, 2001, at 10.

57. PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 615-19 (1830); John J. Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703, 706 (1949) (citing John Marshall's statement made during Virginia Constitutional Convention debate).

58. *Buckley v. Valeo*, 425 U.S. 946 (1976).

courts. Responsible citizenship consistent with the exercise of the right to free expression should be the rule, not the exception.

We know that the judiciary is different from the legislature and the executive. We elect executive and legislative candidates based upon their positions on issues. We expect them to be partial to an agenda and to favor those constituencies that support that agenda. But judges cannot be political candidates in the same way. Wearing a robe, a judge is neither Republican nor Democrat, but constitutionally obligated to resolve cases based only on the law and the facts. A judge has no constituency but due process and the rule of law and must be above the shifting sands of political expediency.

The courts are the great equalizer of society. Within their walls, the rich and the poor, the educated and the uneducated, the strong and the weak stand without distinction in the leveling light of the Constitution and our body of laws. Each comes with the expectation of justice. But if the public believes that a litigant will get "more justice" because of a contribution to a judge's election campaign, that judge is not capable of words or actions sufficient to dispel the belief that justice is compromised.

Thus, the "invisible elephant in the parlor" is money and judicial campaigns. There is nothing so corrosive to the public confidence in the judicial system than the growing amounts of money that are being pumped into judicial races, and the resulting rising tide of judicial politicalization.

In July of this year, the ABA's Commission on Public Financing of Judicial Campaigns released its report and the picture was neither pretty nor hopeful.<sup>59</sup> The growth in spending on contested judgeship races is breathtaking.

- In Michigan, a winning supreme court candidate raised \$180,000 in 1994;<sup>60</sup> four years later, the winning candidate raised over \$1 million.<sup>61</sup>
- In North Carolina, the highest amount spent in a 1988 supreme court race was \$90,300; six years later it had climbed to almost \$242,000.<sup>62</sup> Last year, the state had its first \$1,000,000 Supreme Court campaign.<sup>63</sup>

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59. ABA REPORT, *supra* note 36.

60. *Id.* at 10. The dollar amounts have been rounded. For exact figures see the report.

61. *Id.*

62. *Id.*

63. Glaberson, *supra* note 55, at A1.

- In Alabama, spending on two supreme court seats increased from \$237,000 in 1986 to \$2.1 million in 1996.<sup>64</sup>
- In the last Michigan Supreme Court race, \$16 million was spent.<sup>65</sup> Ohio,<sup>66</sup> Pennsylvania,<sup>67</sup> Mississippi<sup>68</sup>—the list just goes on. That buys a lot of justice—or at least that’s what the public believes, according to the surveys that we have seen.<sup>69</sup>

And the facts indicate that funds are coming from increasingly narrow interests.

- In Illinois, one candidate accepted \$80,000 from ten personal injury law firms.<sup>70</sup>
- A Baton Rouge newspaper reported that “Groups with major financial interests in judicial decisions—trial lawyers and business—are investing heavily in ‘their candidates for races.’”<sup>71</sup>
- In Michigan, the Michigan Manufacturers Weekly Newsletter boasted that, “During 1998-99, MMA-PAC contributions swayed the Supreme Court election to a conservative viewpoint, ensuring a pro-manufacturing agenda.”<sup>72</sup>
- In the wake of the 2000 supreme court races in Ohio and Michigan, the U.S. Chamber of Commerce took credit for spending millions of dollars during the campaigns.<sup>73</sup>
- During the 2001 Pennsylvania Supreme Court election, narrow interest groups were responsible for significant spending

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64. ABA REPORT, *supra* note 36, at 9-10.

65. Glaberson, *supra* note 55, at A1.

66. *Id.*

67. James Eisenstein, *Some Order For The Court*, PITT. POST-GAZETTE, Oct. 15, 2000, at E4.

68. ABA REPORT, *supra* note 36, at 13.

69. *Id.* at 22-23 (stating that nine out of ten Ohio and Pennsylvania residents believed that campaign contributions influenced judicial decisions). Moreover, the report states that “48% of [Texas] judges indicated that money had an impact on judicial decisions.” *Id.* at 23 (citing SUPREME COURT OF TEX., STATE BAR OF TEX. AND TEX. OFFICE OF COURT ADMIN., *THE COURTS AND THE LEGAL PROFESSION IN TEXAS—INSIDER’S PERSPECTIVE* (1999)).

70. *Id.* at 13.

71. *Id.* (citing Lanny Keller, *Judicial Campaigns Undermine Respect*, THE ADVOCATE, Jan. 13, 2000).

72. *Id.* at 18 (citing George Weeks, *Fix is Long Overdue on Selection for State Supreme Court*, DETROIT NEWS, Nov. 28, 1999).

73. Naftali Bendavid, *Report: Public Should Finance Judge Elections; ABA Panel Says Campaigns Getting Nastier and Costly*, CHI. TRIB., July 23, 2001 at 7 (reporting that, “The [Chamber of Commerce] spent more than \$7 million last year on judicial races, focusing its activities on four states—Michigan, Ohio, Mississippi and Alabama”).

on television and print ads that generated litigation over the legality of the tactics.<sup>74</sup>

And we already know, from the claims of those with the dollars, that the 2002 judicial elections will be more costly and contentious than ever before. Millions of dollars are being readied for campaign contributions and issue ads.<sup>75</sup>

Million dollar judicial campaigns give the impression that justice is for sale, or if not for sale, that it can be rented from one election to the next. This is an affront to the American justice system. Public respect for the legislative and executive branches has been battered in recent years. We cannot allow our judicial elections to denigrate to the level of gubernatorial, mayoral, or legislative races. Our courtrooms must remain the inviolable sanctuaries of our rights.

The ABA has long felt that the best answer is merit selection of judges and, indeed, the “preferred” selection method.<sup>76</sup> But one has to realize that, given the state of public opinion, merit selection is not a viable option in many states and is at best a long-term goal. It is time to reconceptualize our approach to improvement of state judicial selection so that we can move beyond merit selection to reap its benefits without its baggage. So, how can we improve the system we have in the short-term, and provide a solid foundation for maintaining American judicial independence in the twenty-first century?

The ABA’s menu of improvements is one place to start. We know that judicial reform must be well tailored to the cultures and customs of local jurisdictions. One size does not fit all. Yet there is much to be commended in the recent ABA report on public financing of judicial campaigns and its efforts to respond to inappropriate judicial criticism and to improve state judicial selection methods. The report calls upon states that select judges through contested

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74. *Bodack v. Law Enforcement Alliance of Am.*, No. 120 WM 2001, 2001 Pa. LEXIS 2386, at \*9-10 (Sup. Ct Nov. 5, 2001) (Castille, J., dissenting) (discussing the prior restraints issues raised by limitations of campaign advertisement that occurred in the 2001 election).

75. See Adam Clymer, *A Bid to Change, an Uncertain Future*, N.Y. TIMES, Feb. 14, 2002, at A31; *Congress: The Issue-by-Issue Outlook for 2002*, Nat’l J., Jan. 19, 2002.

76. ABA REPORT, *supra* note 36, at 5 n.3 (stating that “The ABA has long supported merit selection systems”). The ABA reaffirmed this recently when it adopted the recommendation for public financing. Press Release, *supra* note 53. See Charles Gardner Geyh, *National Summit on Improving Judicial Selection: Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1476 (2001) for a discussion of an alternative system to publicly finance judicial elections.

elections to institute public financing of judicial campaigns.<sup>77</sup> This would eliminate the perceived impropriety associated with receiving contributions from those who may have an interest in the outcome of cases before the court.

The report recommends a number of qualifying safeguards and elements to make public financing effective. It strongly recommends funding from “a stable and sufficient revenue source”<sup>78</sup> to ensure a successful system. I am proud to be a leader in the organization that undertook this seminal study and report.

I am also proud that my home state, North Carolina, is taking a lead on improving judicial selection. It has made a noble effort to adopt merit selection but has come to recognize that this objective is just not politically possible to achieve. With its characteristic can-do spirit, the state has adopted nonpartisan elections for trial judges in both the superior and district courts.<sup>79</sup> Now it is poised to become only the second state in the country to enact a system of public financing of judicial campaigns, with a substantial voter awareness program. It may in fact, become the first state to create a financially viable comprehensive public financing system for judicial campaigns. The North Carolina Senate has been courageous in adopting this program and we can hope that the House will also follow its example when the bill comes up next year.

These actions are a great step forward to preserve the integrity of North Carolina courts. The state has a unique opportunity to lead the nation, something North Carolinians usually do in a quiet, respectful way. North Carolina is working hard to preserve judicial independence. This is a good example for the rest of the country to follow.

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77. Press Release, *supra* note 53.

78. *Id.* at 63.

79. Glaberson, *supra* note 55, at A1.



