

The Least Dangerous But Most Vulnerable Branch: Judicial Independence and the Rights of Citizens

*Report of the 2007 Forum for
State Appellate Court Judges*



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Foreword

The Pound Civil Justice Institute's fifteenth Forum for State Appellate Court Judges was held in July 2007, in Chicago, Illinois. Like all of our past forums, it was both enjoyable and thought-provoking. In the forum setting, judges, practicing attorneys, journalists, and legal scholars were able to consider the increasingly important issue of judicial independence and its protection of the rights of citizens.

The Pound Civil Justice Institute recognizes that the state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is always fruitful. Our attendees always bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute's Fellows. That diversity of viewpoints always emerges in our Forum Reports.

Our previous fourteen Forums for State Appellate Court Judges were devoted to other cutting-edge topics such as scientific evidence, electronic discovery, rule making in the state courts, separation of powers, mandatory arbitration, federalism, the jury as fact finder, secrecy in litigation, discovery's effect on the courts, judicial independence, the American Law Institute's products liability Restatement, the impact of budget crises on judicial functions, and the impact on state courts of the Long Range Plan for the Federal Courts. We are proud of our Forums and are gratified by the increasing registrations we have experienced since their inception as well as by the very positive comments we have received from judges who have attended in the past.

The Pound Institute is indebted to many people for the success of the 2007 Forum for State Appellate Court Judges:

- to our paper presenters—Professor Penny White, of the University of Tennessee College of Law, and Professor Sherrilyn Ifill, of the University of Maryland School of Law, who wrote the papers that started our discussions;
- to our panelists—Janet Ward Black, Bert Brandenburg, Honorable Kevin Burke, Honorable Gordon Doerfer, Dudley Oldham, Abdon Pallasch, Mary Beth Ramey, Anita Woudenberg, and Honorable James Wynn, who provided incisive comments on the issues based on a wealth of diverse experience in the law;
- to the moderators of our small-group discussions—Sharon Arkin, Kathryn Clarke, Bill Gaylord, Rich Hailey, Betty Morgan, Ellen Relkin, and Larry Tawwater, for helping us to arrive at the essence of the Forum, which is what experienced state court judges think about the issues we discussed;

- to the editors of this report—Forum Reporter Jim Rooks, Valerie Jablow, and Kieran Hendrick, Ph.D.;
- and most especially to the Pound Civil Justice Institute’s efficient and dedicated staff—the Institute’s executive director, Dr. Richard H. Marshall, program manager Marlene Cohen, and Forum registrar LaJuan Campbell—for their diligence and professionalism during a time of transition for the Institute.

It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other.

We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your future consideration of matters relating to judicial independence.

Gary M. Paul

President

Pound Civil Justice Institute

2006-07

Introduction

On July 14, 2007 in Chicago, Illinois, 121 judges, representing 36 states, took part in The Pound Civil Justice Institute's Forum for State Appellate Court Judges. The judges examined the topic, "The Least Dangerous But Most Vulnerable Branch: Judicial Independence and the Rights of Citizens." Their deliberations were based on original papers written for the Forum by Professor Penny J. White of the University of Tennessee College of Law ("Judicial Independence in the Aftermath of *Republican Party of Minnesota v. White*") and Professor Sherrilyn Ifill, of the University of Maryland School of Law ("Rebuilding and Strengthening Support for an Independent Judiciary").

The papers were distributed to participants in advance of the meeting, and the authors also made less formal oral presentations of their papers to the judges. The papers were distributed to participants in advance of the meeting, and the authors also made less formal oral presentations of their papers to the judges at the morning plenary session. The paper presentations were followed by discussion by a panel of distinguished commentators: Janet Ward Black, a plaintiff attorney from Greensboro, North Carolina; the Honorable Gordon Doerfer, an associate justice of the Massachusetts Appeals Court in Boston, Mass.; and Dudley Oldham, a defense attorney from Houston, Texas. At the afternoon plenary session, the attendees heard a roundtable discussion on judicial independence, whose participants were: Bert Brandenburg, Executive Director of the Justice at Stake Campaign in Washington, D.C.; the Honorable Kevin S. Burke, a district court judge in Minneapolis, Minnesota; Abdon Pallasch, a journalist on the Chicago, Illinois, *Sun-Times*; Mary Beth Ramey, a plaintiff attorney from Indianapolis, Indiana; Anita Woudenberg, an attorney from Terre Haute, Indiana; and the Honorable James Wynn, a judge of the North Carolina Court of Appeals in Raleigh, N.C. The roundtable was moderated by Kenneth M. Suggs, vice president of the Pound Civil Justice Institute.

After each plenary session, the judges separated into small groups to discuss the issues, with Fellows of the Roscoe Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded on audio tape and transcribed by court reporters. However, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. A selection of the judges' comments appears in this Report.

At the concluding plenary session, the Institute's executive director, Dr. Richard H. Marshall, summarized points of agreement among the judges, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professor Penny White and Professor Sherrilyn Ifill, and on transcripts of the Forum's plenary sessions and group discussions.

James E. Rooks, Jr.
Forum Reporter

Papers, Oral Remarks, and Discussion

JUDICIAL INDEPENDENCE IN THE AFTERMATH OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

Penny J. White, The University of Tennessee College of Law

Professor Penny White begins her paper with a prescient quotation from Roscoe Pound's famous 1906 address to the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice," in which he warned of the dangers of compelling judges to become politicians. As she notes, Dean Pound's words seem even more prescient today, partly as a result of the United States Supreme Court's decision in *Republican Party of Minnesota v. White*.

In Section I of her paper, Professor White examines the threats to judicial independence that existed prior to the White decision. She writes that threats to judicial independence, like the public dissatisfaction with justice of which Pound spoke, are neither new nor novel, having existed since the founding of the United States. But in the 1990s, heightened scrutiny of the judiciary became more prevalent and multifaceted. Often the scrutiny presented itself as a general dissatisfaction with the judiciary as an institution of government, but extended to individual judges and courts as well. Sometimes it was focused on single issues, such as capital punishment, abortion, or tort reform, which seized media and public attention. Sometimes the scrutiny was brought to bear upon a single judge or court as a result of a judicial decision. Professor White discusses some of these attacks, including an attack on a federal judge by both of the 1996 Presidential candidates, and later efforts by Republican members of the House of Representatives to intimidate judges through threats of impeachment. She also notes that state judges have not been immune to such attacks on their independence.

In Section II, Professor White explores the impact of the Supreme Court's White decision. She writes that the decision has affected judicial independence in state courts in significant ways. The White majority's flawed reasoning, based on incorrect assumptions about judges and judging, has led lower courts, judicial ethics authorities, and state supreme courts to abolish restrictions on judicial speech and conduct ill-advisedly. Despite the Supreme Court majority's emphasis on the narrowness of the White decision, other courts have used it as their justification for altering judicial ethics rules to eliminate many restrictions on judicial campaign speech and conduct and to soften some that remained. The result, she asserts, has been a virtual elimination of the distinction between judicial elections and other elections and an increased tendency to view judges as politicians.

Professor White argues that the Supreme Court's White decision has also created an ideal

environment for the exertion of political control over state courts. She examines the nature of judicial elections before the White decision and compares that era to what has happened in the last several years. While earlier judicial campaigns tended to be non-contentious races, where the qualifications of the candidate were the primary focus, today's judicial races have become like many other political races, with runaway spending and barrages of negative advertising. In addition, Professor White notes the emergence of a new "weapon of choice"—questionnaires created by special-interest groups through which they seek to induce candidates to reveal their personal views on controversial legal and social issues. Traditional mechanisms for the protection of judges' independence, such as recusal standards, are also under attack.

Later, Professor White observes that state judges must make difficult personal choices in the post-White environment. As candidates, they must choose how they will finance their campaigns, whether they will conduct traditional campaigns centering on their qualifications or announce their views on the issues of the day, and whether they will respond to special-interest groups' questionnaires. If elected, judges must then choose how strictly they will interpret their jurisdiction's recusal standards.

These changes in the nature of judicial elections pose a great threat to judicial independence. Post-White, judicial elections are heavily influenced by moneyed groups whose sole objective is to control state courts for the purpose of carrying out their social and political agendas. If they succeed, Professor White warns, state judges, like legislators, and governors, will become representatives of those with political clout and abundant resources, destroying permanently any prospect of equal justice for all.

Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.¹

Professor Roscoe Pound (1906)

These prophetic words of Dean Pound, uttered more than a century ago, resonate today as America copes with a new strain of threats to judicial independence in the aftermath of *Republican Party of Minnesota v. White*.² This paper will address the impact of that decision, its implications for state court judges, and its likely effect on the promise of equal justice under law.

I. Threats to Judicial Independence Before *White*

Years before Gregory Wersal³ and a dozen other plaintiffs⁴ filed the lawsuit that would result in *Republican Party of Minnesota v. White*, some judges, lawyers, and academics were alarmed about what they viewed as unprecedented attacks on the independence of the judiciary.⁵ Most acknowledged that attacks on judicial independence were neither new nor novel, having existed since the founding of the country.⁶ Some suggested that disgruntlement with the judiciary, like

dissatisfaction with any institution of government,⁷ simply ebbed and flowed over time.⁸ But during the 1990s, many lamented that the frequency and fervor of the attacks were increasing,⁹ causing one Senator to comment that “I think we are close to being able to say this is an unprecedented series of threats toward the independence of our judiciary.”¹⁰ The American Bar Association (ABA), the country’s largest bar association, agreed, asserting that “[a] new cycle of intense political scrutiny and criticism of the judiciary is now upon us.”¹¹

This heightened scrutiny of the judiciary was multifaceted. It involved not only the judiciary as an institution, but individual judges and courts as well.¹² Often the scrutiny resonated as a general dissatisfaction with the judiciary as an institution of government. Sometimes, it was focused upon an issue, such as capital punishment, abortion, or tort reform, that seized media, and consequently, public attention.¹³ But not infrequently, the scrutiny was brought to bear upon a single judge or court as a result of a judicial decision. When this individual scrutiny resulted in unfair criticisms leveled for the purpose of interfering with the judicial process, judicial independence was potentially undermined.

One notable public attack came in the spring of 1996 from the two men who would vie for the presidency later that year. President Bill Clinton and Senator Robert Dole sparred publicly over whether a federal judge should be impeached for suppressing evidence in a single case.¹⁴ Many complained that “responsible” government officials should not be making such an obvious attempt to interfere with judicial independence by intimidation.¹⁵ But, in reality, in the six years between the impeachment controversy and the decision in *White*, many threats against judicial independence¹⁶ were made by federal government officials,¹⁷ including attacks on federal judges¹⁸ for purely personal political reasons.¹⁹

In the pre-*White* years, it was not unusual for the members of the executive and legislative branches to loudly and unfairly criticize the federal judiciary. While Clinton and Dole welcomed the opportunity to capture media attention by bullying a federal judge,²⁰ it was Congress that identified the intimidation of federal judges and the reduction of judicial power²¹ as useful political strategies. A booklet widely circulated among the Republican members of the 104th and 105th Congresses urged members to initiate impeachment proceedings against so-called “activist judges.” The booklet acknowledged that impeachment was unlikely, but argued:

Even if it seems that an impeachment conviction against a certain official is unlikely, impeachment should nevertheless be pursued. Why? Because just the process of impeachment serves as a deterrent. A judge, even if he knows that he is facing nothing more than a congressional hearing on his conduct, will usually become more restrained in order to avoid adding “fuel to the fire” and thus giving more evidence to the critics calling for his removal.²²

The booklet received some positive attention from Republicans in the House, notably Republican Majority Leader Tom DeLay, who argued that judges should not be impeached for partisan reasons, but for overstepping the bounds of their constitutional authority.²³

While federal politicians were by far the most aggressive and dominant critics of the judiciary (and federal judges the most frequent targets), politicians and political organizations at the state level sometimes orchestrated their own attacks²⁴ against members of the state judiciary.²⁵ It was not unheard of, prior to *White*,²⁶ for a state court judge to be targeted,²⁷ and, occasionally defeated in an election.²⁸ While these occurrences were unpleasant, they remained fairly isolated through 2002; the overwhelming majority of state court judges retained their positions,²⁹ and most of those who warned about the effect of threats to the independence of the judiciary were focused upon attacks on federal courts.³⁰

Not surprisingly, despite all its bravado, Congress did not impeach a single federal judge, though it did continue to insert itself into the workings of the federal courts, sometimes in disturbingly inappropriate ways.³¹

Despite this fairly consistent, and sometimes noisy, rivalry between the federal courts and Congress, most would opine that the courts continue to function as they should, separate from and independent of the attempts to undermine their integrity.

II. The Impact of *Republican Party of Minnesota v. White*

But if these attempts to control the federal courts by intimidation and interference were less than successful, today's efforts to undermine the independence of state courts, spearheaded by special-interest groups and catapulted by the Supreme Court's decision in *Republican Party of Minnesota v. White*, are much more likely to succeed. Success is likely not because state court judges are weak and malleable, but because the independence of the judiciary is as much a matter of public perception as it is of reality.³² The contention that "courts derive their legitimacy from their perceived neutrality" is largely true.³³

State court judges, few of whom hold their positions for life,³⁴ are being enticed by special-interest groups with large coffers and constituencies to compromise their independence in order to maintain their positions. State judicial independence in the aftermath of *White* is at risk of becoming no more than an archived principle.

The Supreme Court's decision in *White* impacted judicial independence in state courts in significant ways. First, the majority's flawed reasoning, in several respects, has led lower courts, judicial ethics bodies, and state supreme courts to eliminate other restrictions on judicial speech and conduct. The result has been a virtual removal of the distinction between judicial elections and other elections, and this has led to an increased tendency to view judges as politicians. In addition, the *White* decision created an ideal environment for the exercise of political control over state courts. The environment is fertile for control not only in the thirty-nine states where judges face some form of popular election, but also in states where judges are chosen by so-called merit selection. Even in jurisdictions where judges are initially appointed, they periodically face a retention vote. Special-interest groups can dramatically influence those "yes-no" races by their negative portrayals of incumbent judges.

A. The Effects of Flawed Reasoning

In the *White* decision, several aspects of the majority's flawed reasoning have led lower courts, judicial ethics bodies, and state supreme courts, to eliminate other restrictions on judicial speech and conduct unnecessarily.³⁵ Even in light of the majority's emphasis on the narrowness of the decision,³⁶ courts have relied on *White* to strike down restrictions on pledges or promises,³⁷ commitments,³⁸ false statements,³⁹ and political activity.⁴⁰ Some state supreme courts have altered their ethics rules⁴¹ to eliminate many restrictions on judicial campaign speech and conduct and soften those that remain. Some courts and judicial ethics bodies have shied away from discipline when adjudicating ethics complaints based on judicial speech and conduct⁴² and, wary of lawsuits filed against nonconformists,⁴³ have altered their advice to judicial candidates. Arguably, most, if not all, of these reactions go beyond what is necessary to effectuate the holding in *White* and flow from the opinion's flawed rationale.

First, the majority opinion discounts the view that judicial elections are, or should be, different from elections for legislative or executive offices.⁴⁴ Although the majority denies this basis for their holding,⁴⁵ the opinion clearly evinces, as Justice Ginsberg declares, a "unilocal 'an election is an election' approach."⁴⁶ Not only does the majority repeatedly refer to the rights of candidates in general,⁴⁷ but their opinion unambiguously concludes that the essence of the case is not that it involves judges, but that it involves elections:⁴⁸ "[I]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."⁴⁹

By denying the uniqueness of judicial office, the *White* majority confuses and promotes a misunderstanding of the role of a judge. Unlike legislative and executive office holders who are elected to represent their constituents, judges must apply the law. They are not permitted to rule based upon majority viewpoint. Their responsibility is not to those who elect them but to the rule of law. When judges campaign for election or retention based on personal qualifications for office, voters perceive the distinction between judges and other office holders. They may observe that people seeking judicial positions do not make promises or announce views on controversial political issues. They are able to deduce at least that these elections are different from legislative and executive branch elections in that regard, and that they are expected to look to the candidate's qualifications and experience, not to promises of future action.

Second, the *White* opinion also muddles the role of judges by asserting a series of false premises about lawyers and judges. One false premise is that, because judges or judicial candidates must be lawyers,⁵⁰ they have predisposed legal views. The faulty logic continues as the majority equates predisposition with predetermined judicial opinions.⁵¹ This premise wrongly assumes that to be legally trained is to be legally predisposed. It also incorrectly assumes that lawyers adopt and accept as their own the viewpoint of their clients.⁵² This leapfrog reasoning—from legal training to legal practice to legal predisposition to judicial decision-making—misconstrues the roles of lawyers and judges.

Equally false, and unfortunate, are the opinion's misassumptions about judges. The majority asserts that when incumbent judges decide cases, teach courses, or write articles, they are expressing

viewpoints that foreordain their future rulings.⁵³ This misassumption both misstates and oversimplifies the process of judging. It is a grave misstatement because ethical judges do not express personal viewpoints in judicial opinions. While judges who engage in scholarship and teaching may express personal opinions, those opinions cannot ethically influence their judicial decisions.⁵⁴ The misassumption oversimplifies the nature of judging because it suggests that a prior ruling determines the outcome of a future case, such that the task of judging is simply cubby-holing cases into predefined “holding” compartments. This one-size-fits-all characterization of the process of judging wrongly assumes that all cases are fungible and all principles of law dictatorial.

Third, in addition to oversimplifying the role of judges, the *White* majority also overstates the role of most judges. To demonstrate that judges are not all that different from other political officials, the Court asserts that “the judges of inferior courts *often* ‘make law’”⁵⁵ To advance this denied, but ubiquitous “unilocular” approach, the majority likens all judges to Supreme Court justices and shatters some of the bedrock premises of the American justice system⁵⁶ in the process.

These and other false assumptions in the *White* majority opinion coalesced with the holding to create the ideal environment for money, politics, and special-interest group agendas to gain an unprecedented stronghold in our state courts. The Court endorsed the belief that a candidate’s personal views on disputed legal or political issues are relevant qualifications for office. Twice the Court characterized the speech that Minnesota prohibited—a candidates’ “announce[ment of] his or her views on disputed legal or political issues”—as speech “about the qualifications of candidates for public office.”⁵⁷ The Court further strengthened this nexus between a candidate’s personal views and qualifications when it expressed discontent with the limited topics traditionally discussed in judicial elections.

By endorsing a nexus between personal views and qualifications for judicial office while discounting the sufficiency of the more traditional subjects of judicial campaigns, the Court created a perfect environment for special-interest groups to peddle their judicial questionnaires.⁵⁸ If announcing the personal viewpoint is “speech about the qualifications of the candidate for public office,” it seems reasonable, from a layperson’s perspective, to ask the candidate to respond. Moreover, from that same perspective, it seems unreasonable, evasive, and even arrogant, for a candidate to refuse to respond.⁵⁹

While an announcement of a candidate’s viewpoint is technically only an *announcement*, the *White* majority, by its incorrect characterizations of lawyers, judges, and judging, has supported the conclusion that personal viewpoints not only predispose a candidate to ruling in a particular way, but also predict, and arguably ensure, a candidate’s rulings. This faulty conclusion buttresses the public’s misperception of the judiciary.⁶⁰ By an overwhelming majority, the American public wants to elect its judges.⁶¹ This is not only because the public has confidence in their own judgment, but also because the public believes that judges can be held accountable through elections. When a voter hears a judicial candidate “announce” a view, the voter is likely to interpret the view as a commitment. From the voter’s perspective, an announcement is meaningful only to the extent that it informs the voter about whether the candidate should be elected. A voter will likely expect adherence to that view, rather than adherence to some abstract notion like the rule of law. And while the *White* majority did cajole those defending the speech limitation by asserting that “candidates for judicial office [are not]

compelled to announce their view,”⁶² the opinion has undeniably resulted in the expectation that candidates for judicial office will discuss and state their views.⁶³

The *White* decision advances this likelihood as well when it ridicules the suggestion, made by the dissent, that judicial candidates act unethically when they curry favor by stating views that will further their chances of election.⁶⁴ Thus, not only did the majority elevate a judicial candidate’s First Amendment rights over the citizen’s rights to fair and independent courts, they also gave judges incentives to join the political fray.

Both the outcome and rationale in *White* have energized special-interest groups in their efforts to exert unhealthy influence over state court judges. The decision that a candidate has the right to announce his or her agreement with the special-interest agenda of the day has created a new group of political activists for special-interest groups who view every state court judge⁶⁵ as a potential on-the-bench advocate for their agenda. This potential is sufficient motivation for special-interest groups to invest their considerable resources in the job of stocking state court benches. Once their campaign is mounted,⁶⁶ the opposition candidate has little choice⁶⁷ but to join the financial arms race. In the end, both the public and the judiciary sense that the system has been soiled.⁶⁸

The increase in the costs of judicial campaigns and the heightened involvement of special-interest groups will likely produce a new breed of judges—those with money and influence. In addition to an overall decrease in respect for the judiciary, there will likely be a corresponding reduction in the prestige of judicial office. Those who have, or who are willing to forge, connections with well-funded special-interest groups will comprise the pool of candidates for judicial office. Some longtime judges will leave the bench rather than become political pawns.⁶⁹

The pool of judicial candidates will likely be not only more political, but also less qualified. As one experienced media consultant has recently observed, “I think the bottom line is that people who are qualified, who have everything going for them . . . end up not being put on a bench [while a] person who is not qualified, who has enough money, who has a real smart political handler, can end up sitting in a judicial seat [with] absolutely no business being there.”⁷⁰ The end result could be not only a state judiciary that lacks independence and integrity, but one that lacks competence as well.

B. The Creation of an Ideal Environment for Control

The holding in *White* has created an ideal environment in which money, politics, and special-interests thrive. This environment has produced a new breed of threats, different in kind and degree, leveled specifically at state court judges. While history is replete with examples of conflict⁷¹ between the three branches of government,⁷² often aimed at undermining the judiciary, the post-*White* threats are orchestrated by moneyed groups whose sole objective is to control state courts for the purpose of imposing their social and political agendas. If they succeed, state judges, like legislators and governors, will represent those with political clout and abundant resources, destroying permanently any prospect of equal justice for all.

1. Judicial Elections Before *White*

Before the decisions in *White* and its progeny,⁷³ most state court judicial elections were decorous events in which candidates talked about their educational backgrounds,—their practical legal experience, their military record, and their service to their church and community. This was the practice in most states for several reasons.⁷⁴

First, judicial ethics rules, though varying from state to state, restricted campaign speech and conduct by judges and candidates for judicial office.⁷⁵ The restrictions were undoubtedly exacting. For example, the limitations on campaign speech usually disallowed announcements,⁷⁶ pledges and promises,⁷⁷ or commitments⁷⁸ with regard to issues or performance in office.⁷⁹ The conduct restrictions were more detailed and varied, depending on the nature of the judicial selection system,⁸⁰ but most included prohibitions on personal solicitation of campaign contributions or of publicly stated support.⁸¹ Many also disallowed candidate involvement in partisan political activities, including attending political gatherings, making speeches on behalf of political candidates or organizations, and holding political office.⁸²

Those few candidates who flouted their ethical obligations risked being reported and investigated and subjected to discipline by state supreme courts and judicial ethics bodies. Sometimes the discipline was harsh.⁸³ The Florida Supreme Court, for example, publicly reprimanded a Florida judge⁸⁴ and fined her one-half of her annual judicial salary for her 1998 campaign, which included “implicit promises that if elected to office, [she] would help law enforcement.”⁸⁵ The New York Commission on Judicial Conduct recommended removal of a judge for campaign conduct that included the judge identifying himself as the “law and order” candidate, but ultimately, the judge was only censured.⁸⁶

It was not only the concern about judicial ethics requirements that motivated most state court judges to conduct modest campaigns. Custom and tradition also dictated banal state judicial campaigns. Although judges had climbed to the bench as a result of their prior political activities and connections, many happily relinquished the demands of political life upon becoming a judge. They routinely declined to voice their personal opinions on legal and political issues,⁸⁷ even when asked during a campaign.⁸⁸ Many felt a welcomed protection in provisions that restricted their attendance at political gatherings and their contribution to and support of other political candidates. The limitations on political speech and conduct were a safe, and appreciated, haven. Once judges became acclimated to avoiding political activity and speech, they carved out a unique judicial image: a judge was not just a politician dressed in a black robe but a special kind of public servant,⁸⁹ one who was uniquely⁹⁰ isolated from everyday political bargaining and dealmaking.

In some jurisdictions, where judicial candidates ran on partisan ballots, the party identification might provide a quasi-platform for the candidates, but in nonpartisan elections, campaign platforms were the exception, not the rule. Most often when they did exist, they typically concerned matters of judicial administration or court improvement, not hot-button political or social issues.

This is not to suggest that, before 2002, all judicial races were dignified or all judicial candidates noble. In some notorious cases, judges and their opponents engaged in fairly acrimonious

campaigns,⁹¹ including, in perhaps the most vitriolic race of recent memory, candidates for Alabama Chief Justice accusing one another of lying, stealing, and cheating.⁹² Occasionally, as already noted, a particular decision would incense the electorate sufficiently to ignite a grassroots campaign against a judge. But those occurrences stand out not because of their frequency, but because of their rarity.

2. Judicial Elections from 2000 to 2006: New Environment—More Money, Television, and Special Interests, Less Decorum

In the three election cycles before 2000, a study showed that around one-third of the candidates for judicial office raised no funds at all.⁹³ Even among those who raised money, the amounts raised and expended were relatively low by today's standards. Television advertisements, the costliest part of elections, were rarely used in state judicial races, with many judges relying on newspaper advertisements and direct mail to market their candidacy. When a nonpartisan national partnership identified the year 2000 as a "watershed year for big money, special-interest pressure, and television advertising in state supreme court campaigns,"⁹⁴ it seemed apparent that state judicial campaigns had taken a turn for the worse.⁹⁵ How drastic a turn could not have been foreseen.

What alarmed observers in 2000 was the dramatic increase in the amount of money raised by candidates seeking state supreme court seats. The more than \$45 million raised by candidates for supreme court seats represented a 61-percent increase over the amount raised two years earlier. Perhaps more staggering, the amount was twice as much as that raised in 1994.⁹⁶ The top three identified sources⁹⁷ of that increased money supply were, in order, lawyers,⁹⁸ business interests,⁹⁹ and political parties.¹⁰⁰

It was groups,¹⁰¹ not candidates or parties, who supplied the funds for the greatest increased expenditure—television advertising, the new "weapon of choice" for judicial candidates.¹⁰² There were ads sponsored by interest groups that reflected positions on tort reform, crime control, and family values,¹⁰³ while only a few ads focused on traditional themes such as candidate background and qualifications.¹⁰⁴ Another cause of concern was the harsh tone of the group-sponsored ads.¹⁰⁵ More than 80 percent of these were negative, in the form of attacks on judicial candidates.¹⁰⁶

While there was good reason to be alarmed in 2000 by the infusion of money and venom into state judicial elections, one observation about the source of the money was amplified in importance after the decision in *White*. In attempting to study the 2000 elections, researchers realized that the study was made more difficult by the nondisclosure of finances by special-interest groups.¹⁰⁷ These groups, which were more active in judicial than in other political elections, could escape reporting requirements by avoiding the use of "magic words," like "elect" or "defeat" in their advertisements.¹⁰⁸

The 2000 elections may have been a watershed, but they were undoubtedly the tip of the iceberg as well. What was seen as "skyrocketing fundraising" in the 2000 state supreme court races would seem trivial by 2004¹⁰⁹ and minuscule by 2006.¹¹⁰ By then, the once-aberrational high-dollar campaign had become the norm. Not only were more candidates raising and spending more money, but more states now faced a judicial money arms race.¹¹¹ The money, once almost evenly supplied by rival groups such as the plaintiff and defense bars, became largely the one-sided gift of conservative

business and special-interest groups.¹¹²

Similarly, the use of television advertisements, seen as an anomaly in 2000, was commonplace by 2002¹¹³ and, for all practical purposes, mandatory by 2006.¹¹⁴ In judicial races, television advertising is now defined as the “norm,” even in primary elections.¹¹⁵ Beginning in 2002, the word “signal” was used to describe the content of television advertisements. “Candidates and special interests routinely [crafted] ads that [would] send signals—that is, offer voters clues as to how future cases might be decided if a particular candidate is elected.”¹¹⁶ While previous advertisements had touted qualifications for office, only 36 percent of the 2002 advertisements did so.¹¹⁷

What the advertisements did peddle in 2002 were candidates’ positions on controversial issues that would attract special-interest influence.¹¹⁸ While advertisements were described as “signals” two years earlier, many of the 2004 advertisements “explicitly state[d] the candidate’s opinions on controversial issues that demand[ed] impartial adjudication in the courtroom.”¹¹⁹ The number of advertisements that promoted a candidate’s qualifications fell to 30 percent,¹²⁰ while those that came painfully close to stating promises were by far the majority.¹²¹

Attack ads, which declined in 2002, were resurrected in 2004 by special-interest groups and political parties.¹²² More than half of all advertisements paid for by interest groups and political parties in 2004 were negative ads.¹²³ The contagion of negative advertising spilled over in 2006 to ads placed by the candidates themselves:

Historically, special interest groups and political parties have proven to be the attack dogs of [state] Supreme Court campaigns. In 2004 special interest groups and political parties sponsored almost nine out of ten negative ads. In 2006 however, it was the candidates themselves who went on the attack, sponsoring 60 percent of all negative ads. [In select states] candidates hurled insults and accusations that would have been unbecoming even in congressional campaigns, much less in campaigns by individuals whose judicial temperament is an important qualification for office.¹²⁴

If special-interest groups were changing the tenor of their advertisements, they were not decreasing their involvement in judicial races. What was characterized as increased attention in judicial elections by special-interest groups in 2000 would double in 2002, when twice as many special-interest groups would advertise for judicial candidates.¹²⁵ By 2004, state judicial elections were aptly described as “interest group battlefields” in which special-interest groups

mobilize[d] their money and membership to shape the outcome of state Supreme Court campaigns Groups on both sides of the culture wars have also accelerated their efforts to elect state high court judges with stated commitments to specific political agendas.

More and more, judicial candidates find themselves pressured to play by a new set of rules¹²⁶

Moreover, both the public and the judiciary now overwhelmingly recognize that special-interest groups are attempting to mold public policy to accomplish their own agenda through involvement in state judicial elections.¹²⁷

3. The Future of Judicial Elections: New Weapons, Battlegrounds, and Personal Choices

If more money, more television, and more special-interest negative advertising were the repetitive themes of the 2000-to-2006 judicial elections, the newcomer in the last two elections would be special-interest questionnaires. Replacing television advertising as the “weapon of choice,”¹²⁸ special-interest questionnaires are the latest tactic in exerting pressure upon state judicial candidates.

Various special-interest groups¹²⁹ distribute questionnaires to candidates for judicial office, including judges who are unopposed and seeking retention in office. Often the questionnaires are accompanied by an introduction that advises the candidate as to their legal right to respond.¹³⁰ In Indiana, for example, the judges received a letter attached to the questionnaire that advised them that the questionnaire included “only questions with answers protected by the First Amendment.”¹³¹ The questionnaires concern “a number of social and political issues such as abortion, gun control, and the role of a judge’s religious beliefs in decision making.”¹³²

Because the special-interest group chooses the questions to ask, they are able to collect the views of the candidates on the issues that are most important to the group. Because most of the special-interest groups represent conservative social and political viewpoints, the candidates that they support are those who express conservative social and political values. By identifying and supporting these conservative candidates, the groups hope to elect more judges who espouse personal viewpoints favoring tort reform and capital punishment and opposing same-sex marriage and abortion.¹³³ Once elected, it is the organization’s expectation that these judges will issue rulings consistent with their personal viewpoints, resulting in heightened scrutiny of tort claims, aggressive enforcement of capital punishment, and continued resistance to reproductive freedom and same-sex marriages.¹³⁴

Candidate responses are most often limited to checking the appropriate box on the questionnaire.¹³⁵ Thus, it is actually the words of the special-interest group, with the candidates’ names attached, that are then used in the group’s advertisements and mailings. In addition to being included in the group’s advertisements, a candidate’s response may attract campaign donations or other assistance from members of the special-interest group.

Special-interest groups do not ignore candidates in retention elections or candidates who do not respond to their questionnaires. Retention candidates whose views are not consistent with the groups may become the target of a “Vote No” campaign. Candidates who do not respond are frequently identified in advertisements as “failing to cooperate.” In some cases, the special-interest group provides its own characterization of the viewpoints of the nonresponding candidate.¹³⁶

In 2006, most campaign questionnaires were circulated by conservative special-interest groups.¹³⁷ Not surprisingly, interest groups that are socially and politically conservative are the dominant

influences in most state judicial elections. While one reason for their dominance is their resources, their advantage also flows from the marketability of their viewpoints.¹³⁸ What began as increased attention to their pet issues in 2000 has become complete domination in 2006. In fact, “[t]elevision spending by interest groups . . . [is] literally entirely one-sided.”¹³⁹ In only one state—Washington—did competing special-interest groups fund television advertisements.

C. Recusal: the Last Stand of the Independent Judge?

Not only are special-interest groups seeking to advance their agendas by electing like-minded judges, they are also working to remove one remaining safeguard of judicial independence. This safeguard, which Justice Kennedy emphasized in his concurring opinion in *White*, is judicial recusal.¹⁴⁰

State court judges have traditionally been guided by a number of specific recusal provisions. Some are statutory, based on kinship, relationship, and financial interest, and others are articulated in the codes of judicial conduct.¹⁴¹ In addition, most state judges are also bound by a general provision that requires recusal in the event of an “appearance of impropriety.”¹⁴² The appearance of impropriety is an objective standard. The test is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”¹⁴³ Some states also have added specific provisions requiring recusal based on campaign contributions¹⁴⁴ or responses to special-interest questionnaires.¹⁴⁵

In a series of lawsuits,¹⁴⁶ largely, but not completely, unsuccessful,¹⁴⁷ special-interest groups are mounting constitutional challenges to many of the recusal provisions.¹⁴⁸ In addition to general ambiguity and vagueness arguments, the groups argue that requiring recusal of a judge who has announced views during a judicial campaign chills the former candidate’s First Amendment rights. They argue that, because candidates have a federal Constitutional right to announce views, once elected, they have the right to exercise all of the duties of office, including adjudicating even those cases that involve issues on which they have expressed personal views. One court has tentatively agreed with that argument, noting that, “Although a candidate would not fear immediate repercussions from the speech, the candidate would be equally dissuaded from speaking by the knowledge that recusal would be mandated in any case raising an issue on which he or she announced a position.”¹⁴⁹

Some of these arguments may have been the impetus behind the ABA’s proposal that the appearance of impropriety standard be removed from the Model Code of Judicial Conduct.¹⁵⁰ When the revised Code was presented to the House of Delegates in early 2007, the appearance of impropriety standard was deleted. This excision inspired heated debate among lawyers and judges, and ultimately journalists and politicians.¹⁵¹ The ABA reinserted the language, prompting one judge to comment that the standard is the “still, small voice judges hear that reminds them that the people who come before them expect to be treated fairly.”¹⁵²

While states may not limit a judicial candidate’s free speech rights during a judicial campaign, they must have the authority to require the proper discharge of judicial duties.¹⁵³ If courts or judicial ethics bodies cower from a disciplined analysis of the recusal provisions,¹⁵⁴ or extend the decision in *White* to invalidate these provisions as many did in the first round of post-*White* litigation, they will have

furthered the destruction of respect for the bench predicted more than 100 years ago by Roscoe Pound.¹⁵⁵

State judges must make difficult personal choices in the post-*White* environment. As candidates, they must choose how they will finance their campaigns, whether they will campaign on traditional qualifications or announce their views on the issues of the day, and whether they will respond to special-interest questionnaires. If elected, judges must choose how strictly they will interpret the recusal standards. Questionnaires will likely remain the weapons of choice for special-interest groups in their efforts to gain control over state courts. Challenging recusal provisions as unconstitutional will just as likely remain the new battleground. But, in the end, the success of the efforts to control the judiciary depends on the willingness of individual state court judges to be controlled.

In recent elections, some candidates have declined campaign donations; many have refused to respond to questionnaires,¹⁵⁶ and some have attempted to spotlight the impropriety of these practices.¹⁵⁷ But many candidates for judicial office believe that voters have a right to know their personal viewpoints. And many sincerely intend only to communicate their views, not to predict or guarantee their conduct in office. For those judges who choose to announce their views, respond to questionnaires, or accept financial support from special-interest groups, the recusal standards provide a meaningful way to assert their independence. By strictly adhering to the appearance-of-impropriety standard, a judge who has announced his or her views or accepted significant campaign contributions can remove any misperception about the purpose of the announcement. Just as easily, a judge who blindly snubs the standard can create a perception, regardless of the reality, that the judiciary is beholden to special interests.

A compelling example of the appearance that can be created by a judge's rejection of recusal can be found in the case of *Avery v. State Farm*. In May 2003, the Supreme Court of Illinois heard oral argument in a state-wide class action against State Farm Mutual Automobile Insurance Company. The appeal stemmed from a class action jury award on behalf of almost five million policyholders in the amount of \$456 million. The judge had awarded an additional \$730 million in punitive damages. The insurance company's appeal remained pending for over a year after the Illinois Supreme Court heard oral arguments. The case was finally decided after the 2004 judicial elections.¹⁵⁸

Two opposing candidates for the Illinois Supreme Court that year raised, between them, over nine million dollars in political contributions, an amount that was almost double the previous national record for any state judicial election. The candidate who ultimately won the election described the fundraising as "obscene."¹⁵⁹ Among his contributions were \$350,000 from State Farm employees, lawyers, and others, and an additional one million dollars from larger groups of which State Farm was a member. As a result, plaintiffs in the class action requested that the justice recuse himself from participating in the decision. He refused. Ultimately the Illinois Supreme Court overturned the verdict against State Farm, by one vote, with the deciding vote cast by the justice who refused to recuse himself.¹⁶⁰

Even the most well-researched and reasoned judicial decision will not be respected if it appears to have been influenced by money or special interests. A court or a decision that is perceived as biased,

regardless of whether bias actually exists, will lose its legitimacy. In an atmosphere in which 70 percent of Americans believe that courts are influenced by campaign fund-raising, and nearly that many also believe that pressure from contributors affects judicial impartiality,¹⁶¹ courts must scrupulously honor the appearance of impropriety recusal standard.

III. Conclusion

Roscoe Pound's 1906 warning that politicizing the courts would ultimately destroy respect for the bench looms ominously in the aftermath of *Republican Party of Minnesota v. White*. More than 100 years earlier another great lawyer, John Marshall, in an impassioned plea for an independent state judiciary, argued that a great "scourge" to the people would be "an ignorant, a corrupt, or a dependent judiciary."¹⁶² Such a judiciary may ultimately be the gift of *White* unless state court judges, by making difficult personal choices, disavow the efforts to control and politicize the state court judiciary.

NOTES

¹ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 48 S. TEX. L. REV. 853 (2007).

² 536 U.S. 765 (2002).

³ Gregory Wersal, a Minnesota lawyer, sought election to the Minnesota Supreme Court on three occasions. *Id.* at 768-69. He filed the first of three lawsuits seeking to enjoin enforcement of several provisions of the Minnesota Code of Judicial Conduct during his 1996 election bid. *See Republican Party of Minn. v. Kelly*, 996 F. Supp. 875-76 (D. Minn. 1998).

⁴ The original lawsuit which ultimately led to the decision in *Republican Party of Minnesota v. White* was filed in the United States District Court by Gregory Wersal, his wife and brother, and the following additional plaintiffs: the Republican Party of Minnesota; the Indian Asian American Republicans of Minnesota; the Republican Seniors; the Young Republican League of Minnesota; the Minnesota College Republicans; the Campaign for Justice; Minnesota African-American Republican Council; the Muslim Republicans; Corwin Hulbert; Michael Maxim; and Kevin Kolosky. *Republican Party of Minnesota v. Kelly*, 996 F. Supp. 875-76 (D. Minn. 1998).

⁵ *See, e.g.*, Anthony Lewis, *The Old Dole*, N.Y. TIMES, April 22, 1996, at A5, available at <http://query.nytimes.com/gst/fullpage.html?res=940DE6DB1F39F931A15757C0A960958260&sec=&spon=&pagewanted=print> (accessed January 10, 2010); Deborah Pines, *Under Fire, Judge Reversed Himself*, NAT'L L.J., April 15, 1996, at A12; Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE6D6163EF936A25753C1A965958260> (accessed January 10, 2010). *See also* sources cited in note 9 *infra*.

⁶ The willingness of one branch of government to attempt to harness the power of another is nothing new. After *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which the United States Supreme Court established judicial review of congressional acts, Congress reacted by passing the Judicial Act of 1802, which abolished circuit judgeships created by the Judicial Act of 1801, and in so doing, restored circuit riding by the Supreme Court justices. More importantly, to hold the Court at bay, the Act abolished the 1802 term of Court, which effectively ended the Court's jurisdiction. Harold R. Burton, *Marbury v. Madison: The Cornerstone of Constitutional Law*, in *THE SUPREME COURT AND ITS JUSTICES* 15-18 (Jesse H. Choper ed., 1987). Other examples include the impeachment trial of Justice Samuel Chase for decisions he made as a circuit judge, which was described at the time as the "entering wedge to the compleat [sic] annihilation of our wise and independent Judiciary," COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, *THE SUPREME COURT OF THE*

UNITED STATES, ITS BEGINNINGS AND ITS JUSTICES 1790-1991 19 (1991); the plank of the Progressive Party in 1912, espoused by Theodore Roosevelt, which advocated the recall of judicial opinions and judges by popular vote, Paul A. Freund, *Storms Over the Supreme Court*, in *THE SUPREME COURT AND ITS JUSTICES* 185 (Jesse H. Choper, ed., 1987); the court packing plan of President Franklin Delano Roosevelt; legislation proposed in 1957 by an Indiana senator which proposed denying courts jurisdiction in a long list of cases including those involving loyalty oaths and subversive activities, *id.* at 186; the 1986 discussion about impeaching three court of appeals judges who voted to overturn a murder conviction on what was termed a technicality, Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L. J. 763, 779 (1988); and the 1996 debate over a constitutional amendment which sought to grant Congress absolute authority to override Supreme Court decisions by legislative act. Stanley Mailman, *Cutting Back on Hearings*, *Judicial Review*, N.Y.L.J., Oct. 28, 1996, at 3.

⁷ See Steven Van de Walle, Steven Van Roosbroek & Geert Bouckaert, *Trust in the Public Sector: Is There Any Evidence for a Long-Term Decline?*, 74 INT'L REV. ADMIN. SCI. 47, 52-53 (2008) (study notes in US “a number of fluctuations rather than a straightforward decline”).

⁸ *Id.*

⁹ See e.g., Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863 (1999) [hereafter *Revisiting*]. (“Arguably the current array of Congressional challenges to the judiciary are the greatest threat posed to judicial independence since Roosevelt unveiled the ill-fated Court packing plan in 1937.”); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999) [hereafter *Burbank*]. (“Concern about judicial independence has been a recurrent feature of American history, as have attacks on courts and their decisions. In recent years, however, such attacks have become more than the expected response of persons who profoundly disagree with those decisions. They have become part of orchestrated strategies of political parties and other groups, empowered by the tools of modern political campaigns and by the ignorance of the electorate, which is the godmother of the single-issue campaign and the godfather of the sound bite.”); *Is There a Threat to Judicial Independence in the United States Today?*, Panel Discussion in 26 FORDHAM URB. L. J. 7 (1998); *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, Panel Discussion in 31 COLUM. HUM. RTS. L. REV. 137 (Fall 1999).

I was among those worried by what seemed like unprecedented attacks on the judiciary. In 1997, five years before *White*, I questioned “whether our system of justice [will] survive the present efforts to reduce its members to contestants in a tough-man contest.” Penny J. White, *If Justice Is for All, Who Are Its Constituents?* 64 TENN. L. REV. 259, 262 (1997). I noted that the “growing trend” toward eliminating independent judges required lawyers to “stave off the attempts to make judicial decisions subject to public polling” and “judicial elections the grand prize for candidates who claim that their constituents are law and order, regardless of the circumstances.” *Id.* at 261.

¹⁰ *Judicial Activism: Defining the Problem and Its Impact: Hearings on S.J. Res. 26, a Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office, Before the Subcomm. on Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. 10 (1997).

¹¹ American Bar Association, *An Independent Judiciary: Report of the Comm. on Separation of Powers and Judicial Independence* (1997).

¹² Many scholars have divided the issue of judicial independence into two parts. The independence of the judiciary as an institution is generally pegged “institutional independence,” while independence of individual judges or courts with regard to decisionmaking is often referred to as “decisional independence.” See, e.g., John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999) (distinguishing independence of individual judges from dependence of the judiciary as an institution); Ronald M. George, *Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345 (2005).

¹³ Drawing on a metaphor used by Justice Otto Kaus of the California Supreme Court, Professor Gerald F. Uelman, in 1997, described the major issues that threatened judicial independence as “crocodiles in the bathtub.” They were the death penalty (“the fattest crocodile”), abortion (“the meanest crocodile”), and popular initiatives (“the angriest crocodile”). Gerald

F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in the Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1135, 1144, 1147 (1997).

¹⁴ Judge Harold Baer, Jr., a federal district judge in the Southern District of New York, granted a defense motion to suppress evidence in the case of *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996) (*Bayless I*), *vacated*, 921 F. Supp. 211, 212 (S.D.N.Y. 1996) (*Bayless II*). The motion alleged that the police did not have reasonable suspicion to stop the car that defendant Bayless was driving and that the subsequent search of the car, which yielded the physical evidence of more than seventy pounds of cocaine and heroin, was therefore the fruit of an illegal stop. The judge granted the motion. *Id.* The ruling prompted more than 200 members of Congress to sign a letter to President Clinton calling for the President to demand Judge Baer's resignation. Presidential nominee Dole called for Baer's impeachment. *See* Harold Baer, Jr., *Interview: A Unique Perspective on Judicial Independence*, 25 HOFSTRA L. REV. 799 (1997); Jon O. Newman, *The Judge Baer Controversy: Correspondence from the White House, Senator Dole, Congressmen, and Judges*, 80 JUDICATURE 156 (1997).

¹⁵ Chief Judge John O. Newman and three prior chief judges of the Second Circuit Court of Appeals issued a public statement decrying the attacks on Judge Baer: "These attacks do a grave disservice to the principle of an independent judiciary and, more significantly, mislead the public as to the role of judges in a constitutional democracy. . . . We have no quarrel with criticism of any decision rendered by any judge. Informed comment and disagreement from lawyers, academics, and public officials have been hallmarks of the American legal tradition. But there is an important line between legitimate criticism of a decision and illegitimate attack upon a judge." CONGRESSIONAL RECORD S3235 (Mar. 29, 1996), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-1996-03-29/pdf/CREC-1996-03-29-pt1-PgS3235.pdf> (accessed January 10, 2010). *See also* David S. Broder, Editorial, *Space for a Judge*, WASH. POST, Apr. 14, 1996, at C7; Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1, B4, *available at* <http://query.nytimes.com/gst/fullpage.html?res=9D06EFDA1539F93AA15750C0A960958260&n=Top/Reference/TimesTopics/People/N/Newman,JonO> (accessed January 10, 2010). Similarly, the United States Attorney for the Southern District of New York, Mary Jo White, criticized the attacks, noting that "The independence of the judiciary is . . . one of the fundamental cornerstones of our government and democracy. It is indeed that independence that both the Government and defendants rely upon in every case for a fair and just decision on the merits." Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299, 301 (1996). In addition, when then-Chief Justice Rehnquist commemorated the centennial of American University's Washington College of Law in April 1996, he described judicial independence as one of the "crown jewels of our system of government." William O. Rehnquist, *The Importance of an Independent Judiciary* (address at American University Washington College of Law), *available at* www.lectlaw.com/files/jud38.htm (accessed January 10, 2010).

¹⁶ In addition to criticisms and threats such as those leveled at Judge Baer, and a publicized agenda to threaten impeachment in order to intimidate federal judges, *see supra* notes 14 & 15 and *infra* note 18, Congress toyed with legislation eliminating life tenure. *See, e.g.*, S.J. Res. 26, 105th Cong. (1997); H.J. Res. 63, 105th Cong. (1997); H.J. Res. 77, 105th Cong. (1997); H.J. Res. 74, 105th Cong. (1997). It also passed legislation limiting jurisdiction in litigation brought by prisoners, immigrants, and death-row inmates, and attempted to enact legislation disallowing single-judge decisions in cases challenging state initiatives.

¹⁷ *see, e.g.*, Ralph Z. Hallow, *Republicans Out to Impeach "Activist" Jurists*, WASH. TIMES, Mar. 12, 1997, at A1 [hereafter *Hallow*] (including a quote from then-House Majority Whip Tom DeLay that "As part of our conservative efforts against judicial activists, we are going after judges . . . in a big way."); "Judicial Intimidation" (NPR "Morning Edition" broadcast, Sept. 26, 1997) (quoting an agreement by then Senate Majority Leader Trent Lott that "[I]t sounds like a good idea to me."); *Judicial Misconduct and Discipline, Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 8 (1977) (quoting a member of the House saying "It is time to begin exploring how and in what way we might take steps to 're-balance' . . . includ[ing] . . . exploring . . . the consequences [of judicial] misbehavior . . ."); and Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679 (1999) (quoting then-Senator John Ashcroft saying, "Activist, out-of-control judges pose a clear and present danger to constitutional freedom.").

¹⁸ Despite Judge Baer's reconsideration of his ruling, then-House Majority Whip Tom DeLay identified Judge Baer as an impeachment "target." *Hallow, supra*. Other attempts to impeach were directed at U.S. District Judge Fred Biery (W.D.

Tex.) for his ruling in an election contest alleging voter fraud, *Casarez v. Val Verde County*, 957 F. Supp. 847 (W.D. Tex. 1997); and Chief Judge Thelton Henderson (N.D. Cal.) for his ruling enjoining implementation of a voter-approved affirmative action ban, *Coalition for Economic Equity v. Wilson*, No. C 96-4024 TEH, 1996 WL 788375 (N.D. Cal., Dec. 6, 1996).

¹⁹ In his 1999 article comparing the then-present threats to judicial independence with the Roosevelt courtpacking plan, Stephan Kline observes that “What is particularly odd about these series of attacks on the courts . . . is that the courts have not been expansive or sought to expand their powers. . . . Even the ferociousness of the Great Depression did not excuse or justify the damaging attacks on the courts, and there is no contemporary national emergency which could justify an assault on judicial independence today” *Revisiting*, at 953-54.

²⁰ Judge Baer’s decision in *Bayless I* was issued on January 22, 1996. Based on the government’s motion to reopen, and a rehearing at which the government presented additional testimonial and documentary evidence, Judge Baer vacated the ruling in *Bayless II* in early April 1996, prompting a journalist for TIME magazine to comment that the judge had proven that he could be “both wrong and arrogant but not stupid.” The journalist continued his criticism not only of the judge, but also of President Clinton and Senator Dole:

[Judge Baer] helped the man who appointed him by reversing his ruling, which left the President free to climb back onto the moral high ground. “It’s important not to get into the business of characterizing judges based on one decision they make,” Clinton said almost immediately after Baer fell on his gavel. Dole, too, accommodated the changed landscape with stunning speed. “I don’t suggest we ought to be able to pressure judges, but we ought to be able to criticize [them] when we think they’ve made a mistake”

The entire episode is a blot on both candidates. One can safely speculate that [the President’s press secretary’s call for the judge to either reverse his ruling or resign] caused Baer to see the case in a different light. Clinton interfered with the process as surely as if he had flown to New York to demonstrate against the judge’s original decision. Dole’s post-reversal words appear equally hypocritical. When the leader of the Senate, the body with the power to remove judges, calls for a jurist’s impeachment, that’s pressure.

Michael Kramer, *Cheap Shots at Judges*, TIME, April 22, 1996, available at <http://www.time.com/time/magazine/article/0,9171,984425,00.html> (accessed January 10, 2010).

²¹ See *Revisiting*, at 867 n. 11. (“During the 104th and 105th Congresses, at least seven constitutional amendments were introduced which would have eliminated life tenure for federal judges, replacing it with a fixed term of between six and twelve years, and sometimes permitting reappointment.”)

²² DAVID BARTON, IMPEACHMENT! RESTRAINING AN OVERACTIVE JUDICIARY 53 (1996). This 62-page booklet, written by Barton in 1996, has been garnering renewed attention. Ralph Neas, president of People For the American Way, describes the book as a “handbook on how and why the [political right wing] should push for impeachment of judges whose decisions they disagree with on abortion, school desegregation, homosexuality, and other subjects.” Mr. Neas’s entire letter, sent to Senator Bill Frist to urge his disassociation with Barton, is available at <http://www.buzzflash.com/alerts/05/04/ale05052.html> (accessed Jan. 12, 2010).

²³ See Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111 (1998). Some conservatives latched on to the pamphlet and criticized Republican leaders for not following its suggestions more closely. See, e.g., *Congress Must Curb the Imperial Judiciary*, PHYLLIS SCHLAFLY REPORT, Feb. 1997, available at <http://www.eagleforum.org/psr/1997/feb97/psrfeb97.html> (accessed Jan. 10, 2010).

²⁴ See generally Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 844-55 (1998) (describing attacks on state court judges); see also Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

²⁵ Similar to post-*White* attacks, the targets of these attacks are often members of the state appellate courts. It is likely that many local judges were also targeted for attack or defeat, but the information about those incidents is much less readily available.

²⁶ The most notorious example of a successful effort to remove state court judges, ostensibly because of their judicial philosophies, occurred in 1986 in California, when voters replaced three members of the state supreme court, Chief Justice Rose Bird, Justice Cruz Reynoso and Justice Joseph Grodin, based upon their perceived liberality. Robert Lindsey, *Deukmejian and Cranston Win As 3 Judges Are Ousted*, N.Y. TIMES, Nov. 6, 1986, at A30. In his description of his time on the court, Justice Reynoso comments that “Politics will always be a part of the appointment process, but politics should not intrude after a judge is appointed.” Cruz Reynoso, *Brief Remembrances: My Appointment and Service on the California Court of Appeal and Supreme Court, 1976-1987*, 13 BERKELEY LA RAZA L.J. 15, 27 (2002).

²⁷ See generally Bright, *supra* note 24, at 817, 847-51 (describing attacks on Texas, Tennessee, Nevada, Nebraska, and Missouri judges).

²⁸ See Uelmen, *supra* note 13 (describing my defeat, and the defeat of Justice David Lanphier of the Nebraska Supreme Court, both in judicial elections in 1996).

²⁹ Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 24 -38 (2003) [hereafter *Baum*].

³⁰ See *Burbank* at 331 (noting that most scholars of judicial studies tend to ignore state courts and state judges).

³¹ The most obvious example is the case of Terry Schiavo, a Florida woman who spent 15 years in a persistent vegetative state, whose husband petitioned to remove her feeding tube. The case originated in Florida state courts but the state court decision was altered by Florida and federal legislation, which was ultimately overturned by federal courts.

³² As Justice O’Connor noted in her concurring opinion in *White*, “Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public’s confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.” 536 U.S. at 789. Justice O’Connor also cited a 2001 national opinion poll that found that 76 percent of registered voters believe that campaign contributions affect judicial decisions and that two-thirds of voters believe that judges give favorable treatment to donors. *Id.* (citing Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001), available at <http://www.gavelgrab.org/wp-content/resources/polls/JASNationalSurveyResults.pdf> (accessed Jan. 12, 2010)).

³³ *Politicians in Judges’ Robes*, N.Y. TIMES, Feb. 26, 2003, available at www.nytimes.com/2003/02/26/opinion/26WED2.html (accessed June 5, 2008).

³⁴ Judicial appointments are made for life, or until mandatory retirement at age 70, in only three states—New Hampshire, Massachusetts, and Rhode Island. Thirty-nine states conduct elections, which may be partisan, nonpartisan, or uncontested retention elections. As a result, 87 percent of state court judges face some sort of popular election. In the other states, judges are selected and retained by vote of the legislature, executive, or other body.

³⁵ See generally Cynthia Gray, *The States’ Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163 (2002).

³⁶ The Court limited its grant of certiorari to one of the several issues raised. See petition for writ of certiorari, *Republican Party of Minn. v. Kelly*, 534 U.S. 1054 (2001). The Court also described the issue narrowly in the opening sentence of the opinion: “[W]hether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.” 536 U.S. at 768. The Court also specifically

confined the holding to the Minnesota “announce” clause: “The Minnesota Code contains a so-called ‘pledges or promises’ clause, . . . a prohibition that is not challenged here and on which we express no view.” *Id.* at 770.

³⁷ See, e.g., *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006); *Indiana Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006); *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); *Family Trust Found., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

³⁸ See, e.g., *Duwe v. Alexander*, 490 F.Supp.2d 968 (W.D. Wis. 2007).

³⁹ See *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

⁴⁰ *Id.* See also *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005), *cert. denied sub nom.* *Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165 (2006); *O’Neill v. Coughlan*, 436 F. Supp. 2d 905 (N.D. Ohio 2006).

⁴¹ See discussion of the litigation and the discipline inquiry that led the Alabama Supreme Court to withdraw an ethics opinion and alter the ethics requirements in Penny J. White, *A Matter of Perspective*, 3 FIRST AMEND. L. REV. 5, 49-52 (2004). See also discussion of that action as well as action by the Supreme Courts of Arizona, California, Georgia, Iowa, Missouri, New Mexico, North Dakota, Pennsylvania, South Dakota, Tennessee, Texas, and Wisconsin in Cynthia Gray, *Developments Following Republican Party of Minnesota v. White* (American Judicature Society, Center for Judicial Ethics, available at www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf (accessed January 10, 2010)).

⁴² See, e.g., *Inquiry Concerning Former Judge Patricia Gray, Decision and Order of Dismissal* (California Commission on Judicial Performance, Aug. 27, 2002), available at http://cjp.ca.gov/userfiles/file/Dismissals/Gray_8-27-02.pdf (accessed Jan. 12, 2010). A notable exception is Florida, which not only severely disciplined Judge Kinsey, see *infra* note 84, but also more recently removed a judge from office for “flagrant misrepresentations made to the voting public” during a judicial campaign, along with other violations. *In re Renke*, 933 So.2d 482 (Fla. 2006).

⁴³ Lawsuits in Alaska and Indiana were filed when judicial candidates declined to answer special-interest questionnaires based on advice given to them by their state judicial ethics bodies. See *White*, *supra* note 41, at 51-54.

⁴⁴ Academics have explained this view as resulting from the Supreme Court majority’s antifunctionalist approach to free speech. *Leading Cases*, 116 HARV. L. REV. 200, 272-74 (2002).

⁴⁵ The majority opinion, authored by Justice Scalia, asserts that the dissenting Justices, and, particularly, Justice Ginsberg, attack “arguments we do not make. For example, despite the number of pages she dedicates to disproving this proposition, . . . we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.” 536 U.S. at 783.

⁴⁶ “Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people’s elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; ‘judge[s] represen[t] the Law.’ . . . I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons.” 536 U.S. at 805 (Ginsburg, J., dissenting).

⁴⁷ *Id.* at 775 (emphasis added); see *id.* at 782 (speech about “the qualifications of candidates for public office” is “‘at the core of our First Amendment freedoms’”); see *id.* at 788.

⁴⁸ “[T]he First Amendment does not permit [those who oppose judicial elections] to achieve [their] goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.” *Id.* at 788.

⁴⁹ *Id.* at 713.

⁵⁰ *Id.* at 778. “The Minnesota Constitution positively forbids the selection . . . of judges who are impartial in the sense of having no views on the law.” (Citing Article VI, Section 5 of the Minnesota Constitution, which requires that judges be “learned in the law.”)

⁵¹ *Id.* at 778-79.

⁵² *Id.* at 779. The majority claims that “[b]efore they arrive on the bench . . . judges have committed themselves on legal issues that they must later rule upon.” In support of the claim, the majority refers to Justice Black’s participation in cases construing the Fair Labor Standards Act, notwithstanding his work on the act as a Senator, and Chief Justice Hughes’s authorship of an opinion overruling a decision he had criticized in a book.

⁵³ “Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon . . . [either by] confronting a legal issue on which [they have] expressed an opinion while on the bench [or by stating] their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches.” *Id.* at 779.

⁵⁴ See generally Terri Peretti, *A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence*, 64 OHIO ST. L. J. 349 (2003) [hereafter *Peretti*]. (“Judges use what freedom they have to decide in accordance with ideological preferences.”) (Citing and quoting DAVID W. NEUBAUER, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 410 (2d ed. 1997) (“judges—particularly appellate court jurists—view cases primarily in terms of the broad political, socioeconomic issues they raise and . . . generally respond to these issues in accordance with their personal values and attitudes.”) Peretti describes my assertions that judges guarantee individual rights as “extravagant.” *Id.* at 350 n. 4 (citing Penny J. White, *It’s a Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 8 (1996)).

⁵⁵ *Id.* at 784, n.12 (emphasis in original). These judges, according to the majority, “make law” when they issue a decision on a situation in which the state’s high court has not ruled and when they issue a decision that is not appealed.

⁵⁶ The referenced principles include separation of powers, judicial independence, and *stare decisis*. The *White* majority reasons that a notion of a judiciary separated from representative government “is not a true picture of the American system,” in which judges make law, shape state constitutions, and set aside laws. *Id.* at 784. This view of state court judges is ill-informed. With regard to the making of law and the setting aside of laws, see, e.g., Judith S. Kaye, *State Courts At the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 19 (1995) (“Vital though the common law still may be, I think it inarguable that it has been surpassed as the preeminent source of law it once was.”); and Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 997 (1982). With regard to the infrequency with which state courts interpret state constitutions, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780-81 (1991). For a view of state court judging from a former state court judge, see Penny J. White, *Some Appeasement for Professor Tushnet*, 71 TENN. L. REV. 275 (2004).

⁵⁷ 536 U.S. at 774, 781.

⁵⁸ See *infra* text accompanying notes 128-139.

⁵⁹ See *infra* text accompanying note 60.

⁶⁰ While expressing overall support for the American justice system, the public has an “uneven” view of the system. A 1999 ABA-sponsored survey noted that “[p]eople’s knowledge of the justice system is uneven. They recognize some obscure tenets but still lack knowledge about more basic ones.” American Bar Association, *Perceptions of the U.S. Justice System* 7, www.abanet.org/media/perception/perception.html (accessed June 6, 2008).

A 2006 survey conducted by Princeton Survey Research Associates International for the Annenberg Foundation found that while the public claims to understand the concept of judicial independence, 77 percent think that courts should rule in accord with voter’s values and almost half think that judges who repeatedly ignore voter’s values should be impeached. The

Annenberg Public Policy Center, *Public Understanding of and Support for the Courts: 2007 Annenberg Public Policy Center Judicial Survey Results*, at 1, 3, available at http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf (accessed January 10, 2010).

⁶¹ Sixty-five percent of Americans want to elect those who sit on the bench, according to a national opinion survey on judicial elections conducted for the University of Pennsylvania's Annenberg Public Policy Center. See Annenberg Center news release, May 23, 2007, available at http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_KHJ_JudicialCampaignFunds20070523/jamieson_judicialelectionsurvey_factcheckconfFINALFINAL.pdf (accessed January 10, 2010).

⁶² 536 U.S. at 783 n.11.

⁶³ The Court not only refers to candidates' views as qualifications "at the core of our electoral process" but also labels the views as "relevant information." *Id.* at 782.

⁶⁴ Justice Stevens commented in his dissent that "To the extent that such statements seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for office." 536 U.S. at 798 (Stevens, J., dissenting). Justice Scalia scoffed at the suggestion, noting that Justice Stevens must "contemplate a federal bench filled with the unfit." He reasoned that if statements to the electorate indicated a lack of fitness, so would statements to the Senate or the President, which he believed were made "in every confirmation hearing." 536 U.S. at 781.

⁶⁵ In the 2006 state court elections, special-interest groups showed interest in judges "further down the ballot." JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK* at 24 (Justice at Stake Campaign 2007) [hereafter *NEW POLITICS 2006*], available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf> (accessed Jan. 12, 2010). In Illinois, special-interest groups gave a combined \$3.3 million to two candidates for a court of appeals seat—four times the previous state record. Half-a-million dollars was spent in a trial court race in 2006 in Madison County, Illinois. In Missouri, an out-of-state special-interest group spent a large amount of money to unseat an incumbent trial judge. *NEW POLITICS 2006* at 24.

⁶⁶ Special-interest groups are able to avoid some campaign disclosure and limitation requirements. DEBORAH GOLDBERG, CRAIG HOLMAN & SAMANTHA SANCHEZ, *THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS* 18 (Justice at Stake Campaign, 2002) [hereafter *NEW POLITICS 2000*]. By avoiding "magic words" like "elect" or "defeat," the groups can avoid some requirements. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976). Preserving these loopholes has been another agenda item of special-interest groups who have brought many challenges to campaign limitation requirements. See, e.g., *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Randall v. Sorrell*, 126 S. Ct. 2479 (2006); *Wisconsin Right to Life Inc. v. Federal Election Commission*, 546 U.S. 410 (2006) (per curiam).

⁶⁷ David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, 39 CT. REV. 16, 17 (Spring 2002), available at <http://aja.ncsc.dni.us/courtrv/cr39-1/CR39-1Rottman.pdf> (accessed Jan. 10, 2010). In this survey, 90 percent of supreme court justices, 81 percent of appellate judges, and 80 percent of trial judges described themselves as being under a "great deal of" or "some" pressure to raise money for elections.

⁶⁸ In the Annenberg Center opinion survey cited *supra* in note 61, 70 percent of the respondents said that "the necessity to raise campaign funds will affect a judge's ruling once in office." And 63 percent believe that "pressures from past contributors would affect a judge's fairness and impartiality to a great or moderate extent."

⁶⁹ In the spring of 2007, one of the pioneer female state supreme court justices announced that she would retire rather than endure another "expensive and divisive" election. Justice Linda Trout, who served on the Idaho Supreme Court for 15 years, was Idaho's first female justice and at that time was the only female member of the court. Justice Trout was the target of a negative campaign in 2002 when she was Chief Justice. In announcing her retirement, Justice Trout noted that "Judicial elections have turned into bitter, nasty fights, which I don't think is seemly for the judiciary." Scott Michels, *Judicial*

Elections Turn 'Bitter,' Nasty' and Pricey: Attack Ads and Special Interest Groups are Poisoning Judicial Campaigns, Critics Say, AP NEWS (June 19, 2007), available at www.abcnews.go.com/TheLaw/story?id=3292991&page=1 (accessed Jan. 10, 2010).

⁷⁰ Media consultant Helen Lavelle made these comments in an interview in a report on “Justice for Sale” on the PBS news program “Frontline,” available at www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/lavelle.html (accessed Jan. 10, 2010).

⁷¹ The positive aspects of the separation of powers and the corresponding checks and balances are described throughout *The Federalist Papers*. For example, *Federalist 51* includes this passage: “It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.” *Federalist 78* includes the now-famous description of the judiciary as the “least dangerous” and “weakest” branch: “Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

⁷² Many authors, including myself, have discussed the history of judicial independence. See, e.g., Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L. J. 3 (2003); *Revisiting, supra*; J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence From What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241 (2001); Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L. J. 1053 (2002).

⁷³ The cases that have followed, and largely expanded upon, the *White* decision are of two kinds. First, many courts have ruled upon lawsuits seeking to enjoin the enforcement of judicial campaign speech and conduct provisions. Second, many courts and administrative bodies have ruled upon First Amendment defenses raised by judges and judicial candidates alleged to have violated similar provisions. See generally Penny J. White, *Preserving the Legacy: a Tribute To Chief Justice Harry L. Carrico, One Who Exalted Judicial Independence*, 38 U. Rich. L. Rev. 615, 653-68 (2004).

⁷⁴ I draw this conclusion from several personal experiences, including being a candidate in three judicial elections, being a voter in dozens of others, and talking frequently to judges from all around the country about their experiences as candidates for judicial office. Of course, there are notable exceptions to the generalization made in the text, including judicial races for the Texas and Alabama Supreme Courts. Many cite the 1994 Alabama Supreme Court race, orchestrated by Karl Rove, as the race that shifted judicial campaigns into rancorous mud fights:

[In 1994,] judicial races in Alabama were customarily low-key affairs. “Campaigning” tended to entail little more than presenting one’s qualifications at a meeting of the bar association, and because the state was so staunchly Democratic, sometimes not even that much was required. It was not uncommon for a judge to step down before the end of his term and handpick a successor, who then ran unopposed.

All that changed in 1994. Rove brought to Alabama a formula, honed in Texas, for winning judicial races. It involved demonizing Democrats as pawns of the plaintiffs’ bar and stoking populist resentment with tales of outrageous verdicts. At Rove’s behest, [Perry] Hooper and his fellow Republican candidates focused relentlessly on a single case involving an Alabama doctor from the richest part of the state who had sued BMW after discovering that, prior to delivery, his new car had been damaged by acid rain and repainted, diminishing its value. After a trial revealed this practice to be widespread, a jury slapped the automaker with \$4 million in punitive damages. “It was the poster-child case of outrageous verdicts,” says Bill Smith, a political consultant who got his start working for Rove on these and other Alabama races. “Karl figured out the vocabulary on the BMW case and others like it that point out not just liberal behavior but outrageous decisions that make you mad as hell.”

Throughout the summer the Republican candidates barnstormed the state, invoking the decision at every stop as an example of “jackpot justice” perpetuated by “wealthy personal-injury trial lawyers”—phrases developed by Rove that have since been widely adopted. To channel anger over such verdicts

toward the incumbent Democratic justices, Rove highlighted their long-standing practice of soliciting campaign donations from trial lawyers—just as Republicans (which Rove did not say) solicit them from business interests. One particularly damaging ad run by the Hooper campaign was a fictionalized scene featuring a lawyer receiving an unwanted telephone solicitation from an unseen Chief Justice Hornsby, before whom, viewers were given to understand, the lawyer had a case pending. The ad, and the unseemly practices on which it was based, drew national attention from Tom Brokaw and NBC's *Nightly News*.

The attacks began to have the desired effect. Judicial races that no one had expected to be competitive suddenly narrowed, and media attention—especially to Hooper's race after the "dialing for dollars" ad—became widespread. Then Rove turned up the heat. "There was a whole barrage of negative attacks that came in the last two weeks of our campaign," says Joe Perkins, who managed Hornsby's campaign along with those of the other Democrats Rove was working against. "In our polling I sensed a movement and warned our clients."

Joshua Green, *Karl Rove In a Corner*, ATLANTIC MONTHLY, Nov. 2004 [hereafter *Green*], available at www.theatlantic.com/doc/200411/green (accessed Jan. 10, 2010). Although Rove's candidate lost at the polls, he was eventually declared chief justice following over a year of legal wrangling challenging the election. *Id.*

⁷⁵ Because the judicial selection methods vary from state to state, so too did the restrictions on campaign speech and conduct, with the most liberal provisions being in effect where judges were selected in partisan elections. This article does not differentiate as to the various provisions, but generalizes about speech and conduct restrictions. It is noteworthy that, while some originally opined that *White* would have limited applicability in the states with merit selection and retention votes, courts have not drawn that distinction. For example, in *Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), the court found the difference between Alaska's retention elections and the partisan elections in effect in Minnesota to be of "little consequence." 380 F. Supp. 2d at 1083, n.10.

⁷⁶ The "announce" clause, Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct in effect at the time of the *White* case, was part of the 1972 ABA Model Code of Judicial Conduct. It provided that a "candidate for judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues."

⁷⁷ The "pledges and promises" clause, before the recent amendments, provided that a "candidate for judicial office shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Model Code of Judicial Conduct, Canon 5(A)(3)(d). The amended version provides that a "candidate for judicial office shall not with respect to cases, controversies, or issues that are likely to come before the court, make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office. . . ."

⁷⁸ The "commitments" clause, before the recent amendments, provided that a "candidate for judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court." ABA 1990 Model Code of Judicial Conduct Canon 5A(3)(d)(ii).

⁷⁹ A few states, notably Georgia, also had a "false statement" provision that prohibited "the use of any form of public communication the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or that is likely to create an unjustified expectation about results the candidate can achieve." See *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (quoting Ga. Code of Judicial Conduct Canon 7(B)(1)(d) (1998)).

⁸⁰ The ABA's Model Code of Judicial Conduct, in Canon 5, includes some provisions that apply to all judges and candidates; some provisions that apply to judges and candidates subject to public election; and some provisions that apply to judges or candidates seeking appointment.

⁸¹ Canon 5(C)(2) provides that "a candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate. . . . Such committees may solicit and accept reasonable campaign contributions"

⁸² Under versions of the Code in effect in many states at the time of *White*, candidates for judicial office could not endorse candidates for other public offices, make speeches on their behalf, or engage in partisan political activity other than their own campaign. *See, e.g.,* Spargo v. New York State Comm’n on Judicial Conduct, 244 F. Supp. 2d 72, 81-82 (N.D.N.Y. 2003) (quoting 22 N.Y. Comp. Codes R. & Regs. §100.5 *et seq.* (2003)). Most states also included a general provision that required that a “candidate, including an incumbent judge for a judicial office . . . shall maintain the dignity appropriate to judicial office.” The revised Code of Judicial Conduct retains this provision. Now found in Canon 5(A) (3), and applying to all judges and candidates, the rule provides that “A candidate for judicial office . . . shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary”

The “Terminology” section of the Code now defines “impartiality” to denote “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.” This definition is in response to the *White* majority’s befuddlement with the term’s meaning: “Respondents are rather vague, however, about what they mean by ‘impartiality.’ Indeed, although the term is used throughout the Eighth Circuit’s opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Code of Judicial Conduct, none of these sources bothers to define it.” 536 U.S. at 775.

⁸³ *See generally* Lisa Milord, *Associative Political Conduct of Judges and Judicial Candidates*, 14 JUD. COND. RPTR. 1 (Fall 1992).

⁸⁴ Judge Patricia Kinsey was charged with 12 ethical violations arising out of her 1998 campaign for the office of County Judge in Escambia County. Kinsey’s campaign was a traditional “law and order” campaign. Her campaign materials included a full-page picture of herself with 10 uniformed, armed police officers, in which she asked, “Who do these guys count on to back them up?” She asserted, for example, that she was “[t]he [u]nanimous [c]hoice of [l]aw [e]nforcement”; that “Police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars”; that criminals probably would not want to read her campaign literature; that judges “must support hard-working law enforcement officers by putting criminals behind bars”; that she would “bend over backwards to ensure that honest, law-abiding citizens [were] not victimized a second time by the legal system that is supposed to protect them”; and that she “[a]bove all else . . . identifie[d] with the victims of crime.” Kinsey characterized her opponent as a “liberal,” noting that the incumbent judge, a former criminal defense lawyer, was “still in that defense mode” and characterized an accused as a “punk.” Kinsey misrepresented facts about judicial hearings, including claims that her opponent had failed to revoke bond in a case, thereby showing “a shocking lack of compassion for the victims,” and used the nickname “Let ‘Em Go Green” for the judge. Kinsey described her responsibility as a judge to be “absolutely a reflection of what the community wants.” *In re Kinsey*, 842 So.2d 77, 81-83, 87-88, and 87 n.6.

⁸⁵ *Id.* at 77, 89 (Fla. 2003). The case against Judge Kinsey was instituted in 1999 based on her conduct in the 1998 campaign. The administrative hearing was concluded in 2000, but the Florida Supreme Court decided the case six months after *White*. Although Judge Kinsey raised a First Amendment defense, the Florida Supreme Court held that its ethical restriction was “more narrow” and that the “compelling state interest in preserving the integrity of [the] judiciary and maintaining the public’s confidence in an impartial judiciary” is “beyond dispute.” *Id.* at 87. Ultimately, the United States Supreme Court denied Judge Kinsey’s petition for certiorari. *Kinsey v. Florida Judicial Qualifications Comm’n*, 540 U.S. 825 (2003).

⁸⁶ *In re Watson*, 794 N.E.2d 1 (N.Y. 2003). Watson wrote a letter to law enforcement personnel asking for their votes in order to “put a real prosecutor on the bench.” *Id.* Watson also stated in the letter that the city needed a judge who would “work with the police, not against them” and who would “assist our law enforcement officers as they aggressively work towards cleaning up our city streets.” Watson also wrote letters to the editor commending his own work as a prosecutor and asking voters to elect him so that the city could send a similar message, presumably by his presence on the bench. His newspaper ads focused on his “proven experience in the war against crime.” He also insinuated that the incumbent judges were responsible for soaring arrests in the local community. *Id.* at 2-3. The New York Court of Appeals upheld the state’s “pledges and promises” provision because it “further[ed] the State’s interest in preventing actual or apparent party bias and promoting open-mindedness because it prohibits a judicial candidate from making promises that compromise the candidate’s ability to behave impartially, or to be perceived as unbiased and open-minded by the public, once on the bench.” *Id.* at 6-8.

⁸⁷ Rottman, *supra* note 67, at 18. In the 2001 survey of judges, nearly two-thirds said that judicial ethics rules, though often preventing them from responding to unfair criticism, contained “the right amount and type” of restrictions.

⁸⁸ *Id.* Ninety-seven percent of judges surveyed “strongly supported” the proposition that “judicial candidates should never make promises during elections about how they will rule in cases that may come before them.” In my own experience, the mantra “the Code does not allow me to respond” was so universal that groups hosting candidate forums, such as the League of Women Voters and others, would often announce the limitations or interrupt inquiries to explain a judge’s ethical restrictions.

⁸⁹ *Id.* at 19. The public also views judges as a “special kind of politician.” Eighty-two percent of the public surveyed found the following statement either “very convincing” or “somewhat convincing:”

Judges should be treated differently than other public officials since they must make independent decisions about what the law says. Judges should not have to raise money like politicians, make campaign promises like politicians, or answer to special interests. We must take concrete steps to ensure that judges can make unpopular decisions based only on the facts and the law.

⁹⁰ *Id.* When those surveyed were asked to choose between two statements describing courts, 81 percent selected as “more convincing” or “much more convincing” the first of these two statements:

Courts are unique institutions of government that should be free of political and public pressure.
Courts are just like other institutions of government and should not be free of political and public pressure.

⁹¹ While Alabama may take the lead in acrimonious campaigns, Texas and Illinois are often the leaders in campaign costs. *See generally* Marlene Arnold Nicholson & Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 JUDICATURE 294 (1994); Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 CRIME, LAW & SOC. CHANGE 91 (1992); Richard Woodbury, *Is Texas Justice For Sale?*, TIME (Jan. 11, 1988), available at www.time.com/time/magazine/article/0,9171,966426,00.html?promoid=googlep (accessed Jan 10, 2010).

⁹² Challenger Perry Hooper, who originally trailed Chief Justice Sonny Hornsby in the 1994 election for Alabama’s Chief Justice, stated, “We have endured lies in this campaign, but I’ll be damned if I will accept outright thievery.” *Green, supra* note 74.

⁹³ *NEW POLITICS 2000* at 8, fig. 2, available at <http://www.gavelgrab.org/wp-content/resources/JASMoneyReport.pdf> (accessed Jan. 12, 2010).

⁹⁴ *Id.*

⁹⁵ The report summarized that “[The year] 2000 was a turning point for high-stakes campaigning in Supreme Court elections. In several key states, a flood of spending, TV buys, and negative ads suggests that the good old days may have just ended” *Id.* at 4.

⁹⁶ *Id.* at 4.

⁹⁷ The source of 24 percent of the contributions could not be identified by interest. *Id.* at 9. The report noted that “[R]esearchers face major obstacles in compiling complete and accurate summaries of contributions and expenditures” *Id.* at 18.

⁹⁸ Lawyers accounted for 29.2 percent of the total. *Id.* at 9.

⁹⁹ Business interests accounted for almost 20 percent of the total.

¹⁰⁰ Political parties accounted for almost 12 percent of the total. Ideological interests represented the smallest identified source of campaign contributions. Clearly lawyers and businesses are arguably contributors with ideological interests, as is labor—a separate source identified as including political action contributions from all union sources. *Id.* at 9.

¹⁰¹ The study divided the ads into three groups based on sponsorship: candidate-sponsored, party-sponsored, and group-sponsored ads. *Id.* at 17.

¹⁰² More than \$10 million was spent on more than 22,000 airings of television advertisements. *Id.* at 5.

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 17.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 18. “[M]any interest groups that have invested huge sums in judicial elections have avoided disclosing their finances.”

¹⁰⁸ *Id.* Even before the *White* decision, judges and the public placed special-interest group accountability as a top reform that could improve judicial elections. Rottman, *supra* note 67, at 22-23, charts 4 and 5, Table 13, and authorities cited in Rottman’s n. 12.

¹⁰⁹ DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT”—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL* 13 (Justice at Stake Campaign, 2005) [hereafter *NEW POLITICS 2004*], available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf> (accessed January 07, 2010).

While the overall total nationwide expenditures did not jump drastically in 2004, the statewide expenditures did. In 40 percent of the states with supreme court races, aggregate candidate fundraising records were broken in 2004. *Id.* at 13. In addition, the disparity between the amount of money raised by winners and losers grew, with the average cost of winning increasing 45 percent since 2002. *Id.*

In Illinois, two opposing candidates for an Illinois Supreme Court seat raised, between them, more than nine million dollars. *Business Week* magazine reported that this was more than 18 of the 34 candidates for the United States Senate had raised. *Id.* at 18.

¹¹⁰ *NEW POLITICS 2006* at 15.

¹¹¹ *Id.* at 15. Five states broke fundraising records. In Alabama, for example, two candidates raised over \$13 million. Alabama is the home of the three of the four most expensive court races in American history. Illinois Supreme Court candidate Justice Lloyd Karmeier, himself a recipient of \$2.3 million from the U.S. Chamber of Commerce via the Illinois Republican Party, was quoted as saying, “That’s obscene for a judicial race. What does it gain people? How can people have faith in the system?” *NEW POLITICS 2004* at 19.

¹¹² Whereas in 2000 lawyers donated about ten percent more than business to judicial campaigns, by 2006 business interests donated twice as much as lawyers. *NEW POLITICS 2006* at 18. Charles Mahtesian, editor of *THE ALMANAC OF AMERICAN POLITICS*, explained that the reason for the large investment by the business community was to restock courts viewed as “unsympathetic” to business with more “business-friendly” judges. “The business lobby in ‘state after state’ is tired of seeing legislative gains undermined by ‘unsympathetic courts’ and will try to ‘help business-friendly candidates’ with elections to the state’s highest courts.” Charles Mahtesian, *Bench Press*, *GOVERNING* (Aug. 1998), available at <http://www.governing.com/archive/archive/1998/aug/courts.txt> (accessed Jan. 12, 2010).

¹¹³ Television advertisements were used by judicial candidates in twice as many states in 2002, appearing in 64% of the states with contested races. In 2000, television advertisements were used in less than a quarter of the states. DEBORAH GOLDBERG & SAMANTHA SANCHEZ, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002* at 4 (Justice at Stake Campaign 2004) [hereafter *NEW POLITICS 2002*], available at <http://www.justiceatstake.org/files/NewPoliticsReport2002.pdf>. (accessed Jan. 12, 2010).

¹¹⁴ Television advertisements were used by judicial candidates in 2006 in all but one state with contested supreme court races. *NEW POLITICS 2006* at 1. The ads were described as “often used to misrepresent or distort facts, and mislead or scare voters.” *Id.* at 1.

¹¹⁵ *Id.* at 6.

¹¹⁶ *NEW POLITICS 2002* at 11.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 12-13. An Illinois candidate in 2002 campaigned on the platform that she would “keep fighting because as any crime victim will tell you, there’s a lot more to be done.” An Alabama candidate said that “I won’t be a vote for trial lawyers or big corporations.” *Id.* at 12. In 2002 every single interest-group advertisement addressed a “divisive topic.” *Id.* at 13.

¹¹⁹ *NEW POLITICS 2004* at 9.

¹²⁰ *Id.*

¹²¹ A candidate for the Illinois Supreme Court campaigned that he was “tackling the medical malpractice crisis.” A Mississippi judge announced that “the words ‘under God’ belong in our Pledge of Allegiance.” A special-interest ad proclaimed that he believes the words “‘In God We Trust’ belong on the walls of every classroom,” that he would “protect the sanctity of marriage between man and woman,” and that he believed that “no punishment is too harsh for those who prey on the most vulnerable among us.” *Id.*

¹²² *Id.* at 10.

¹²³ *Id.* at n. 15. A group called Citizens for Judicial Reform ran an ad claiming that “no woman is safe” with Michigan Justice Stephen Markman on the Michigan Supreme Court because “Markman ruled it was legal for employers to harass women on account of their sex.” *Id.* at 11.

¹²⁴ *NEW POLITICS 2006* at 8 (footnote omitted). In the Alabama chief justice race, the text of an ad sponsored by a candidate included this statement: “Convicted of rape and murder, Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama Supreme Court.” A Georgia ad said that a candidate was “sued by his own mother for taking her money” and implied that the candidate threatened to kill his sister while she was pregnant. In Nevada, a judge said of her opponent that “First she took thousands in contributions from two convicted topless club owners. Then she slashed bail for gang bangers who brutalized an MGM employee.” *Id.* at 9.

¹²⁵ Not only did the number of special-interest groups double, the number of states in which special-interest groups ran advertisements doubled as well. *NEW POLITICS 2002* at 7, 10.

¹²⁶ *NEW POLITICS 2004* at 23. In 2004, business groups, including the United States Chamber of Commerce and state counterparts, donated more to judicial campaigns than lawyers. It is reported that more than one dollar out of every three raised by state supreme court candidates came from business interests. *NEW POLITICS 2004* at 24.

¹²⁷ Alexander Wohl, *Judge on the Stump: What Can—and Can’t—State Judicial Candidates Say?*, 13 AM. PROSP. (July 29, 2002), available at http://www.prospect.org/cs/articles?article=judge_on_the_stump (accessed Jan. 10, 2010) (reporting that eight out of 10 judges and nine out of 10 citizens believe that special-interest groups are mobilizing courts to promote

the group's own ends).

¹²⁸ Compare *NEW POLITICS 2000* at 5 with *NEW POLITICS 2006* at 30.

¹²⁹ The special-interest groups that have requested answers to questionnaires include various right-to-life organizations such as the Christian Coalition, the League of Christian Voters, the Family Institute, the Family Foundation, and the Family Alliance.

¹³⁰ The candidate guide sent to Alaska judicial candidates by the Alaska Right to Life Committee in 2002 contained this introduction:

The Alaska Right to Life committee certainly recognizes that judicial candidates should maintain actual and apparent impartiality [and] should not pledge or promise certain results in particular cases that may come before them This questionnaire is intended to elicit candidates' views on issues of vital interest to the constituents of the Alaska Right to Life Committee without subjecting candidates answering its questions to accusations of impartiality [sic] or requiring candidates to recuse themselves in future cases.

Alaska Right to Life Committee candidate guide, on file with author.

¹³¹ This letter was drafted by James Bopp, plaintiff's counsel in *White* and many of the cases that have expanded its holding.

¹³² *Christian Coalition of Ala. v. Cole*, 355 F.3d 1288, 1290 (11th Cir. 2004) (describing the questionnaire sent to Alabama judges by the Christian Coalition of Alabama in 2000).

In recent years, the questionnaires have most frequently sought the candidate's position on same-sex marriage, abortion, and the posting of the Ten Commandments in courtrooms. North Carolina Right to Life asked judicial candidates to agree or disagree with this statement: "I believe that *Roe v. Wade* was wrongly decided." *NEW POLITICS 2006* at 30. Kansas judges were asked if they agreed that "[u]nder the Kansas Constitution, a statute defining marriage as between one man and one woman is the prerogative of the Kansas State Legislature, not the Kansas Supreme Court."

In a recent Alabama judicial election, the League of Christian Voters proposed a ten-question list. Their chairman, Mobile attorney Jim Ziegler, said, "You've got 10 commandments, you've got 10 questions." The questions, listed on the Web site, include:

1. Are you a born-again Christian? Please give your testimony.
2. In what church or other Christian ministries are you active? What are your areas of service in each?
3. Please describe your family situation.
- ...
5. What actions did you take regarding the removal of Chief Justice Roy Moore?
- ...
9. Would you describe yourself as a conservative Christian? What actions have you taken on conservative issues?
10. If you are endorsed by the League of Christian Voters, are you willing to have your campaign organization (not you personally) distribute hundreds of marked sample ballots with all the league's endorsed candidates marked, including yourself? If so, how many such fliers would your organization be able to distribute?

10 Commandments—10 questions, www.votelaw.com/blog/archives/001250.html (accessed Jan. 10, 2010).

¹³³ These are among the most common topics in questionnaires. *NEW POLITICS 2006* at 30.

¹³⁴ See *Peretti* at 359 (stating that "Independent judges . . . provide valued assistance to a group seeking to stop a policy inimical to its interests. An independent judiciary offers interest groups not only hope, but a real opportunity to win some policy concessions.").

¹³⁵ Some have suggested that, because special-interest groups limit a candidate's response to the questions provided and disallow narrative comments, "whoever's asking the question not only wants to frame the question, they want to frame the answer." *NEW POLITICS 2006* at 31.

¹³⁶ *Id.* at 34.

¹³⁷ *Id.* at 30.

¹³⁸ "It appears that conservative groups have an advantage in spending money on judicial campaigns because of their business base, though labor unions and trial lawyers also can raise substantial funds. The most powerful advantage for conservative groups is not money; rather, the policy issue most likely to sway voters, criminal justice, is one that favors conservatives. This means that the impact of electoral pressures on judicial decisions, whatever the strength of that impact may be, is primarily in favor of conservative positions on criminal justice." *Baum* at 41.

¹³⁹ *NEW POLITICS 2006* at 7.

¹⁴⁰ In *White*, Justice Kennedy, in his concurring opinion, relied on recusal as a viable answer to the problems that the decision would create. "Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of the duties and the honorable conduct of their office. . . . Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign. . . . It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." 536 U.S. at 794 (Kennedy, J., concurring).

¹⁴¹ *See generally* ABA Model Code of Judicial Conduct, Canon 3.

¹⁴² *See generally* ABA Model Code of Judicial Conduct, Canon 2.

¹⁴³ *Id.* Commentary to Canon 2A.

¹⁴⁴ *Id.* at Canon 3(E)(1)(e). "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [_____] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [[\$_____] for an individual or [\$_____] for an entity]] [[is reasonable and appropriate for an individual or an entity]]." The individual jurisdictions are to insert the applicable time tables and amounts or use the "reasonable and appropriate" language. *Id.* at n. 4.

¹⁴⁵ *Id.* at Canon 3(E)(f). "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge, while a judge or candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding." Some states are drafting specific recusal provisions that require recusal when the judge answered a questionnaire submitted by an organization that is now a party to a lawsuit.

¹⁴⁶ *See, e.g.,* Family Trust Foundation of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004); Indiana Right to Life, Inc. v. Shepard, 463 F. Supp. 2d 879 (N.D. Ind. 2006); Kansas Judicial Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006); Duwe v. Alexander, 490 F.Supp.2d 968 (W.D. Wis. 2007).

¹⁴⁷ Of the cases cited in the preceding note, only the Wisconsin district court has been persuaded that the judicial recusal provisions impermissibly chill the judicial candidate's First Amendment rights.

¹⁴⁸ The amended Model Code of Judicial Conduct provides, in Canon 3E(1)(f), that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to an issue in the proceeding; or the controversy in the proceeding." The amended Code also requires recusal when campaign contributions exceed a set amount. ABA Model Code of Judicial Conduct,

3E(1)(e).

Some states specifically require recusal when a judge has responded to a questionnaire regarding an issue in the case. In both North Dakota and Alaska, judges were advised by the state judicial ethics body that they might face mandatory recusal if they responded to special-interest questionnaires.

¹⁴⁹ Duwe v. Alexander, 490 F. Supp. 2d 968 (W.D. Wis. 2007).

¹⁵⁰ *The A.B.A.'s Judicial Ethics Mess*, N. Y. TIMES, Feb. 9, 2007, available at <http://www.nytimes.com/2007/02/09/opinion/09fri3.html> (accessed January 07, 2010).

¹⁵¹ *Id.* Before the end of the controversy, Senator Patrick Leahy wrote then-ABA President Dennis Archer, stating his “dismay” at the original proposal recommending removal of the provision. At the heart of Senator Leahy’s concern were “special-interest funded junkets” for federal judges, which he ultimately proposed to prohibit through his “Fair and Independent Judiciary Act of 2006.” The letter is available at <http://leahy.senate.gov/press/200404/042104.html> (accessed Jan. 10, 2010). The proposed Act can be viewed at <http://leahy.senate.gov/press/200601/012706a.html> (accessed Jan. 10, 2010).

¹⁵² James Podgers, *Judging Judicial Behavior: ABA House Retains Ban on ‘Appearance of Impropriety,’* ABA JOURNAL (online version) (Mar. 2007), available at http://www.abajournal.com/magazine/judging_judicial_behavior/ (accessed Jan. 10, 2010) (quoting California appellate court Judge Laurie D. Zelon, a member of the ABA Board of Governors).

¹⁵³ 536 U.S. at 794 (Kennedy, J., concurring) (noting that states may “adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”).

¹⁵⁴ While discussion of the nature of a “disciplined analysis” of constitutional attacks on recusal provisions is beyond the scope of this article, such an analysis might include: viewing the role of a judge after election as different from that of a judicial candidate; viewing the state’s interest in impartiality by a judge as more weighty than the state’s interest at stake in limiting campaign speech; and taking into account post-*White* indicators of declining public confidence in the courts.

¹⁵⁵ Rottman, *supra* note 67, at 23. Most members of the public “strongly support” a provision that would require that judges recuse themselves in cases in which one side has donated to the judge’s campaign.

¹⁵⁶ *NEW POLITICS 2006* at 32. The report discusses the large percentage of judges in Florida, Iowa, and Tennessee who refused to respond to questionnaires, often with harsh words for the groups who sent them. For example, Justice Carol Hunstein is reported to have told the Georgia Christian Coalition that “[A]ny candidate who expresses a personal viewpoint on an issue in advance of having to decide that issue . . . compromises his or her objectivity with respect to a case that may come before the court.” *NEW POLITICS 2006* at 33 (citing Alyson M. Palmer, *Justice Says No Thanks to Christian Coalition*, FULTON COUNTY DAILY REPORT, Aug. 16, 2006).

¹⁵⁷ *NEW POLITICS 2006* at 33 (reproducing a letter from Peter D. Webster, First District Court of Appeal in Florida, to the Florida Family Policy Council that refers to questionnaires as “ill-conceived” and predicts that “Over the long term, their impact cannot be anything but bad—bad for the judiciary as an institution; bad for the rule of law; and bad for the people of Florida.”).

¹⁵⁸ This description of the Illinois Supreme Court race and the *Avery* decision is a composite from several sources, including an article on the Web site of the Brennan Center for Justice at New York University, which unsuccessfully attempted to persuade the U.S. Supreme Court to review the case. “*Avery v. State Farm Automobile Ins. Co.*,” www.brennancenter.org/stack_detail.asp?key=102&subkey=35397 (accessed Jan. 10, 2010).

¹⁵⁹ James Sample, *The Campaign Trail: The True Cost of Expensive Court Seats*, SLATE (March 6, 2006), available at www.slate.com/id/2137529 (accessed Jan. 10, 2010).

¹⁶⁰ *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 126 S. Ct. 1470 (2006).

¹⁶¹ In the Annenberg Public Policy Center's 2006 survey cited *supra* in note 61, seven of 10 polled said that the "necessity to raise campaign funds will affect a judge's rulings once in office. Sixty-three percent believe that "pressures from past contributors would affect a judge's fairness and impartiality to a great or moderate extent."

¹⁶² John J. Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703, 706 (1949) (quoting John Marshall's statement before the Virginia Constitutional Convention).

REBUILDING AND STRENGTHENING SUPPORT FOR AN INDEPENDENT JUDICIARY

Professor Sherrilyn Ifill, University of Maryland School of Law

Professor Sherrilyn Ifill begins her paper with a brief review of recent events that have caused anxiety about the erosion of judicial independence in the United States—the soaring cost of judicial elections, increased negative campaigning in judicial elections, the spread of judicial candidate questionnaires, lessened restrictions on judicial speech, and ever more contentious U.S. Supreme Court confirmation hearings. She suggests that those who believe that judicial independence is under siege must convince the public that judicial independence is a bedrock democratic value that cannot be compromised. To do this effectively, she suggests that those concerned with judicial independence pool their efforts as they relate to both the state and federal courts and that proponents argue that judicial independence is designed to protect citizens and our democracy first, and judges second.

In Section II, Professor Ifill discusses dueling meanings of judicial independence. One can no longer assume that the term “judicial independence” has only positive meanings for the public, she stresses. Any effort to promote judicial independence, therefore, must begin by confronting the very meaning of this term. For many, she writes, judicial independence is, as Justice Kennedy recently stated, “a foundation for sustaining the Rule of Law.” But, as she notes, for an increasingly large and vocal contingent of legislators, citizen groups, and even lawyers, judicial independence has come to mean “judicial activism.” Professor Ifill argues that that view of judicial independence—as something to be reined in—reflects a fundamental misunderstanding of the judicial function. It is the very essence of the judicial function that judges must be prepared to make decisions that run counter to the popular will.

Professor Ifill also warns against underestimating the influence of Supreme Court confirmation hearings on how average citizens think about judges and the judicial office. The confirmation process has had a tremendous influence on judicial independence, and the public has come to regard the selection of judges as just another political exercise. She then argues that the unleashing of virtually unfettered “speech” of judicial candidates in state judicial campaigns has presented a relatively new and potentially devastating challenge to the preservation of judicial independence.

In Section III, Professor Ifill argues that too much of the debate and discussion about judicial independence has focused on judges. Instead, she writes, judicial independence is, at its core, designed to protect litigants and citizens. It has its roots in separation of powers, but it is also compelled by the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution, which guarantee litigants the right to appear before judges who are impartial. And, as she notes, due process protects citizens as well as litigants. In order for the judiciary to maintain its legitimacy, it must enjoy the confidence of all citizens. Citizens are more likely to comply with the rule of law

when they believe that judges are acting independently and legitimately in determining what the law is.

Professor Ifill then argues that making the case for judicial independence will also require that those who advocate for judicial independence face the reality that judges are political actors and serve a representative function. Denying the political and representative aspect of the judicial function, she writes, is counterproductive. If advocates of judicial independence refuse to concede that politics does in some measure influence judicial selection and election, and that judges can serve some representative function, albeit a limited one, they lose credibility with average citizens. She notes that studies show that most voters regard judges as politicians. Those who seek to strengthen judicial independence must explain to the public the complexity of the judicial function and how the political function of judges differs from that of other elected officials. One way to do so, Professor Ifill argues, is for judges and judicial aspirants to demonstrate their independence. In addition, judges should conform their conduct to standards that promote both the fact and the appearance of independence. A sitting judge's record should also reflect, over the course of some time in office, that the judge has demonstrated his or her independence by taking an unpopular position.

Professor Ifill suggests some structural reforms that might advance the cause of judicial independence. She advocates public funding of judicial elections, so that the public will not view judges as purely political actors. Next, she urges that judicial education programs include mandatory "impartiality training" to assist judges with the process of curbing their biases and promote public confidence in judges' ability to be impartial. Finally, Professor Ifill suggests that we borrow from the German model of judicial education, where judges are trained, not elected or appointed, and teach "judging" and the importance of judicial independence in law school.

I. The Importance of an Independent Judiciary: The Received Wisdom

A. An Independent Judiciary as the Cornerstone of American Democracy

The idea of an independent judiciary was written deliberately and consciously into the very DNA of American democracy. Despite the many disagreements among the Framers of the Constitution on matters ranging from the scope of executive power to slavery, there was a nearly unanimous consensus that a nation built on the rule of law must be served by judges who would not be subject to control, influence, whim, or pressure from the executive or legislative branches. To ensure this, the Framers created structural incentives, now recognized the world over, to promote judicial independence, including lifetime tenure and undiminished compensation for all Article III judges.¹

An independent judiciary has come to be recognized throughout the world as the hallmark of democracy. The March 2007 upheaval in Pakistan, in which thousands of lawyers and average citizens took to the streets to protest the effort by President and military leader Pervez Musharraf to

remove the Chief Justice of the Supreme Court from office,² demonstrates how attacks on the independence of the judiciary are regarded as among the most serious threats to the social order, even in non-democratic countries.

The first decade of the twenty-first century has been marked by anxiety among leaders of the bench and bar about the erosion of judicial independence in the United States. In 2006, the Georgetown University Law Center devoted an entire conference to the subject,³ attended by no fewer than four U.S. Supreme Court justices. This anxiety is not without cause.

The 1980s: Increased Visibility of Judicial Elections

Sustained attacks on the independence of the judiciary, at both the state and federal levels, have been steadily growing since the late 1980s.⁴ Two important things happened during that decade.

First, judicial elections rose from their sleepy state of near-obscurity to become among the most high-profile and expensive election contests in many states. Since then, judicial elections in many states have come to resemble the bare-knuckle free-for-all we have come to associate with elections for legislative or executive offices, with candidates and special interest groups running provocative and often misleading attack ads, most often aimed at incumbents.⁵

Negative attack ads have criticized decisions issued by judges in individual cases and presented them as emblematic of an incumbent's entire record. Crime victims have become among the most sought-after spokespersons to appear in ads denouncing a judge's record in criminal cases. Candidate questionnaires issued by special interest groups ask judicial candidates to state their personal position on issues such as abortion, gay marriage, and the death penalty.⁶ For incumbent judges facing re-election campaigns, the words "soft on crime" have become the three most feared words in the English language.

The cost of judicial election campaigns has increased exponentially in some states, and campaign expenditures of more than \$1 million have become standard for seats on state supreme courts.⁷ How this campaign money is raised has changed as well, as judicial candidates now often personally solicit campaign contributions—a practice long considered *verboden* in many jurisdictions. Judicial campaign committees traditionally insulated judicial candidates from seeking out contributions from lawyers and voters directly. But federal courts have struck down as unconstitutional some state laws restricting judicial candidates from personally soliciting contributions for their own campaigns.⁸

The Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*,⁹ striking down state restrictions on the ability of candidates for judicial office to announce their views on controversial issues that might come before them, further loosened—and, some would say, coarsened—the tone of judicial elections.

The 1980s: Confirmation Hearings Turn Contentious

The second event in the 1980s that affected judicial independence was the U.S. Senate Judiciary Committee's hearings on the nomination of Judge Robert Bork to the Supreme Court—perhaps the

most contentious confirmation hearings ever.¹⁰ They ushered in a period of open and naked partisan and ideological warfare in Supreme Court (and even lower federal court) confirmations, with battles fought hard and publicly on television. By the year 2000, commitments to nominate a certain kind of justice to the Supreme Court had become important and high-profile campaign promises for both Republican and Democratic presidential candidates.¹¹ And the perceived failure to keep that promise resulted, perhaps for the first time, in a president withdrawing the nomination of his candidate (and good friend) to appease the robust demands of a powerful ideological wing of his own party.¹²

There can be no question that the consensus on judicial elections has eroded over the past 20 years in the U.S. Indeed, some have called into question the very meaning of judicial independence.

There are many fine articles suggesting reforms that might help to protect judicial independence.¹³ Principal among these is the long-standing call, first made by Roscoe Pound in 1906, that state court judges be appointed to office rather elected¹⁴ —a topic that has been discussed with some thoroughness by so many scholars. For reasons I have outlined in earlier scholarship,¹⁵ I do not believe that a mere switch to appointing judges would miraculously solve the problems associated with judicial independence. Threats to judicial independence in the federal courts belie the claim that appointment is a cure-all. I do not, therefore, address that solution in this paper.¹⁶

A Modest Proposal

Instead, I offer a very modest proposal. My effort is to suggest how those of us who believe that judicial independence is under siege, and who advocate strengthening judicial independence, might reconceive how we talk about this important subject with the public at large. Our job is to convince (or reconvince) the public, factions of the legislatures, and, in some cases, the bar, that judicial independence is a bedrock democratic value that cannot be compromised. To do this effectively, we must mount the most persuasive and forthright arguments. Here I offer two suggestions.

The first is that we pool the efforts of those concerned with this important issue as it relates to both state and federal courts. A fragmented strategy focused on one or the other is bound to fail, because so much of the perception of the issues surrounding judicial independence is shaped by citizens' experiences observing both federal and state court controversies.

The second is that we remember that judicial independence is designed first and foremost to protect our citizens, then our democracy, and then our judges—in that order. By this I mean that the emphasis in our advocacy must be focused on the value of judicial independence to the citizenry, rather than to judges.

II. Drifting Off Course: The Eroding Consensus on the Importance of an Independent Judiciary

A. Dueling Meanings of Judicial Independence

I wish first to talk about language. For many of us, judicial independence is, as Justice Kennedy recently stated, “a foundation for sustaining the Rule of Law.”¹⁷ And we agree with Justice Stephen Breyer’s assessment that a judge acting independently demonstrates “an indifference to improper pressure and a determination to decide each case according to the law.”¹⁸

But for an increasingly large and vocal contingent of legislators, citizen groups, and even lawyers, judicial independence has come to mean something different. Judicial independence has come to mean “judicial activism.” Rather than independence *from* outside influences and pressures, judicial independence for some suggests an undemocratic usurpation of power by judges in order to decide cases in ways that are contrary to the views of the mainstream—creating what one U.S. Congressman reportedly called “a judiciary run amok.”¹⁹

The view that judicial independence is something to be reined in reflects a fundamental misunderstanding of the judicial function. It is the very essence of the judicial function that judges must be prepared to make decisions that run counter to the popular will. As Justice Kennedy so eloquently put it, “[j]udicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must.”²⁰

Intimidating the Judiciary

For the last 15 years, at the federal level there have been blatant efforts to intimidate federal judges in retaliation for decisions opposed by some members of Congress. In 1998, prominent legislators threatened to impeach federal district judge Harold Baer for his decision approving the suppression of evidence in a drug case in New York, a call that was tacitly approved, at least initially, by President Bill Clinton.²¹ In 2005, a proposal was circulated in the House Judiciary Committee to create an “office of inspector general for the federal judiciary,” to impose punishment on judges for offenses that fall short of being an impeachable offense.²² And when Congress was unsuccessful in its attempt to overturn the decisions of federal trial and appellate courts that had rejected the efforts by a brain-damaged woman’s parents to have her feeding tube restored (against the wishes of the woman’s husband), several members of Congress issued angry public statements denouncing what they called activist judges. Then House Majority leader Tom DeLay remarked ominously, “The time will come for the men responsible for this to answer for their behavior, but not today.”²³

The willingness of some members of Congress to openly threaten judges with retaliation for their decisions on the grounds that they are activist or have “run amok” constitutes a serious threat to the independence of the federal judiciary. Such public statements often mischaracterize the essential role of judges, leading the public to believe that they should expect from judges the kind of responsiveness to constituent will that they can expect from legislators. Indeed, Representative DeLay argued that judges were “in some cases just ignoring the legitimate will of the people.”²⁴ Yet, this is precisely what judges must be prepared to do in order to apply the rule of law.

Matters of Definition

Moreover, the fact that these attacks are advanced using language that directly confronts judicial independence is a quite troubling development. Mr. DeLay, at a conference called “Confronting the Judicial War on Faith,” suggested that federal judges often act beyond their authority under the guise of judicial independence. He argued that “judicial independence does not equal judicial supremacy.”²⁵ Last year, Illinois Bar Association President Irene Bahr reframed the question when she asked, “What really does judicial independence mean? Is it a protection mainly for judges or is it more importantly a protection for our citizens and our system of government?”²⁶ Bahr, like most lawyers, fortunately embraced the latter definition, but she quite rightly acknowledged that the very meaning of judicial independence is now in play. This creates significant challenges for members of the bench and bar who seek to educate the public and voters about the importance of judicial independence in maintaining the rule of law and protecting the rights of citizens.

In a poll conducted in 2005 by Syracuse University’s Maxwell School of Citizenship and Public Affairs, 58 percent of the respondents agreed with the statement that “in many cases judges are really basing their decisions on their own personal beliefs,”²⁷ rather than on what the law requires. The willingness of a significant portion of the public to endorse the view that judges have essentially run amok means that there is a fundamental misunderstanding of how and why judges decide cases as they do. Certainly it is clear that the function of judges as a counter-majoritarian force is not understood by average citizens (and by some legislators).

Independence from What? Independence from Whom?

This is not to say there are not genuinely thorny theoretical problems associated with defining precisely the parameters of judicial independence. These tensions are especially challenging in the context of judicial elections. The Jacksonian Democracy movement’s emphasis on elected officials who were accountable to the public and more in touch with the common man was at the very heart of the mid- and late-nineteenth century move by most states to elect their judges. Thus, judicial elections were adopted by most states precisely to impose accountability on the judiciary—accountability to the electorate. Given this reality, can judicial independence also mean that elected judges should be independent *from voters*, as well as from the legislative and executive branch? Isn’t the whole purpose of judicial elections to provide a way for voters to remove from office those judges who, for whatever reason, they do not support?

These questions should and must be engaged, especially because so many scholars and judicial independence advocates seem to regard judicial elections as an inherent threat to judicial independence. In fact, the switch from appointing to electing judges in the second half of the nineteenth century as part of the Jacksonian Democracy movement was not designed to weaken the quality of the judiciary, nor was it aimed at changing the essence of the judicial function. Instead, Jacksonians felt that judges had been too narrowly drawn from the wealthy and privileged classes,²⁸ a concern that continues to resonate among those who resist efforts to switch from electing to appointing judges in some states.²⁹ Populists sought to ensure that the people would be able to choose

judges more in touch with the values of the common man. But there is no evidence that in their desire to bring greater diversity to the bench, Jacksonians expected judges to be subject to irrational whims of the electorate, or obligated to issue decisions that reflected the will of the citizenry but ran contrary to the rule of law.

Judging is Different

Unlike candidates for the legislature, the city council, governor, or mayor, judges, when in office, are bound not only by state and federal constitutions, but also by precedent, and by the ethics of office to exercise their duties in a way that does not advance the agenda of one or another constituency or litigant. The process of legal education in and of itself inculcates lawyers with certain values that inhibit the kind of “free-for-all” judging that many citizens now seem to think characterizes judicial decision making. While it is true that judges have discretionary authority that is not narrowly circumscribed, even discretion must be exercised within the bounds of accepted legal principles, or judges will face reversal by a higher court. Theoretically, the appellate process should ensure that judges cannot, even if they want to, consistently provide the kind of partisan decision making that voters can rightfully demand of other kinds of elected officials.³⁰

But the general public is by and large unaware of these constraints on judicial decision making. As a result, when judges make decisions that are legally correct but appear wrong to the general public (e.g., dismissing criminal charges against a defendant because of Fourth Amendment violations in the collection of evidence, reducing a large jury verdict in a serious personal injury case because of legal restrictions on punitive damages, or permitting a group with an odious message to hold a march or rally on public grounds), citizens may be inclined to believe that the judges are acting irrationally, lawlessly, or in accordance with their own personal views.

In sum, one can no longer assume that the term “judicial independence” has only one meaning. Any effort to promote judicial independence through public education therefore must begin by confronting the very meaning of this term, its origins and rationale, and by considering the ways in which judicial elections present unique challenges to preserving judicial independence.

B. The Challenge to Judicial Independence in the Federal Court Confirmation Process

As I suggest above, the U. S. Supreme Court confirmation process has contributed to the erosion of the consensus that judicial independence is an essential value that must be preserved in our democracy. As the federal court confirmation process has gotten more contentious, more dramatic, and more partisan, the public may have come to regard the selection of judges as just another political exercise. Because of the extremely high-profile nature of Supreme Court confirmation hearings, and the prominence of campaign rhetoric about Court appointments in presidential elections, it is difficult to sustain the idea that judges are different, and that judicial elections at the state court level should be played by rules that are different from those in elections for other political offices.

The influence of the Supreme Court confirmation hearings on how average citizens think about judges and the judicial office should not be underestimated. Much of what the public learns about the qualities they should look for in a judge, what questions it is appropriate to ask a judicial aspirant, and

the role of partisan affiliation in whether or how to support a judicial candidate, is gleaned from what the public observes in the televised confirmation hearings. And what does the public see? They see U. S. Senators asking federal judicial aspirants precisely the kinds of questions many judicial independence advocates regard as improper when posed by third-party special interest groups in state judicial elections.³¹ And they see judicial candidates answer some questions forthrightly, refuse to answer others, and in still other cases, provide answers that appear on their face to be disingenuous.³²

Similarly, challenges to judges' independent decision making in cases like that of Judge Baer or the Terri Schiavo case also influence how average citizens view these same issues as they relate to state court judges. And the Supreme Court's highly controversial decision in *Bush v. Gore*,^{32A} and the questions that arose about the impartiality of Justice Antonin Scalia after he went duck hunting with Vice President Cheney during the pendency of a high profile Supreme Court case against the vice president,³³ similarly influence how citizens view the independence of the federal judiciary.

Those who engage in public education aimed at promoting judicial independence at the state court level must take into account the fact that controversies involving the selection or decision making of justices on the Supreme Court play a role in shaping the public's views about judicial independence.

C. The Challenge to Judicial Independence in State Judicial Elections

Without question, the unleashing of virtually unfettered "speech" in judicial campaign contests has presented a relatively new and potentially devastating challenge to the preservation of judicial independence. Even before the Supreme Court's 2002 decision in *White*, striking down Minnesota's "announce clause," which prohibited candidates for judicial election from announcing their views on disputed legal or political issues, special interest groups had used, with some success, "attack ads" that homed in on judicial decisions to brand incumbent judges as favoring one or another ideology or unpopular position. The defeat of California Supreme Court Justice Rose Bird and two of her colleagues in a retention election in the mid-1980s proved that such tactics could be successful.³⁴ Since then, attack ads have become the rule, rather than the exception, in some states.

Incumbent judges faced a dilemma. They learned that once branded "soft on crime" or "pro-abortion," they would have a hard time changing the perception in the public without doing what judges traditionally believed they need not, and should not, do—bow to external pressure to justify the exercise of their decision making authority. Traditionally, the four corners of a written judicial opinion have long been the sole, and most appropriate, forum for an explanation of a judge's reasoning and decision. But relying solely on a judicial decision that the average voter will not have read has left incumbent judges vulnerable to distortions of their record by special interest groups or electoral challengers.

Judges traditionally have also refrained from publicly stating their views about contentious political or legal issues. Indeed, most judges were barred by state canons of judicial ethics from announcing their views about controversial issues that might come before them. The *White* decision removed this prohibition. Read narrowly, the Court in *White* freed elected judges to offer their views about controversial issues, so long as they did not commit to deciding cases that might come before

them in a particular way. Read broadly, the Court in *White* regards judicial candidates as having full and robust free speech rights that can be exercised to the limits enjoyed by any other candidate for elective office.

Thus the Court's decision in *White* could be read either as empowering judges who would otherwise be compelled to remain stoic in the face of *ad hominem* attacks by interest groups or as eviscerating the very essence of the judicial function. I hold the latter view. I regard the *White* decision as an invitation to treat elected judges as though they are candidates for any other nonjudicial office. *White* subordinates judicial independence to the First Amendment, with little acknowledgment that judicial independence is itself grounded in a countervailing and critically important constitutional imperative—due process of law—which I will take up in the next section.

It is also important to note that challenges to judicial independence are not exclusively a problem for elected judges. All judges have faced increased attacks at the state level. Appointed judges are as vulnerable as elected judges to some “reforms,” like the 2006 Colorado ballot initiative to impose term limits on judges of the state’s highest courts *retroactively*—a law that, if passed, would have removed the majority of justices on both courts. Challenges to judicial independence will not be stopped simply because jurisdictions embrace a “Missouri Plan” for selecting judges. Likewise, the “J.A.I.L.4Judges” initiative proposal in South Dakota last year,³⁵ which would have abolished judicial immunity, is yet another example of a citizen-sponsored attack on judicial independence that would have affected both elected and appointed judges. Both these measures failed—43% voted for the Colorado initiative and 57% against,³⁶ and 11% of the South Dakota electorate voted in favor of “J.A.I.L.” and 89% against.³⁷ But the fact that 43% of the electorate in Colorado were willing to impose retroactive term limits on judges of the state’s highest courts indicates that the retaliatory impulse against judges expressed by some members of Congress has struck a responsive chord in a significant portion of the state electorate.

III. The Way Home: Reinvigorating the Meaning of, and the Case for, Judicial Independence

A. Refocusing on Citizens’ Rights—It’s Not Just About Judges

This is perhaps not a popular thing to say to judges, but too much of the debate and discussion about judicial independence has focused on judges. A case in point involves a compelling brief for preserving and promoting judicial independence that was presented to Congress by the Chief Justice of the United States in January 2007 in his *2006 Year End Report on the Federal Judiciary*.³⁸ The context of this discussion about judicial independence caught some on the raw. Chief Justice Roberts’s speech on judicial independence focused entirely on the admittedly important issue of the need to increase the salaries of Article III judges. Without question, and as ably demonstrated by the Chief Justice, federal court judges are long overdue for pay raises (as are many state court judges).³⁹ And Congress’s failure to increase the pay of Article III judges may indeed ultimately compromise the quality of the bench, though I think for different reasons than those offered by the Chief Justice.⁴⁰

But here was an opportunity for the Chief Justice to talk about judicial independence with Congress—a branch of government that in the past 15 years has generated some of the most troubling

challenges to judicial independence, as other members of the Court have noted in recent public statements.⁴¹ No doubt seeking to emphasize the pay issue, which he called a “constitutional crisis,” Chief Justice Roberts chose to use the language of judicial independence to make his case. In other instances, judges have quite compellingly described how undermining judicial independence has increased threats against federal judges.⁴²

All of these issues are important and valid components of the judicial independence discussion. But, to my mind, they focus too much on how judicial independence is intended to protect judges. In fact, judicial independence is at its core designed to protect litigants and citizens. It has its roots in the doctrine of separation of powers, yes, but it is also compelled by the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution. At its core, the right to due process guarantees litigants the right to appear before judges who are impartial, and who are free of influences that might result in bias or prejudgment of a case.⁴³ So important is this due process right that the Supreme Court has held that even the *appearance* of partiality or bias entitles a litigant to seek recusal of a judge and requires a judge to withdraw from a case.⁴⁴ Justice Frankfurter famously wrote nearly 80 years ago that “justice must satisfy the appearance of justice,”⁴⁵ a sentiment cited with obvious approval by the *White Court*.^{45A}

Judicial Independence’s Critical Role in Due Process

Moreover, there are troubling signs that unfettered candidate speech in judicial elections is having a negative effect on the protection of due process rights of criminal defendants. Several studies have shown that “elected state supreme court justices are more likely to affirm jury verdicts imposing the death penalty in the two years before the end of their terms than at other times.”⁴⁶ Yet, according to another study, in the 1980s, “state supreme courts with judges elected by the legislature or in contested voter elections affirmed death penalty sentences in more than 62% of the cases, . . . [while] state supreme courts comprised of judges appointed for life terms affirmed death sentences in only 26.3% of the cases.”⁴⁷ A recent study of judges in one state suggests that judges’ sentences become harsher “as reelection nears.”⁴⁸ If the conclusions of these studies are even partially accurate, then the threat to judicial independence posed by the increasingly volatile rhetoric in contested and retention judicial elections is, at its core, a threat to due process.

The concern for due process is not limited to the criminal context. High-profile civil cases involving popular local defendants or plaintiffs, large employers in the local jurisdiction, or hot-button issues like child custody for gay parents, same-sex marriage, or judicial permission for minors to obtain abortions, may also encourage judges to decide cases with an eye toward an upcoming election campaign.⁴⁹

As I stated above, due process protects not only litigants. All citizens in a society governed by the rule of law must have confidence in the judiciary in order for the judiciary to maintain its legitimacy. The public may agree or disagree with a court’s ruling, but they are more likely to comply with the rule of law when they believe that the judges are acting independently and legitimately in determining what the law is.

Moreover, decisions in cases between individual litigants often have an impact on the lives of everyday citizens, whether it's a case seeking damages against a tobacco company, challenging the right of the city to impose speech restrictions on billboards, or challenging the right of police to use certain forms of force or interrogation.⁵⁰ Thus, the public is, perhaps unknowingly, deeply invested in ensuring that the due process rights of litigants to appear before judges who are impartial and free to act without fear of reprisal or retaliation is protected.

B. Facing Hard Truths

1. Judges as Political Actors

Re-invigorating the case for judicial independence will also require that judges, and those who advocate most vigorously for judicial independence, face some hard truths. One of these is the reality that judges *are* political actors. This does not mean that judges always, or even ever, act politically in their decision making. But judges, whether elected or appointed, have generally achieved some success in the political arena. Few judges are plucked from political obscurity. Most have not only been active members of the bar, but also active, prominent, or well-regarded members of one or another political party. Selection to fill an unexpired term is certainly aided by having political contacts, or by being of the same political party as the governor, or having formerly served ably in another political position. In this sense, judges may be known “politically” to the electorate before they are ever seen as a judge. In some states, judges run in party primaries, while in others, party affiliation is indicated on the ballot. Nor is the appointive process free from political influence. The composition of a judicial nominating commission may change entirely once a governor of one or another party is elected.⁵¹ And, as stated above, a judicial nominee who shares the political party of the executive may stand a better chance of being appointed to an open seat than a judicial aspirant who does not share the same party as the executive. Political parties may also engage in cross-endorsement agreements to ensure that judicial nominees selected by parties run unopposed.

It is disingenuous, therefore, to suggest to the public that judges are utterly divorced from the political process. Here again, what average citizens observe in the Supreme Court nomination and confirmation process, and what they know of their own state's political system, has already convinced them that judges are political actors. They see, live and in Technicolor, a clearly political process at work for the selection of the most prestigious and important judges in the country. It is unlikely that these same citizens are inclined to believe that their local judges—who, unlike federal court nominees, actually run for office—are entirely nonpolitical. During the month-long ill-fated nomination of White House Counsel Harriet Miers to serve on the Supreme Court, a national poll showed that over 85% of Americans believed that “the partisan background of judges influences their court decisions” either “a lot” or “some.”⁵² Other studies show that most voters regard judges as politicians.⁵³ It is up to judicial independence advocates to explain how the political function of judges can and should differ from the political functions of legislators or elected executives.

2. Judges as Community Representatives

Similarly, I have argued elsewhere that judges also serve a representative function.⁵⁴ This goes against the received wisdom that “judges are not representatives,” but it is, I believe, true. Judges are,

of course, not representatives in the same sense that legislators are representatives. Representation is a more complex and textured exercise of authority than a mere knee-jerk response to the electorate. Voters choose representatives at least in part because of their faith in that representative's ability to exercise judgment and leadership. Judges represent at once the legal system, justice, the communities they serve, and their own moral values. Judges seek to preserve the authority and consistency of the legal system by respecting precedent and uniformity in applying legal principles. Because they are human, judges also apply their own legal, moral, and political visions. Judges also represent the values of the communities they serve. An educated electorate ostensibly selects a judge because it trusts the judge to blend and balance these considerations appropriately in the exercise of the judge's inevitable discretionary power.

Judges represent by virtue of their role as leaders. I have argued that diversity on the bench speaks to the representative aspect of the judicial function.⁵⁵ The inclusion of racial minorities and women on the bench helped promote the inclusion of perspectives and viewpoints that had been absent from judicial decision making. Justice Thurgood Marshall made this kind of contribution to the Supreme Court. As Justice White once wrote, Thurgood Marshall brought to the deliberations of the Court "experience that none of us could claim to match" and "would tell us things that we knew but would rather forget."⁵⁶ In this sense, Marshall "represented" the experiences of many African-Americans. This does not mean that a judge's decisions must serve the interests of a particular constituency, but a judge by virtue of his unique experiences—as tax lawyer, former legislator, or trial lawyer—brings his or her unique experiences and perspectives to bear on the deliberative process. We would not be comfortable with a bench comprised of all former tax lawyers or all law professors. Instead we seek a diverse bench populated by lawyers of different races, political parties, genders, and areas of professional specialty. That judges are in some sense political actors and serve a (limited) representative function, does not necessarily undermine the independence of the judiciary. It is simply a pragmatic reality that must be recognized and acknowledged, but also the excesses of which must be guarded against in exercising the judicial function.

Denying the political and representative aspect of the judicial function is counter-productive. If advocates for judicial independence refuse to concede that politics does in some measure influence judicial selection and election, and that judges can serve some representative function, albeit a limited one, they will lose credibility with average citizens. Members of the bench and bar who seek to strengthen judicial independence must take the lead in explaining to the public the complexity of the judicial function.

3. Leading by Example: Conduct of Judges and Judicial Candidates

In order to promote advance judicial independence, judges and judicial aspirants must *act* independently. This means that, despite the Supreme Court’s invitation in *White* for judicial candidates to exercise their free speech rights to the limits permitted by the First Amendment, those seeking judicial office—or seeking to remain in judicial office—should refrain from engaging in the kind of public discussion and debate that promotes the public’s sense that judges are just like any other political actor.

Campaign conduct committees in a number of states have created voluntary codes for speech in judicial elections. In Maryland, for example, all incumbent judges and several challengers agreed to “take the pledge” to abide by the standards set by the Maryland Judicial Campaign Conduct Committee, which was formed in 2005 at the request of Chief Justice Robert Bell.⁵⁷ The Committee was made up of respected citizens from throughout the state and was cochaired by two former state attorneys general—one from the Democratic party and one from the Republican party. It also issued “decisions” based on complaints received from the public and determined whether judicial candidates (even those who didn’t “take the pledge”) had violated the standards. The National Ad Hoc Committee on Judicial Campaign Conduct has made itself available to assist groups in creating such committees in their own states.

Campaign conduct committees can be an important tool in the fight to promote judicial independence. The standards they adopt, although voluntary, help educate the public about what is appropriate conduct for those who seek judicial office. What is appropriate may be quite different from what is legally permissible—candidates for judicial office need not, I would argue, exercise their free speech rights to the full extent permitted by *White*. Even Justice Scalia states in *White*, “We do not assert that candidates for judicial office should be compelled to announce their views on disputed legal issues.”⁵⁸ Efforts should be made to encourage a culture in which voters come to value and respect the restraint of judicial candidates in their speech.

The Importance of *Demonstrating* Independence

Judges already serving on the bench should also conform their conduct to standards that support both the appearance and fact of independence. This might mean refraining from going duck hunting with the governor of your state, or refusing to personally solicit campaign funds, even if you are constitutionally permitted to do so.

A sitting judge’s record should also reflect, over the course of some time in office, that the judge has acted independently by taking an unpopular position in interpreting the law, or a position not favorable to the judge’s political or professional constituency. For example, the public should expect that, over the course of a judicial career, a judge who is a former insurance defense counsel will on occasion rule against insurance companies, or that a judge who is a former civil rights lawyer will on occasion have cause to rule against a civil rights plaintiff.

Those who have never served on the bench but seek judicial office (whether elected or not) should be required to make a similar showing from their professional or personal history. Candidates

for judicial office should be asked by nominating commissions and on questionnaires to identify professional decisions they have made in their career that reflect independence and a willingness to go against the grain.

In short, those who seek judicial office should, as a qualification, be required to demonstrate independence and impartiality.

C. Structural Reforms

1. Public Funding of Judicial Elections

As I suggest above, the increasingly significant role of money in judicial campaigns constitutes one of the greatest threats to judicial independence. When a judge or judicial candidate must raise more than a million dollars to obtain, or even *retain*, a seat on a state's supreme court, the public cannot help but increasingly regard judges as pure political actors, who, like legislators, are provided with large campaign contributions from those who expect that in return judges will decide cases in ways that favor the interests of contributors. We can only expect this confidence to be further eroded by the Supreme Court's determination that judges may personally solicit campaign contributions,⁵⁹ a practice formerly forbidden in most states.

For this reason, public funding of judicial elections is an essential reform that must receive the highest priority. States like North Carolina have begun the process, but other states should follow this lead. Moreover, the public funding systems adopted should be mandatory for all candidates, whether in contested or retention elections, and whether for trial or appellate courts.

2. Mandatory "Impartiality Training" for Judges

I have long found it alarming that our system of judicial appointments and elections presumes that, by virtue of attaining judicial office, a lawyer who has acted as an advocate throughout his or her career can suddenly fully exercise impartiality. In fact, the ability to suspend one's prejudices, existing beliefs and perspectives requires a conscious act of will. To do so requires first and foremost that one learn how to recognize one's own biases, and then how to suspend those biases.⁶⁰ As Justice O'Connor has said, "judicial independence doesn't happen all by itself."⁶¹

Yet, although new judges received training in docket control, sentencing rules, and administrative practices, most jurisdictions do not provide mandatory training on impartiality for new judges, or even refresher courses on the same for judges who have served on the bench for some time. If, as Justice Breyer recently said, "independence is a state of mind,"⁶² then judges, both novice and senior, should be provided with the kind of training that would enable them to achieve and maintain that mental state.

Requiring that judges receive impartiality training would have two benefits. First, it would obviously assist judges with the process of thoughtfully examining and curbing their biases. Second, it

would promote public confidence in the willingness and ability of judges to distance themselves from outside or internal influences that might inappropriately influence judicial decision making.

3. Improving Education for Judging—Borrowing from the German Model

In Germany, judges are taught, not elected or appointed. Much of a German's law school education is focused on training students in the skills of judging. In addition to years of classroom training followed by rigorous exams, students must complete a two-year apprenticeship.⁶³ This practical training focuses primarily on training students for judicial and government service rather than on the private practice of law. Thus, becoming a judge in Germany is not the result of a well-executed campaign or selection by a judicial nominating commission. Attaining a judgeship is the result of nearly a decade of classroom education and apprenticeship, performing at the very highest levels on the judicial equivalent of the bar exam, and satisfactorily demonstrating during practical training the "skills required in the judiciary—preparation of opinions and judgments—rather than . . . the lawyerly skills of negotiating, advocacy, and drafting."⁶⁴

We may not wish to adopt such a system wholesale, but we might wish to build on the German idea of "teaching" judging in law school. I am astounded to find that many law students, and I fear lawyers, are themselves insufficiently educated about the importance of judicial independence and the complexity of the judicial function. We assume that young lawyers will learn this in their first job as a lawyer. My fear is that many young lawyers get a very skewed or cynical view of these matters in their earliest years practicing law.

I have taught courses on judicial decision making at my own law school, and I found that students were deeply engaged and deeply appreciative of the tremendous difficulties and challenges faced by judges. I would encourage the widespread offering of such courses in our law schools, to be taught by law professors and judges (perhaps in collaboration), as a way of inculcating the value and importance of judicial independence in new and successive generations of lawyers. Moreover, secondary school curricula—beginning with eighth grade government courses, should include a module on the role of judges in a democratic society.

IV. Conclusion

In sum, the effort to promote judicial independence will require us to recognize how threats to judicial independence in the federal courts affect state courts, and vice versa. Appointed judges should recognize that they are not insulated from the threats to independence that affect elected judges. Instead, greater communication and collaboration must characterize our efforts to promote judicial independence.

Very importantly, our rhetoric about judicial independence and the actions we take to promote it should emphasize, first and foremost, the centrality of judicial independence to upholding the due process rights of citizens. Thus, citizens, rather than judges, should remain the central focus of our efforts.

Finally, there are real, concrete actions that judges and judicial aspirants can take to promote a culture of independence in judicial elections, selection and decision making. Working in collaboration with educators, law schools, and the bar, judges must, as Justice Stephen Breyer has said, “meet the demands of independence in our own work and help to teach its value to others.”⁶⁵

NOTES

¹ U.S. CONST. art III.

² Kim Barker, *In Pakistan, An Accidental Hero Rises*, CHI. TRIB., June 11, 2007 (available at 2007 WLNR 10850390).

³ Materials and proceedings from the conference, “Fair and Independent Courts: A Conference on the State of the Judiciary,” are available at <http://www.law.georgetown.edu/judiciary/conf2006.html> (accessed Jan. 12, 2010).

⁴ By focusing on the 1980s, I do not mean to suggest that there have not been sporadic attacks on judicial independence since the Supreme Court decided *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). There are numerous historical examples of encroachments on judicial independence: Congress’s decision to postpone the 1802 Term of the Supreme Court to delay the Court’s decision in *Marbury*; the impeachment of Samuel Chase; the Court-packing plan of President Roosevelt; efforts in Congress by McCarthy supporters during the 1950s to restrict the jurisdiction of courts in cases involving so-called “subversives”; unsuccessful Congressional efforts in the 1960s to remove one-person, one-vote, and federal busing cases from federal court jurisdiction; and jurisdiction-stripping legislation like the recently enacted Military Commissions Act of 2006. I focus on the last 20 years, which has been marked by a sustained and rising attack on the judicial independence of both state and federal judges. These attacks have emanated from Congress, the executive branch, citizen groups, and corporate- or special-interest-sponsored groups (like tort “reform” groups) that pose as “citizen” groups.

⁵ For a comprehensive review of the practices now common in judicial election campaigns, see JAMES SAMPLE, LAUREN JONES, & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK* 24 (Justice at Stake Campaign 2007) (hereinafter *NEW POLITICS 2006*), at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf> (accessed Jan. 12, 2010).

⁶ *Id.* at 30-34.

⁷ *Id.* at 15-24.

⁸ See *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2007 WL 2726121 (E.D. Ky. Sept. 27, 2007); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

⁹ 536 U.S. 765 (2002).

¹⁰ See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary*, 100th Cong. (1987).

¹¹ David G. Savage, *Supreme Stumpers: The Next President Could Reshape the Court and the Legal Arena*, A.B.A. J., Oct. 2000, 26.

¹² Jan Crawford Greenburg, *Bush Pulls Plug on Miers; New Court Choice Imminent*, CHI. TRIB., Oct. 28, 2005, C28.

¹³ See, e.g., Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503 (2007); Joanna Cohn Weiss, *Tough on Crime: How Campaigns For State*

Judiciary Violate Criminal Defendants' Due Process Rights, 81 N.Y.U. L. REV. 1101 (2007); Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483 (2004).

¹⁴ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* 48 S. TEX. L. REV. 853 (2007)

¹⁵ Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After Republican Party of Minnesota v. White*, 10 MICH. J. RACE & L. 55 (2004).

¹⁶ Moreover, a comprehensive review of “social scientific research on merit selection systems does not lend much credence to proponents’ claims that merit selection insulates judicial selection from political forces.” Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 743 (2002).

¹⁷ Hon. Anthony M. Kennedy, *Judicial Security and Independence, Testimony to the United States Senate Committee on the Judiciary*, February 14, 2007, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2526&wit_id=6070 (hereinafter Kennedy (accessed Jan. 12, 2010)).

¹⁸ *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903 (2007) (part of the *Georgetown Law Journal* symposium issue on the conference on “Fair and Independent Courts: A Conference on the State of the Judiciary”) (hereinafter Breyer).

¹⁹ Carl Hulse & David Kirkpatrick, *DeLay Says Federal Judiciary Has ‘Run Amok,’ Adding Congress is Partly to Blame*, N.Y. TIMES, April 8, 2005, A21 (hereinafter Hulse & Kilpatrick).

²⁰ Kennedy, *supra* note 17.

²¹ Allison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996 at A1 ; Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, March 23, 1996 at A1.

²² David D. Kirkpatrick, *Republican Suggests a Judicial Inspector General*, N.Y. TIMES, May 10, 2005 at A12.

²³ Carl Hulse & David Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005 at A1.

²⁴ Hulse & Kilpatrick, *supra* note 19.

²⁵ *Id.*

²⁶ Irene F. Bahr, *Judicial Independence: A Citizen’s Right*, 94 ILL. BAR J. 576 (2006).

²⁷ Maxwell Poll, Campbell Public Affairs Institute, The Maxwell School of Citizenship and Public Affairs, Syracuse University, 2005. Results available at [http://www1.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law and Courts Questions from 2005 Poll.pdf](http://www1.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf) (accessed Jan. 23, 2010).

²⁸ See Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501, 503 (1988); Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966).

²⁹ I have articulated the concern, for example, that in some jurisdictions appointing judges may undermine efforts to bring greater racial diversity to the bench. See Ifill, *Through the Lens of Diversity*, *supra* note 15, at 84-90. See also, Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, *supra* note 16 at 744 (concluding that “merit plans may place fewer racial and religious minorities on the bench”).

³⁰ I say “theoretically” because in fact trial judges enjoy virtually irreversible authority for a whole range of critical judicial decision making, including rulings on discovery, admissibility of evidence, credibility of witnesses, and sentencing. Sherrilyn

Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L. REV. 95, 142-48 (1997) (hereinafter *Judging the Judges*).

³¹ Nominee Judge Samuel Alito was asked by Wisconsin Senator Russ Feingold the following question: “Does the President, in your opinion, have the authority, acting as Commander in Chief, to authorize warrantless searches of Americans’ homes and wiretaps of their conversations in violation of the criminal and Foreign Intelligence Surveillance statutes of this country?” *The Nomination of Samuel Alito to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. On the Judiciary*, 109th Cong. 413 (2006). This was an issue very much in active litigation and likely to come before the Supreme Court, as Judge Alito noted in his response. In an effort to provide Judge Alito with an opportunity to defend himself against criticism based on the Judge’s former membership in a college alumni organization that espoused racist and sexist views, South Carolina Sen. Lindsay Graham asked Justice Alito, “Are you a closet bigot?” *Id.* at 548.

³² Perhaps most famous among these is the contention by nominee Judge Clarence Thomas during his confirmation hearings that he had never discussed *Roe v. Wade*, the highly controversial abortion case that was decided while Thomas was in law school. Thomas is a staunch Roman-Catholic, and had been a government lawyer and then federal appellate judge in Washington, D.C. for well over a decade before he was asked this question by Sen. Patrick Leahy during the confirmation hearings. *The Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. On the Judiciary*, 102nd Cong. 222 (1991).

^{32A} 531 U.S. 98 (2000).

³³ For a critique of Justice Scalia’s decision not to recuse himself from participating in the decision in *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004), see Sherrilyn Ifill, *Can He Be Recused?*, LEGAL TIMES, April 26, 2004, at 60.

³⁴ John H. Culver & John T. Wold, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1986).

³⁵ “J.A.I.L.” stands for Judicial Accountability Initiative Law. The effort to repeal judicial immunity was spearheaded by a man named Ronald Branson, who had previously tried to have a similar initiative put on the ballot in California and several other states. NEW POLITICS 2006, *supra* note 5, at 56-57.

³⁶ *Id.* at 50.

³⁷ *Id.* at 56.

³⁸ John G. Roberts, Jr., C.J., *2006 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (Jan. 1, 2007), available at <http://www.uscourts.gov/newsroom/yearend06.pdf> (hereinafter *2006 Year-End Report* (accessed Jan. 12, 2010)).

³⁹ “Adjusted for inflation, the average U.S. worker’s wages have risen 17.8% in real terms since 1969. Federal judicial pay has declined 23.9%.” *2006 Year-End Report*, *supra* note 12, at 3 (emphasis in original).

⁴⁰ Chief Justice Roberts noted that “60% [of federal judges today come] from the public sector, less than 40% from private practice,” whereas “[i]n the Eisenhower Administration, roughly 65% came from the practicing bar.” *Id.* at 3. Justice Roberts warned that “it changes the nature of the federal judiciary when judges are no longer drawn primarily from among the best lawyers in the practicing bar”—whom he identified as attorneys from private, rather than public practice. *Id.* at 3. Justice Roberts offered no evidence to support his view that lawyers from the public sector are intellectually or professionally inferior to private bar attorneys. Justice Kennedy also seems to share this view about the threat to the quality of the federal judiciary posed by public sector attorneys (“One of the distinguishing marks of the Anglo-American legal tradition is that many of our judges are drawn from the highest ranks of the private bar.”). Kennedy, *supra* note 17.

- ⁴¹ See, e.g., Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1 (2006).
- ⁴² Sandra Day O'Connor, *Remarks on Judicial Independence*, *supra* note 19, at 5.
- ⁴³ Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1084 (1996) ("The association between impartiality and due process is as old as the judicial system itself.").
- ⁴⁴ But see the decision of Justice Antonin Scalia denying a motion to recuse in *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004). For a discussion of flaws in Supreme Court recusal practice, see Sherrilyn Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606 (2002).
- ⁴⁵ *Offutt v. United States*, 348 U.S. 11, 13 (1954).
- ^{45A} 536 U.S. at 817.
- ⁴⁶ Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1111, citing Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 496 (1995).
- ⁴⁷ *Id.* citing, Gerald F. Uelman, *Elected Judiciary*, in ENCYC. AMER. CONST. 170, 171 (Leonard W. Levy et al. eds., Supp. 1 1992).
- ⁴⁸ *Id.* citing, Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004).
- ⁴⁹ See, e.g., Matt Mosk, *Impeachment Plan Stuffed*, WASH. POST, March 10, 2006, available at http://blog.washingtonpost.com/annapolis/2006/03/impeachment_plan_stuffed.html (accessed Jan. 12, 2010).
- ⁵⁰ I thank Dr. Richard Marshall, former Executive Director of the Pound Civil Justice Institute, for emphasizing this point during our discussions about this paper.
- ⁵¹ Reddick's study showed that "many nominating commissioners have held political and public offices and . . . political considerations figure into at least some of their deliberations." *Merit Selection: A Review of the Social Scientific Literature*, *supra* note 16, at 743.
- ⁵² 2005 Maxwell Poll, *supra* note 27.
- ⁵³ David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, 39 CT. REV. 16 (2002).
- ⁵⁴ I first advanced the argument I make in the text here in *Judging the Judges* at 134-38.
- ⁵⁵ Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).
- ⁵⁶ Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215-16 (1992).
- ⁵⁷ See www.MDJCCC.org. I serve as the Reporter for the Maryland Judicial Campaign Conduct Committee. The National Center for State Court's Ad Hoc Committee on Judicial Campaign Conduct has a wealth of information available on its Web site to assist local jurisdictions in the formation of conduct committees. See http://www.ncsconline.org/D_DEV/am/issues_ad_hoc.asp (accessed Jan. 12, 2010).

⁵⁸ 536 U.S. at 783 note 11.

⁵⁹ See *Carey v. Wolnitzek*, *supra* note 8.

⁶⁰ See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1979). For a discussion of the particular challenges faced by legal decision makers in this regard, see Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 U.C.L.A.L. REV. 273, 280 (1989); Charles R. Lawrence, III, *The Id, the Ego & Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

⁶¹ Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1 (2006).

⁶² Breyer at 904.

⁶³ Jutta Brunnee, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399 (1992).

⁶⁴ *Id.* at 405.

⁶⁵ Breyer at 907.

Morning Plenary Session: Paper Presentations and Panel Comments

Oral Remarks of Professor Penny J. White, The University of Tennessee College of Law

As I go through the short presentation I have for you, you will see that I am leaning heavily on two organizations: the Justice at Stake Campaign and the Brennan Center for Justice at New York University. I commend them for their work and appreciate their allowing me to use some of their materials. They made my research much more efficient because of what they do in this area.

Now, the title of the forum itself, “The Least Dangerous but Most Vulnerable Branch,” suggests, I think, by historical reference a certain degree of angst. I have been accused for over a decade now of being “the Henny Penny of judicial independence.” I am going to try very much to live up to that accusation today. I am going to produce the anxiety. That is my job. I hope that at the end of my paper, and at the end of this presentation, there is a sense that, as Henny Penny said, “the sky is falling.” Then Professor Ifill is going to provide the solution—along with the rest of you in your participation today. So, at the end of the next few moments, there may be some anxiety. If so, that is what I intended.

How Do Judges Feel?

I guess we can start by saying that misery loves company. I think it is just so prophetic that the quote at the beginning of my paper is over a hundred years old: “Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench.” It’s from Roscoe Pound’s famous 1906 address to the American Bar Association on “The Causes of Popular Dissatisfaction with the Administration of Justice.” So it is both a longstanding and a historic anxiety that we face when we think about judges and politics and judicial independence. I have two cartoons that illustrate this. One shows a judge on the bench, with people in the jury box wearing labels that say, “politicians,” “special interests,” and “angry litigants,” and they say, “We find him guilty and want him to hang. . . . But enough about the judge. . . .” And there’s another that’s captioned “Laundry Day at the Tennessee Supreme Court” that shows the judges’ robes being hung out on a clothesline, and one of them has a target on the back. Judges, how many of you have felt that way?

If you have not felt personally attacked or institutionally attacked, perhaps you have felt misunderstood.

It does help a little to realize that this tension is not new. It is not novel. It is not even particularly creative. I do think, however, that it has changed. It has changed as a result of the Supreme Court’s decision in *Republican Party of Minnesota v. White*. That is my topic: “Judicial Independence in the Aftermath of *Republican Party v. White*.”

The Impact of *Republican Party of Minnesota v. White*

I start from the premise that *White* is based on flawed reasoning, but that by itself gets us nowhere. I have written about it a couple of times. If you really like to wring your hands, you can read those articles. But the fact of the matter is that *White* is the law. The Supreme Court has declined to revisit *White* on numerous occasions, and once particularly in the due process context. So *White* is where we are. What has it done? My position is that it has motivated states—and I will go as far as to say it has *intimidated* states—to make dozens of unnecessary revisions in the speech and conduct provisions of their codes of judicial conduct.

I also think that *White* has denied the uniqueness of the role of judges, and, in that way, promoted a misunderstanding of the role of the courts. It has muddled the role of judges and the process of judging in two ways. First, it has oversimplified the role of judges. It has led to a “one size fits all” idea: you have an opinion, you have an issue, you make a decision consistent with your opinion. It is basically “cubbyhole” justice. Second, in its assumption that all of you make new law every day, it has, ironically, *overstated* the role of most judges. In that way, I think, it has promoted confusion in the public about the role of the judge.

What concerns me most, however, is the nexus that I think *White* has endorsed—the syllogism, as I call it—that flows from this idea that a judicial candidate’s personal views on political and social issues are relevant to a voter’s decision on whom to select for the judiciary. From the voter’s perspective, the candidate’s views make sense only in so far as they inform the voter about what to expect from the candidate. So, in my opinion, realistically, an announcement of those views by a judicial candidate is heard by the voter as a commitment. And *White* suggests that the views expressed or announced by a candidate may be taken by the voter as an indication of the decisions that will be rendered in the future if the candidate becomes a judge. It is this nexus that concerns me the most, and that has, I think, provided the ideal environment for control of the state judiciary. Why? Because now, candidates who wish to express their views can have access to treasuries supplied by groups who have the same views.

I think *White* has energized the involvement of special interest groups in judicial elections. I think it has motivated some candidates who otherwise would not have entered the judicial arena to enter it because of their political connections, and I fear and believe that it will create some different kinds of judges—judges who are more political, more connected, more dependent, and less qualified. The day the final draft of my paper was due to be sent to the Pound Institute, Linda Copple Trout, a justice of the Idaho Supreme Court since 1992, announced that, because of some of these very issues, she would retire rather than stand for reelection. So not only might we see a different kind of judge, we may lose some of those who have served us most honorably.

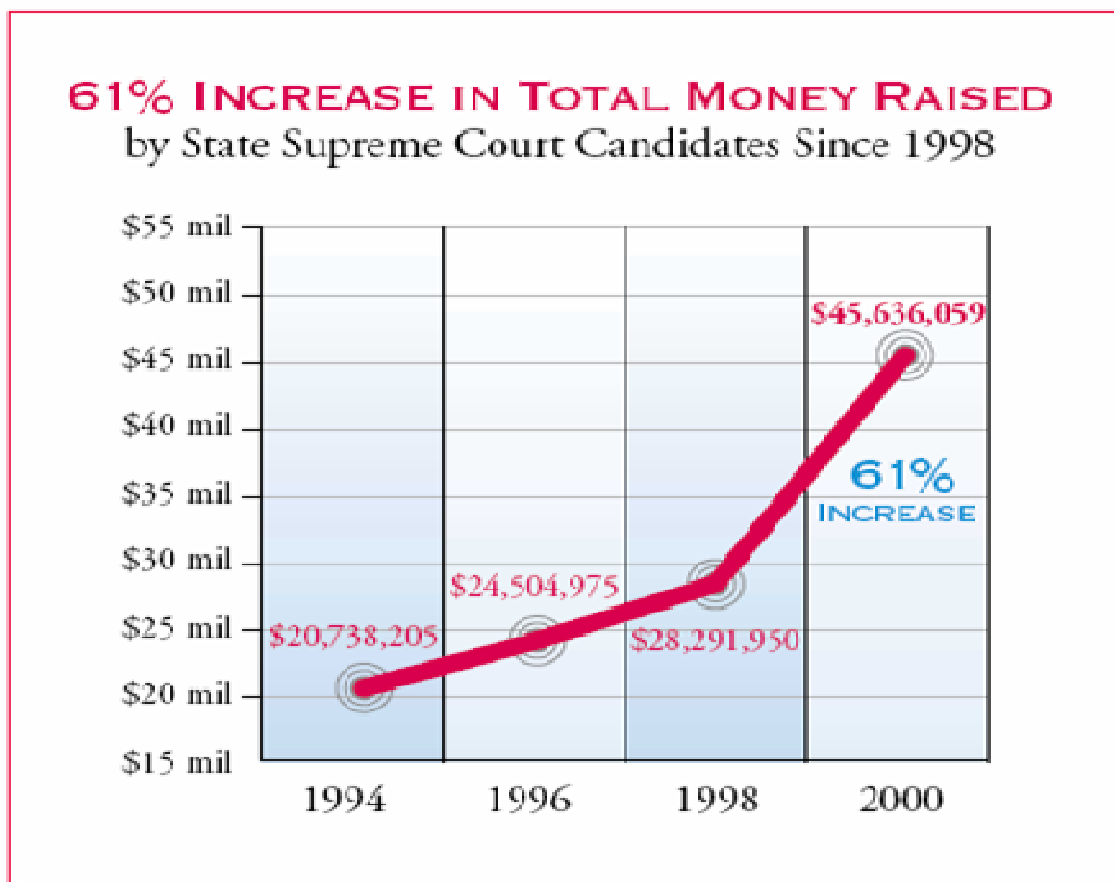
A Statistical Picture of Judicial Elections

Now, let me just spend a few minutes on some statistics to give you the big picture. First, a *caveat*: these all come from state supreme court races, but they are indicative. They are not absolutely complete, but they are indicative. I should preface all of this by saying that I am not suggesting that

judges are not acting independently. I am suggesting that perception is reality, and that courts derive their legitimacy from the perception of independence. I want to talk about three things.

How much money?

The first issue is money—how much money? Money is the big change in judicial elections. Between 1994 and 2000, there was more than a 100 percent increase in the total money raised for campaigns, and a 61 percent increase just between 1998 and 2000.¹



Source: *The New Politics of Judicial Elections 2000* (Justice at Stake Campaign 2002), Fig. 1, at 7.

How much money does that mean for an individual judge? Well, again, looking at the races from 1999 to 2006, in 1999-2000 the median amount spent by candidates was over \$202,000, and it increased by 2005-2006 to over \$243,000.²

Median Candidate Fundraising, 1999-2006 Supreme Court Elections

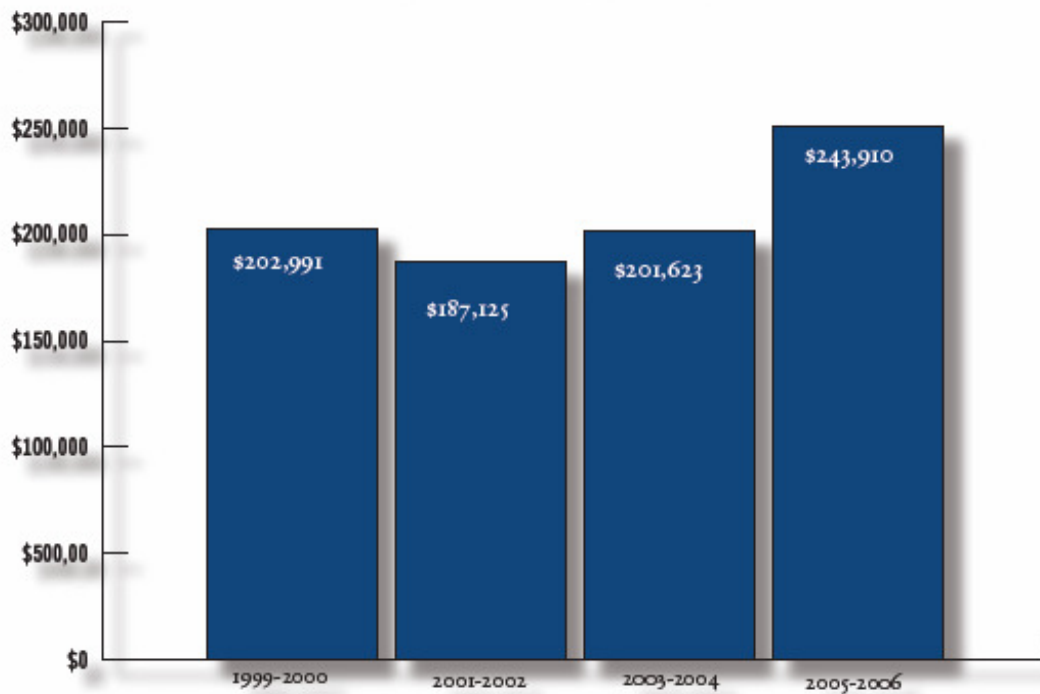


Figure 10. This figure shows the median amount raised by candidates for state Supreme Court seats who raised any money in their election campaign. A detailed breakdown by election type is shown on page 25.

Source: *The New Politics of Judicial Elections 2006* (Justice at Stake Campaign 2007), Fig. 10 at 17.

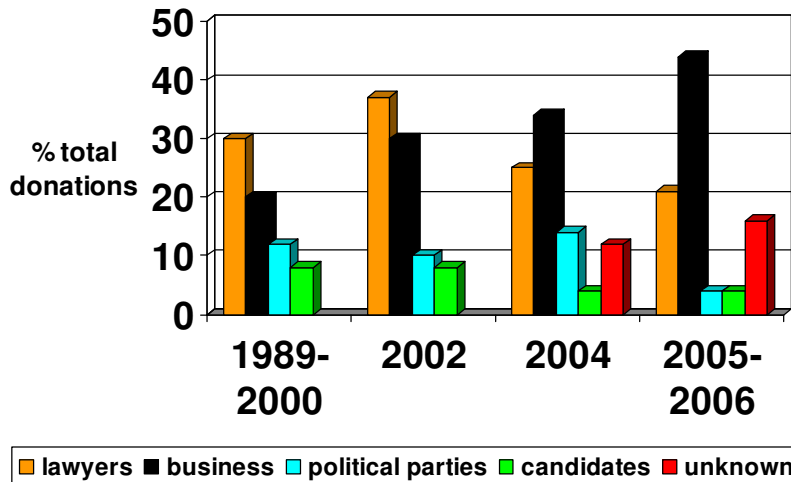
The total raised for judicial races in 2006 was \$34.4 million.³ From 1999 to 2000, the candidate with the most money won 80 percent of the time.⁴ That trend changed in 2006. In 2006, the candidate with the most money won only 68 percent of the time, so maybe we are seeing a downturn.⁵

Whose Money?

That brings us to the obvious next question—whose money? Traditionally the money had been the money of lawyers, business groups, political parties, the candidates themselves, and others. Between 1989 and 2000, lawyers outspent business, and together they combined to provide about 50 percent of the money spent on judicial elections.

Now look at the trends in 1989 through 2006. Lawyers' contributions went up between 1989 and 2002, but have declined steadily since then. Candidates' own contributions have decreased each year. Business contributions have increased from about 20 percent in 1989-2000 to nearly 45 percent in 2005-06. And a new "Unknown" category has appeared. Those are the groups that do not even report what they are spending. That category has been rising, and is now almost as large as the lawyer groups. So, the big change there is in the source of the money.⁶

Percentage of Judicial Campaign Financing by Interest Group



Money for what?

Money for what? Television advertising. That is where the money is going. In 2000, TV advertising was used in only 22 percent of the states with contested supreme court elections. In 2006 it was used in 91 percent of the states.⁷

Percentage of States with Contested Supreme Court Elections Featuring TV Advertising, 2000-2006

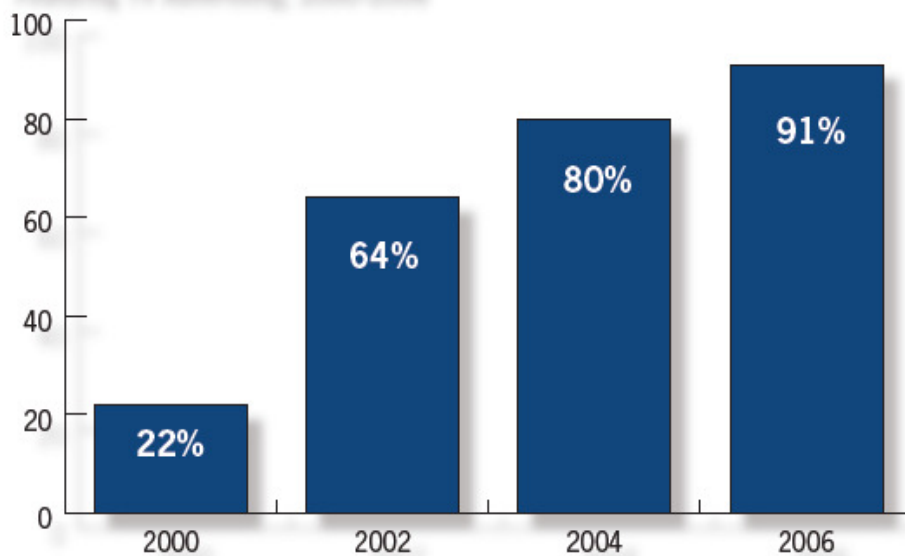


Figure 1.

Source: *The New Politics of Judicial Elections 2006* (Justice at Stake Campaign 2007), Fig. 1, at 2.

In 2006, in eleven state supreme court races, television ads were used in all of the races except one. I think there are only two states where television ads have not appeared, North Dakota and Minnesota. So, that is where the money is going, and you can see graphically how it has increased over the last six years.

I guess the thing that is of most concern to those of us who think there is a certain temperament and aura to a judicial campaign is the increase in the negative content of the ads and the source of the negative advertising. In 2004, 90 percent of the negative ads were sponsored by political parties and special interest groups. What we see in 2006 is that the candidates have increased the number of negative ads that they are running.

Well, television is not the only new phenomenon. Another is questionnaires sent to candidates for judicial office by special interest groups. There has been increased pressure to respond, and there has been some increase in the number of judges who do respond. Many of you have seen the typical kinds of questions that are asked on these questionnaires.

Again, in 2006, there was an increase in the number of judicial candidates who were responding to these questionnaires. Fewer candidates who stated their positions in advance, either by responding to questionnaires or otherwise, won their races.⁸ So there has been a decline, perhaps, in candidates' motivation to respond to the questionnaires and a decline in the questionnaires' influence on who wins and loses.

Judges Must Make Choices

Now we come to the final analysis, which is the aftermath, the impact of the changes brought about by the Supreme Court's decision in *Republican Party of Minnesota v. White*. What does *White* leave us with? My opinion is that it's simple. It leaves us with a matter of personal choice—personal choice which every judge at this Forum and every judge on the bench in every state must exercise. You have choices about campaign finance to an extent. You have choices about responding to questionnaires. More importantly, I think, you have choices about adherence to lofty recusal standards. The more recent litigation in this area attempts to eliminate recusal standards, arguing that they violate the First Amendment. There has been some success, in one lawsuit, where the litigants have succeeded in getting the recusal standard itself declared unconstitutional. I suggest to you that, so long as you as a judge believe that a recusal standard is appropriate, no one can force you to *not* recuse yourself. So I leave you with that—it's a matter of personal choice. I thank you very much.

NOTES

¹ DEBORAH GOLDBERG, CRAIG HOLMAN, AND SAMANTHA SANCHEZ, *THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS* at 4 and Fig. 1 (Justice at Stake Campaign, 2002) (hereafter *NEW POLITICS 2000*).

² JAMES SAMPLE, LAUREN JONES, AND RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS*

ARE FIGHTING BACK at 15 and Fig. 10 (Justice at Stake Campaign 2007) (hereafter NEW POLITICS 2006).

³ NEW POLITICS 2006 at 15.

⁴ NEW POLITICS 2006 at 20.

⁵ NEW POLITICS 2006 at 20, 24.

⁶ NEW POLITICS 2000, Fig. 3; DEBORAH GOLDBERG AND SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002, Fig. 8 (Justice at Stake Campaign 2004) (hereafter New Politics 2002); DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER AND RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT”—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL, Figure 14 (Justice at Stake Campaign, 2005) (hereafter NEW POLITICS 2004); and NEW POLITICS 2006, Fig. 11.

⁷ NEW POLITICS 2006, Fig. 1.

⁸ NEW POLITICS 2006 at vii.

Oral Remarks of Professor Sherrilyn Ifill, University of Maryland School of Law

This is a subject to which I have devoted a good part of my scholarly life, because it is so important to me. Unfortunately, I have to say that I am anxious as well, as Professor White is. I think the anxiety is quite well placed. I think we are in a very difficult and dangerous time as it relates to what I regard as one of the central pillars of our democracy.

I did not write my paper to try to provide all the answers. I actually see it more as tough love. I am excited to be in a group of judges who are really committed to grappling with this issue. It is my hope that we will have an opportunity to ask and to answer some of what I think are the hard questions.

My paper proceeds in two parts. The first raises three principal points. It is based on my own scholarly research, but also on my experience spending a good deal of time talking to average people about judges and judicial independence.

Judicial Independence and the Rule of Law

The first point, which I think is critically important, is that I think we have to begin to recognize that this term “judicial independence” that we regard as being sacrosanct is almost *sui generis*. We know what it means, we understand what it means, and we presume it is a good thing. However, it is not universally regarded that way. Increasingly, the term “judicial independence” has become equated with judicial *activism*, which in turn has become equated with the idea of judicial irresponsibility.

As we talk with members of the public about judicial independence, we have to understand that the questions that many members of the public have about judicial independence are not all

illegitimate. They question, and they want to understand, how independently a judge can act, and whether “independence” means essentially that a judge gets to do whatever that judge wants, based on that judge’s personal feelings—what many people call “judicial activism.” It behooves us to recognize that that question is out there among the public—because if we merely continue, in our public discussions, to bandy this term “judicial independence” about, we really miss the opportunity to educate the public about what precisely we mean by it.

What we mean by “judicial independence,” of course, is that it is essential to the rule of law that judges to be able to make decisions based on the law, free from fear of reprisal of any form—reprisal in terms of physical threats, reprisal in terms of reduction of salary, reprisal in terms of removal from office. In order to uphold the rule of law, judges need to feel that they can make their decisions independently, free from political pressure.

That raises difficult questions, I think. The public legitimately asks how judges who are subject to election, appear at political events, have campaign committees, and so forth, can be independent and impartial.

Well, it is a very difficult line to walk and a very difficult issue to explain, but I invite you all not to presume that that question is illegitimate. It is actually a good question. It is the tough question about judicial elections. Many people actually answer that question by simply suggesting that judges should not be elected—that we need to move to a “Missouri Plan” for merit-based selection of judges in all states. I happen not to be one of those people. I have written quite a bit about my hesitation to throw out the baby with the bath water. I recognize that there are many problems with judicial elections. I started my career as a lawyer suing various jurisdictions over how judges were elected, but I actually believe in judicial elections. I understand why people would want judges to be elected, and I think that judges can be elected and still preserve their impartiality and their independence. I admit that I have a hard time explaining that in a sound bite. It takes a little bit of time to be able to explain how judicial elections and an impartial judiciary can coexist.

Explaining that is, of course, not aided by the kinds of discussion—for example Justice Scalia’s opinion, and, worse, Justice O’Conner’s concurrence, in *Republican Party v. White*—in which, frankly, they seem to suggest that judicial elections cannot coexist with an impartial judiciary. We need to take the time to honor the questions and to be prepared to answer the question. That means we have to answer the question about money, which is something Professor White alluded to. If you are raising money, and money is coming in from certain segments of the community, how can that coexist with your independence and impartiality? I hope that, in our discussions today, we will have a chance to talk about that. I have my answers, but we have to honor that question by being prepared to answer it, rather than merely dismissing all iterations of that set of questions as an attack on the judiciary.

How the Public Understands Judicial Independence

Second, in the paper I really invite state court judges to recognize and to be very aware of the fact that what happens at the federal court level very greatly influences the public's perception of who state judges are and what role you play in your communities. When members of the public watch confirmation hearings for nominees to the United States Supreme Court, gavel to gavel, for a week or two at a time, they see Congressmen and Congresswomen asking judicial nominees questions like, "Are you a bigot?" That's what Lindsey Graham asked Judge Alito in an effort to give him a chance to rehabilitate himself. Or they ask them specific questions about specific cases, about their judicial philosophy, or about which present justice on the Supreme Court they agree with or disagree with, or about how they might approach a particular case if they were presiding over it. The public then gets the sense that those are legitimate questions to ask a judicial aspirant. It is very hard, then, for you at the state level to say, "I do not want to respond to this question on the questionnaire because it is inappropriate," when the public has watched their Members of Congress ask those very same questions of judicial aspirants in the federal realm. They have also seen judicial aspirants sometimes answering those questions forthrightly, sometimes declining to answer, and sometimes answering disingenuously. All of that contributes to the way the public perceives judges.

If you watch the federal judicial nomination and confirmation process, it is, frankly, very political. So how, then, can you draw a line between the federal nomination and confirmation process, which is infused with politics, and the parallel state process, and suggest that somehow what you are doing at the state level is different—is free from politics? I think that is a difficult row to hoe, but I suggest that, if we want to work on this question of judicial independence, we are going to have to work together with those who are part of the federal nomination and confirmation process, because you cannot divorce the public perceptions that arise from that process from how the citizenry views you as state court judges.

In fact, there are many extrinsic sources that influence how people perceive the judiciary. I have experienced this myself. I spend a good deal of time talking, writing, and working on the question of diversity on the bench, and I get a lot of pushback because of the perceptions people get from television and movies. If you look at most television shows and movies that include some kind of courtroom scene, most of the judges are African American. I do not know why, but they are. Very often they are African American women. So, this puts the perception out there that we do not have a diversity problem. I look around the room, and apparently that is not true. So many things influence how the public sees what is happening on the bench.

The Public's Right to an Independent Judiciary

Thirdly—and I think this is the most important part, but I say it with some trepidation in this room—I really invite those of us who care about judicial independence, but particularly you who are judges, to turn your attention away from yourselves. By this, I mean that the point of judicial independence, the essence of it, the purpose of it, the importance of it in our democracy, is the protection of the citizenry. It is actually not to protect judges. Judges get the collateral benefit of judicial independence, but the purpose of judicial independence is to protect the rule of law, to give citizens the opportunity to know that court decisions that are made not based on hackery, not based

on politics, not based on who has the most money, but based on the law. That is how I think we have to begin to talk about judicial independence. So long as judicial independence is thought of as being mostly about judges—for example the First Amendment rights of judges, for those who believe that that is the most important thing—we lose the Fourteenth Amendment Right of the citizenry to have a judiciary that is impartial, that is free from influence. The essence of judicial independence is the Due Process right not only of litigants, but also of citizens at large, to have cases decided by an impartial judiciary.

So, I invite us, beginning at this conference, but certainly as you go forward into your states, to not refer to attacks on judicial independence as attacks on judges. They are attacks on the citizenry. They are attacks on the rule of law. They may have the veneer of personal attack, but make no mistake, they are an attack on the very foundation of our democracy—an attempt to corrupt one of the most critical branches of government and to undermine the role of that branch of government in the protection of the rights of citizens.

Judges as Political Actors

In the second part of the paper, I turn to what we can do. First, I suggest that we face some hard truths. I argue in the paper, and have argued elsewhere, that judges are political actors. Ouch! That's difficult to say, I know. I did not say politicians—I said political actors. I think it behooves us to face that honestly and to talk with the citizenry about that honestly. Most of you, if you run for election, do so in elections which are partisan or in which, at least, your party is indicated on the ballot. Many of you had other political positions before you came to the bench. Others of you were active in political parties. Many of you were selected by your state's governor to fill unexpired terms, because you were in the same political party as the governor and you had all of your other qualifications. We know that politics plays some role in judicial selection and judicial elections. I find this not to be unseemly, and therefore I find no reason to run from it. It is a reality. It is the truth. It does not turn you into pure politicians to acknowledge that politics plays a role in judicial selection and judicial election. I do think that it hurts us when we try to run from that reality, because the public disbelieves us and it undermines our credibility.

Judges as Representatives

I also think that judges serve a representative function. This one really gets me in trouble. I talk about it a little bit in the paper, but I invite you to think expansively about what it means to be a representative. It does not mean that you are always a *legislative* representative, one who translates the wishes of your constituency into political action. Anyone who is a leader serves as a representative. You do serve a function within your community as a representative. I think it is worthwhile to acknowledge that aspect of serving as a judge as well.

Judges Should Lead by Example

One of the things I think is most important is that you lead by example. That is, *be* independent, and *be* impartial. I really think it is critically important that judges and judicial aspirants be prepared,

and be able to show in the record of their career, whether on the bench or off the bench, that they have demonstrated independence. This to me is a qualification to serve as a judge. So, I think it is important that judicial nominating commissions, for example, ask judicial aspirants, “Point to a decision that you made in your career that demonstrates your independence, your willingness to go against the grain.” If you have served as a judge for a long time, you want to be able to point to a decision that you made that was unpopular, that went against the grain. This strikes me as a really critically important qualification for someone who aspires to be a judge.

Training for Impartiality

Next in my paper I talk about training and education. I actually think that impartiality is not something that we can just wish into existence. I think it actually takes some work to be able to achieve it, and I think there are a number of scholars who have pointed this out—to be able to control our biases, whether it is a bias for our political party, a bias for one side of the aisle or another, or a bias for plaintiff lawyers, or defense lawyers, or tax lawyers, or civil rights lawyers. To be able to control that bias takes some work. In our current system, we presume that once you are elected to be a judge, you are automatically impartial. I think that we need to require mandatory training as a way not only of helping you as judges to actually be impartial, but also to demonstrate to the public that we take seriously the question of impartiality and independence, that we regard it as a key and critical aspect of judging, and that we believe that all judges need impartiality and independence training, not just as new judges, but on a regular basis.

Educating the Public

Finally, I talk about public education. I have taught seminars on judging and judicial decision-making. When I do presentations and faculty forums, I am shocked at how very little law students, and even some of my colleagues, really know about what you do, about how difficult it is to be a judge—what goes into judicial decision-making, the pressure that is on you. I find that, when people have an opportunity to sit down and study it, they are quite shocked, and they gain a tremendous amount of respect for the difficulty of judicial decision making. I think we need to teach this to citizens. I talk about how in Germany you get educated to be a judge. That is a track you get on in law school. I do think we need more courses on judicial decision-making in our law schools. We probably need them in our colleges and our high schools, too, but I would focus on law schools. Some of you are professors in your local law schools. I really invite you to teach a course on judicial decision-making. There are some wonderful materials—helpful law review articles, case studies, films and so forth—to help people begin to think about this incredible job that you do. I hope we will have an opportunity in our discussions to deal with some of the more difficult issues that I have talked about. I welcome the opportunity to grapple with this issue yet again.

Comments by Panelists

Dudley Oldham

Janet Ward Black

Honorable Gordon Doerfer

Dudley Oldham

The papers that have been presented are absolutely outstanding, provocative articles for our discussion today. Professor Ifill and I have been on prior programs on these topics, but this is the first time that I have been on one with Professor White. I think of Professor White as Justice White, because when I began my work in some of these areas in judicial independence, we used the example of her retention election in Tennessee to make the points that we were trying to score in terms of awareness of the increasing encroachment of politics and big money in the judicial elections. So, it is a real pleasure to be here with you, Penny.

It is almost like the Yogi Berra line about “*Déjà vu* all over again.” For those of us who have been working in this area, and for all of you who serve on the bench and who have to undergo either partisan elections or appointment retention elections, you have “been there, done that.” You already know the issues that have been discussed and that will be discussed throughout the day, but some of the ideas that have been coming out of those discussions for many years may be new and different to you. They may be thought-provoking to you. They may be opportunities for you to take back to your specific states some ideas that can help improve the system.

Gaps in Public Understanding

The other thought I have is the Pogo quip, “We have met the enemy, and he is us.” We are permitting all of this to occur by our inability to educate the public about what judges do. I think Professor Ifill’s comments about that are something I certainly agree with. Judicial independence is an important concept for all of us. I agree very much with her comment that the public needs a better understanding of the definition of what we mean by “judicial independence.” There are too many knee-jerk reactions about “activist judges” and other clichés. We have been counseled by the Justice at Stake Campaign and other organizations that have begun to work in these areas and do a lot of polling that the public needs a better definition of judicial independence. One suggestion has been to use the term “fair and impartial courts,” instead of “fair and impartial judges,” as a way to get across to the public the point that we really are about justice, not about individual judges or about freedom for you all to do what you wish, unfettered by any kind of bounds. There is a big lack of education about the whole judicial branch—or, for that matter, the branches of government.

Back when I was in school, there were civics classes. Many of you had civics classes. I never hear the word “civics” anymore. Classes in “government” are minimized in much of public education. We

need to have a resurgence, I think, of understanding the basic functions of the three branches of government and how they function with each other and the importance of each branch. I am not telling you anything you do not already know, of course, but I really do believe that education is a way for us to get at the subject of judicial independence at its core. It is important for the bar and the bench to speak out on some of these issues. I do not think it is possible any longer for those of you on the bench to *not* get out in public—to speak and be a part of the interaction on these topics—and you cannot be insulated from it.

All of us are concerned—and I know I have been, through the work I have done with the American Bar Association Judicial Independence Committee—about the heavy politicization of judicial elections and the money that has been infused into different states by special interest groups to try to affect the outcome of the elections in those target states. Different special interest groups do it in various different ways, but the purpose is to affect those outcomes. And I believe that the way in which that has escalated has really given the public a perception that justice is for sale, and that the election of judges is a heavily politicized process. Professor Ifill mentioned the impact on the public of observing the U.S. Supreme Court confirmation process. Watching it, you cannot help but believe that the particular views of a candidate, which are expected to be followed by their opinions on the bench, are going to be the rule of the day. I think that gives the public an improper perception of what justice is all about, and they don't understand that our real goal is to have fair and impartial courts. The public has every right to know what those of you feel about matters in your background and your experience. We as lawyers and you as judges know that you set aside your personal opinions as you consider a particular matter before you. You look at it independently on the facts before you. You truly try to follow the law, not your personal bias. And the public needs to understand that, although it's difficult, you really try to do that in your work.

Politicization of Texas Judicial Elections

Unfortunately, I believe my State of Texas may be where this current movement really began. It was in the mid-1970s, and it really started over the issues of personal injury litigation. The Texas populace is basically conservative about matters generally. Back in Texas in the mid-70s there was high respect for the courts. The Texas Supreme Court had enjoyed a very high degree of respect throughout the state for many, many years. There was a perception at that time by the plaintiff bar that they could not get changes in personal injury law through the legislature. They had made many attempts in legislative sessions to get some relaxation of the measure of damages and to broaden the avenues of recovery, and frustration set in to the point that they thought, “We will approach this a different way. Let us get some of us elected to the Texas Supreme Court. Let's effect change from the top down.”

It took four or five years to do that, to get name recognition, and a lot of money was infused into the process, but they began to have success. And the moment that there was a numerical majority on the Texas Supreme Court of “plaintiff” persuasion, the Court began to overturn practically a hundred years of precedent, principally in the area of what evidence could be submitted to a jury on punitive damages. Previously, to submit a question of punitive damages to a jury the plaintiff had to provide substantial evidence of conscious indifference on the part of the defendant. The newly constituted Texas Supreme Court said that minimal evidence would do to submit a question of punitive damages

to the jury.

As all of you know, once you raise the question of punitive damages you put emotion into that issue, and all of a sudden, overnight—and you can look at the historical statistics on this—punitive damage awards in Texas shot through the ceiling. That had reverberating effects all through the American insurance market, and even in the Lloyd's insurance market in London, and it was an eye-opener to all of the special interest groups around the country about what you can do if you start affecting judicial races—and the big money followed.

I really do believe that the practice of these special interest groups in infusing money into these elections is the root of some of the evil that we have experienced now. I have been doing a whole lot to try to change that. One person that I want to mention who had the real interest at heart was John Hill, a member of the Texas plaintiff bar for many years, a member of the American College of Trial Lawyers, former Chief Justice of the Texas Supreme Court, and Attorney General of Texas. John resigned from the Texas Supreme Court in 1988 specifically for the purpose of trying to change the way in which judges were selected. John died three days ago, but his legacy will be the work that he did in this area, which he continued until his last breath was taken. John and I talked about it three weeks ago. I and many others had worked with him on this, including Tom Phillips, our immediate past Chief Justice. His legacy will last many years in the area of judicial independence.

Janet Ward Black

I am Janet Ward Black from North Carolina, and I am the president of the North Carolina Bar Association. I am hoping to give a little hope to this today. Also, I am a plaintiff's lawyer, and I also have been a contributor in judicial races. There are some of us in the audience who have had the opportunity to do that.

It appears that the judges here are chosen in a variety of ways, with some who are appointed judges, some who face contested elections, and some who face retention elections. You may have seen the reference in Professor Ifill's paper to the North Carolina system that has been established in the last four years. We are allegedly the nation's first "clean elections" state, with public financing for state appellate court seats. I want to talk a little bit about that today. For those of you who do face elections, and are having to respond to ugly television ads, we have managed to stop that to some extent in North Carolina. I think there is hope, and it is a model that you might want to consider and encourage others to consider. It is my understanding that recently New Mexico has adopted something similar, and that there are other states that are interested as well. We do think we are on to something.

North Carolina's System of Publicly-Financed Judicial Elections

There were three goals of the North Carolina program. The first was to restore public confidence in the system; the second was to restrain the soaring spending on judicial elections; and the third was to eliminate wealth barriers to judicial office. Sometimes, it was only the wealthy who could manage to get elected to judgeships in North Carolina. The system has had some success with the second and

third goals. As to restoring public confidence, though, that is a long road.

Ours is a voluntary system. Judges can opt into it. There are a couple of judges here from North Carolina who I am sure would be happy to share their experiences with our system. It requires broad initial public support at low dollar numbers in order to qualify for public financing. At least 350 North Carolina voters each have to donate between \$10 and \$500 to your campaign prior to the primary, and you are responsible for raising between \$33,000 and \$35,000, depending on whether you are running for the Supreme Court or the Court of Appeals. However, candidates could also raise between \$66,000 and \$70,000 for the primary elections. Once you qualify, you do not spend any of your own money from then on. You receive public financing for the general election, and you agree to spend only the money that has been allocated to you. Those monies range from about \$130,000 to \$210,000, depending on the seat that you are running for.

There is also a provision for “rescue” funds, which are intended to reduce the advantages of candidates who are personally wealthy or have large campaign contributions. If a candidate who does not participate in the program tries to outspend a candidate who is, the program will provide rescue funds of from \$200,000 to \$400,000. The system also provides a voter guide that is mailed to all registered voters in North Carolina.

So, how do we pay for it? A couple of ways. There is a \$3.00 state income tax checkoff, which obviously is completely voluntary. Lawyers were asked to contribute \$50 each to the fund at the time they renewed their law licenses, but not enough of them did so, so the legislature now imposes a mandatory \$50 surcharge on North Carolina law licenses. Those two avenues raise about \$1 million apiece.

What have been the results?

- First, you do not need to be wealthy to become a judge in North Carolina. In fact, wealth can’t even help you, because a candidate’s personal campaign contribution is limited to \$1,000, and contributions from family members are limited to \$2,000.
- Second, participation in the program by judicial candidates has been substantial and effective. In 2006, there were elections for six seats on the North Carolina Supreme Court and Court of Appeals. Of the 12 candidates for those six seats, eight enrolled in and qualified for the public financing program, and five of the eight won the seat they were running for. In the comparable 2004 elections, five candidates enrolled and qualified, and four of them won.
- Third, North Carolina taxpayers are happy, because it is their money that is going into these elections, not out-of-state money.
- Fourth, the lawyers are happy, because in the past the judges had to come primarily to lawyers for donations. In 2002, shortly before this law went into effect, lawyer donations represented 73 percent of the contributions to judicial campaigns. In 2004, in the very first election cycle after the law took effect, that number went down to 13 percent.

- Fifth, at this point we are not seeing negative ads on television.
- Finally, the public is pretty happy about this as well. Both incumbents and challengers have won elections. Minorities have won and majorities have won. Male, female, republican, democrat—it has been a success across the board.

What is the bad side? Some of the judges will tell you that the public financing program doesn't provide enough money to do big statewide campaigns because it really is not enough money to be able to be on television in a big way. The North Carolina State Bar is not happy, because it has to enforce the collection of the \$50 surcharge on lawyers, which some lawyers have not wanted to pay. The program does not completely eliminate §527 groups, but it does have enough money so that so far our judges have not had problems.¹

Not “Fair and Impartial Judges,” but “Fair and Impartial Courts”

The last item that I want to mention to you has to do with political messages. I think the way we talk about things is extremely important. I want to commend to you what Dudley Oldham said about using the term “fair and impartial courts” rather than “fair and impartial judges.” As subtle as that difference is, it can help us—because, unfortunately, the rhetorical war has been won by the opponents of the rule of law. What the public hears is “jackpot justice,” “activist judges,” “greedy lawyers,” “frivolous lawsuits,” and “clogged courts.”

A system that I want to commend to you is what the State Bar of Georgia has done. They created a program called Foundations of Freedom, is intended to educate public opinion leaders and decisionmakers about the importance of safeguarding justice. They have tried to impress upon state bar members the point that you cannot fall into the rhetoric of the other side. You will lose. What you have to do is go back to core messages and speak of fundamental American values such as equal protection, equal rights, justice for all, and the principle that no one is meant to be above the law, not even our leaders.²

Americans want to elect judges. We need to face that fact. When there have been opportunities of late for the voting public to decide to the contrary, they have chosen to retain their right to elect their judiciaries. They also recognize that they do not have enough information most of the time to cast their votes for judges intelligently. You are probably familiar with the survey of the Annenberg Public Policy Center at the University of Pennsylvania that found that only one third of United States residents know the names of all three branches of government.³

Even Small Changes Help

We can make small changes. We need to do that in a very deliberate way. You've probably heard the sappy story about the two people who were walking on the beach and came upon a big pile of starfish stranded on the sand. One of them reaches down and starts throwing starfish back into the ocean. The other person who is with her says, “Why in the world are you doing that? What possible

difference can you make?” The first person picks up another starfish and throws it back in and says, “I made a difference to that one.” That is really what we need to do—make small incremental improvements.

The North Carolina Bar Association is in the midst of our “4All” campaign, which is inspired by the phrase “liberty and justice for all” in our Pledge of Allegiance. It is to focus on the provision of civil legal services to the poor and to return the public debate to a core value of the American people—that “liberty and justice for all” is a promise worth keeping. We have found in our polling that Americans pay attention to whether or not lawyers give away legal services for free, and that we need to encourage lawyers to be pro bono volunteers and to show the public that lawyers are out there doing wonderful things, and that judges are out there doing wonderful things. Our North Carolina Supreme Court is going to be involved in this. In fact, we are having a statewide service day on April 4, 2008, which will be called “4/4 4All.” We are trying to encourage other states as well to have one day where the legal community gives away legal services because we are out there doing good things.⁴

I want to leave you with a couple of quotes. Here is another from the speech by Roscoe Pound that Penny White cited: “[W]e must not be deceived . . . into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.”⁵ I wonder what he would say 101 years later.

It’s Not About Judges—It’s About the People

I’d also like to underscore a point that Professor Ifill made. I think we need to make sure that the public understands that this is a debate about them, not about judges. Judges do not need independence for their own sakes. They need independence for the sake of the people. The system of law exists to serve the public, not judges. Alexander Hamilton wrote, in *The Federalist* No. 78, that judicial independence is “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws,” and is particularly critical because “no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day.” I think the more we can make that point, the more successful we will be.

Honorable Gordon Doerfer

I am Gordon Doerfer, and sometimes I think I am here as a representative of a foreign country. I am from Massachusetts. We have a system of selecting judges, which does not involve any elections whatsoever. It starts with a provision in our state constitution, which is entitled The Declaration of Rights, which says that “[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.”⁶ That is written into our constitution of 1780, John Adams being the principle author. So, the tradition in Massachusetts ever since its founding has been a sort of a mirror image of the federal system, with the one exception that we do not have a confirmation process in the state legislative branch, but we do have a confirmation process by another popularly elected body, the Governor’s Council. So, there is some opportunity for voter input to select the people who will pass on the nominations of persons who are nominated for judicial office.

There have been instances where nominations have been rejected.

I mention that because I want to keep on the table the notion that there may be something to talk about in terms of appointment of judges, even though it is quite clear that there is a very pessimistic prognosis for changing any elective systems that now exist. There is in fact, I am told, a movement underway right now not to change elected systems into appointment systems, but the other way around. I suggest that we may want to take a look at and focus on the types of arguments and campaigns that are being waged in certain jurisdictions to roll back the retention election mechanism, which was introduced into this country back in the 1940s as a way of dealing with the problem of purely nominated or appointed judges.

I'd like to mention a few of the themes or ideas that we may want to be talking about for the rest of the day that came out of the presentations of the authors and the comments that have been made so far. One of the themes is that the problems that we are concerned about are inherently related to the process of electing judges. Let's assume for the moment that it is just practically not going to happen that there are going to be any major changes in states that elect judges to a system in which judges are appointed. I think it is important to think carefully about that and to try to figure out what constructively can be said about that debate. Is there any point, at this late date, in still trying to promote changes into an appointive system?

Judicial Accountability in an Appointive System

I suggest that the major issue that is always raised in arguments relating to "taking away the vote," if you will, from the electorate is accountability. "Accountability" is a loaded term, just as "judicial independence" is. I think it is important to focus on what exactly we mean when we say we want to honor the value of accountability. In systems in which there is not a complete electoral input in the selection and retention of judges, how can we achieve the goal of accountability of judges? And what exactly do we mean by it?

I suggest that there are mechanisms and ways of proceeding which guarantee accountability in an appropriate sense in the conduct and activities of judges, even in those states such as Massachusetts where judges are not elected but are appointed.

Just to mention them briefly, there are:

- Codes of judicial conduct;
- Judicial education programs;
- A judicial nominating commission, which scrutinizes and passes on the initial appointment of judges, which is subject to scrutiny by the bar as well;
- Written opinions—we write down and explain to the public the basis for a decision, which in a sense is a method of accounting for ourselves in the decisions that we make; and

- Appellate processes.

I would put these on the table as something we may want to talk about.

Judicial Speech

Another aspect of what we are talking about here is speech. To what extent should we as judges be engaging in dialogue with the public, or in making comments or statements to the public? And how can we regulate—self-regulate, if you will—what we can say, and what we should say, and what we should not say, without the enforcement of norms by law? Let us face it, the reason the First Amendment has been a focus in the debates over judicial independence is that we were talking about state enforcement of limitations on speech. As judges we should speak thoughtfully and carefully, and not suggest that we have made up our minds ahead of time. But if the state will impose a sanction on us for violating that principle, then we step into the First Amendment thicket. Maybe the answer is for us to be a little self-controlled about how we explain what we do—whether it is in the course of an election, or in explaining how the courts work, or in making controversial decisions. Some self-restraint on the part of judges in trying to communicate with the public, including the press or civic groups, may be the most practical, and ultimately the only, available method of promoting the value of public understanding, while yet avoiding the constitutional briar patch in the litigation that is going through the courts.

I suggest that we as judges do in fact have a duty to try to explain what we are doing, to try to make it understandable to the public—either through what we write, or through our interaction with the press, or in other public speaking. There are definite ways of doing this without overstepping the bounds, without creating the impression that you are committing yourself to some kind of position in your future decision-making.

Training for Judges

I would just mention, for example, that for those who are looking for guidance on how to get through the ethical thicket, there are training materials. The American Judicature Society has a training module. It is called *When Judges Speak Up*. It provides a workbook and some video vignettes of hypothetical situations.⁷ I have used it myself to conduct seminars for judges on what they can or cannot do and how they should deal with the public and the press, and how to avoid violating the ethical norms of codes of judicial conduct. This is done not in a sense of just staying out of trouble, but also in promoting the goals of codes of judicial conduct, which are to encourage confidence and faith in the integrity of the independence and impartiality of the judicial system.

Codes of conduct need not be looked at as just a rulebook, for the violation of which you can be subject to discipline. A special commission of the American Bar Association recently examined codes in great detail in the course of revising the Model Code of Judicial Conduct.⁸ I think it is a fair consensus that codes of conduct are not just rules—they are aspirations. They are statements of the best practices, if you will, to promote public confidence and faith in the judiciary. So, if you look at the codes, I think you can see not just a threat that you are going to get fined or disciplined if you

violate it, but really a guidebook, if you will, or a set of principles that, if followed, will promote further public confidence in the judiciary. So they should not be looked on as just penal statutes that are subject to strict scrutiny. They should be looked at as helpful guides to promote the values that we all share in this area.

The Core Role of the Judiciary

A bit about the question of the core role of the judiciary. I just came across an article that was written by a colleague with the following quote in it that supports the notion that judicial independence is really a fundamental right of the people:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done,” by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.⁹

So there is judicial precedent and support for the implications judicial independence has for due process in our system. It is not something we are just making up as we go along in order to find some basis for restraining our speech.

Accountability, I think, is the key concept, and I hope we can look at some of the mechanisms that are available to provide the proper amount of accountability. We are not talking about accountability in the political sense, however. We are not talking about restraining and removing judges because of an unpopular decision or turn of the law. So I hope we will be able to keep some of these things in mind.

Response by Professor White

Let me respond first by going to the due process question in saying that I agree wholeheartedly with what Professor Ifill has said about focusing on the rights of the citizens rather than on some sort of idea that a judge is entitled to ten years in office. Justice Scalia actually posed this question in *Republican Party v. White*. He said that, “if . . . it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for re-election, then—quite simply—the practice of electing judges is itself a violation of due process.”¹⁰ Now, he says that as if that is a no-brainer. It’s not.

Case law on Biased Judges

I remind you that the case law on due process deals with biased judges. One of the seminal cases is *Tumey v. State of Ohio*,¹¹ which Justice Scalia cited in *White*. Tumey was prosecuted for violating the Ohio Prohibition Act. He was tried before the mayor of the town where the violation occurred, and was found guilty and ordered to pay a \$100 fine and \$12 in costs. The costs were to be paid directly to the mayor—but only, of course, if the defendant was found guilty. So the mayor had a personal stake in the outcome to the extent of \$12, and that procedure was held to violate the Due Process Clause. There are other similar cases where justices of the peace received one sum if they granted a warrant, and nothing if they found no probable cause. So there are cases out there that establish that citizens can call upon the Due Process Clause for protection. Again, Justice Scalia posed the question, rhetorically undoubtedly, but I would suggest that due process is implicated if a judicial candidate's election is wholly contingent upon her ruling in accord with the views of those who are funding her campaign, notwithstanding the rule of law.

Of course, the Supreme Court had the chance to go there in 2006 in *Avery v. State Farm*, the Illinois class action in which five million State Farm policyholders were awarded over \$1 billion in damages. So in *Avery* there was much more than \$12 at stake. The Illinois Supreme Court heard oral argument in 2003, but delayed ruling until after the 2004 state judicial elections. The case was then decided after the election of a new justice, whose campaign had received substantial contributions from people connected to State Farm, and the jury's award to the policyholders was reversed by one vote.¹² The plaintiffs asked the U.S. Supreme Court to address the due process issue, but the court denied cert.¹³ So maybe the U.S. Supreme Court is not going to go into the due process issue. But that does not stop litigants from raising it—and dropping it in your laps in the state courts.

Just a couple of other responses. I certainly agree with everything that has been said about public education and giving attention to messages. I certainly commend, and I think we will hear a lot from Judge Burke about those sorts of things, particularly public education efforts. I am looking forward to that.

Public Finance of Judicial elections

Let me talk a little about public finance because I could not close without being Henny Penny a little more. The public finance system in North Carolina looks like a nice solution, doesn't it? Well, let's see what the Fourth Circuit says, because the same litigants who litigated *Republican Party v. White*, who are litigating the recusal standards that I mentioned to you earlier, and who have filed a successful lawsuit against the commitments clauses, the misrepresentation clauses, the political activity clauses, and the solicitation clauses, and have successfully dismantled those portions of the code of judicial conduct have sued to disable the North Carolina public financing system on the same basis—that it limits the First Amendment rights of those who wish to be candidates. They have lost at the district court level, and I am told that the briefs have just been filed in the Fourth Circuit. If they lose in the Fourth Circuit, that case may go to the Supreme Court.¹⁴ Obviously, I am hopeful that the system will be upheld as Constitutional, and I am hopeful that a year or two from now Janet Ward Black can come back and tell us there is still hope. That is something that we have to concern ourselves with.

Judicial Accountability

There is another kind of accountability that Tennessee and about twelve states have tried. I think it is a wonderful, wonderful opportunity to answer this question that those who are litigating the First Amendment try to pose. They say, “Voters need information. Voters need to know how to select a judge.” If that is the real issue, the answer is quite simply a judicial evaluation system. The American Bar Association has published guidelines for evaluation of judicial performance.¹⁵ New Jersey was the leader in this, and about a dozen other states now have judicial evaluation systems. It should not scare you. It will help you. It will help you be a better judge. Plus, it will give your state the information that matters, the kinds of assessment of judicial traits that the voters truly need to know in order to select judges intelligently.

There is another issue that I want to get out on the table in terms of accountability. Many states—through their court systems, bar associations, the League of Women Voters, or other groups—have developed good questionnaires for judges, for litigants, for jurors, and for court personnel. These questionnaires give all of the different people who use the courts an opportunity to comment on their effectiveness. They then publish the comments from the questionnaires in voter guides that are distributed to the voters either by mail, as in Alaska or Colorado, or by newspaper, as in Tennessee and some other states.¹⁶

So, if we are stuck with electing judges, because “that is what the people want” (though I would like for us to dig a little deeper into that question), then let us give them the information that they need to select the right kind of judges based upon a judicial evaluation system, not based upon sound bites and how much special interest money candidates can collect by agreeing with special interest’s agenda.

Response by Professor Ifill

I certainly agree with almost everything that has been said and want to come back to the discussion of this horrifying North Carolina case. But first I want to talk a little bit about appearances, because appearances are so important. As Justice Sandra Day O’Connor once said, in striking down a redistricting plan, “appearances do matter.”¹⁷

The Importance of Appearances

I think appearances really matter when we’re talking about judicial independence and judicial impartiality. And that’s not just what I think. Justice Frankfurter wrote in 1954 in *Offutt v. United States* that “justice must satisfy the appearance of justice.” That is why we have the reasonable person standard in the federal recusal statute, and in fact in most recusal statutes. In other words, if it *appears* that a judge could not decide a case free from bias, the judge should recuse himself or herself, or can be asked to be disqualified from deciding the case. The idea is that the *perception* of impartiality and independence is as important as the reality.

There was certainly a much more robust discussion about this when Justice Scalia went duck hunting with Vice President Cheney.¹⁸ That was yet another example where a lot of public attention was given to a situation involving the federal courts—a question of recusal in the Supreme Court—and an appearance of partiality or bias. Again, the public sees all of that, and it is very hard for them to separate that out from how they look at these same issues in the state courts.

So appearances are critically important, and this is something over which you have a great deal of control—that is, how you appear in the community, and the kind of presentation you make as it relates to impartiality and independence. One example: last year there were contested judicial elections in many counties in my state of Maryland, and the judicial candidates—incumbents and challengers alike—do what most politicians do in Maryland, and I suspect in many jurisdictions. They begin to show up at churches, especially black churches, in the weeks before the election. Well, this is kind of problematic because of course the gubernatorial candidates are also showing up, the mayoral candidates are also showing up, and the candidates for the state legislature are also showing up.

Public Presence, Public Financing

So, what can we do about that? Well, I think it is important for judges in particular to be out in the community. There is one judge in Baltimore County who regards going out to churches and various civic events as part of his job as judge—to be known in the community. He does it irrespective of who is sponsoring the function. He does it irrespective of religious denomination. And as a result he is very well regarded. He is not seen as a partisan, but as a leader in the community. So, all of these are the kinds of things that I think affect the appearance of impartiality and independence.

On the subject of public finance, I find it so critically important what Professor White was just saying about the challenge to the North Carolina system. I think it is quite disturbing. It really continues this trend of elevating the right of judges to speak above all else. I have to say I am quite dismayed, and in some sense offended, by the idea that the right of judges to say whatever they want and to spend as much money as they want is more important than the integrity of the judicial system as a whole, and more important than the public's sense of confidence in the legitimacy of the justice system. I find this just appalling. If the courts take a favorable view of this notion of primacy of free speech rights of judges, I think we are in deep trouble indeed.

Existing Restraints on Judges

Finally, I wanted to go to something Judge Doerfer said about the kinds of things that restrain judges. This is what I mean about the need to talk with the public about the kinds of things that restrain judges from doing whatever they want, because I think outside of the legal community, people are unaware of those things. The role of precedent, the role of appeals, the sense of professional integrity, the way in which training to become a lawyer steers you toward certain ways of thinking and arguing in logic, the importance of written opinions as a way of holding one accountable, I think those are the kinds of discussions that the public is entirely unaware of. It basically looks to them as if, once you get up there, it is party time.

I think we have to help make the public aware of the ways in which the profession itself, and the

structure, the mechanics of the judiciary, actually restrain judges in ways that I think the public would *not* expect, and the ways in which they keep judges from being able to have a free-for-all once they are on the bench. This reality, I think, is not at all absorbed by the public. Maybe the public could get an idea of this in civics class, but I think not. I think probably an eighth grade civics class is not the place to have this conversation. So, in that regard, I think in terms of talking about public education, we have to start to get more specific.

The Need to Communicate

Where do we think this intervention should happen? Where is the best place? What are the best forums? Who are the best messengers? Sometimes it will be judges, but sometimes it will be other members of the bar. It will be law professors. It will be other kinds of teachers or leaders in the community. I think we have to begin to get down to nuts and bolts rather than simply talk about “public education.” What other kinds of communications we are trying to use? Not just the lofty, “This is the third branch of government,” and how important judicial independence and the rule of law are, but the kind of things Judge Doerfer is talking about.

Here are the things that bind us as judges. I know it looks like we are on easy street, but our stomachs hurt a lot too. We have to be conscious of all of the various ways in which pressure bears on us within the profession, within our own standards, as we have been trained as lawyers to make decisions that have integrity within the context of the profession. So, that is the kind of public education I am very interested in, but I think the public does not know, and I think we have not done a very good job of communicating.

I would also point out an excellent article by Professor Chad Oldfather at Marquette University Law School. It is going to come out in the *Georgetown Law Journal*, and it is about writing opinions and accountability in judging. It is very, very good. It is extremely thorough, and includes lots of empirical research, but it goes into that whole question of whether writing produces better judicial decision making.

NOTES

¹ More information on the North Carolina public finance program is available on the Web site of Democracy North Carolina: <http://www.democracy-nc.org/concerns/voe-judicial.html> (accessed Jan. 23, 2010). See also Doug Bend, *North Carolina's Public Financing of Judicial Elections: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597 (2005), and the 2009 report issued by the Center for Governmental Studies, *Public Campaign Financing: North Carolina Judiciary. Balancing the Scales*, available at http://www.democracy-nc.org/downloads/cgs_nc_judg_061709.pdf (accessed Jan. 23, 2010).

² An excellent example of this approach is a PowerPoint presentation on the Web site of the State Bar of Georgia: http://www.gabar.org/public/pdf/lre/americas_courts_presentation.pdf (accessed Jan. 23, 2010).

³ Annenberg Public Policy Center, “Constitution Day: For Many Americans, It’s Time for the Basics” (news release), Sept. 14, 2006, available at http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_AC20060914.pdf (accessed Jan. 23, 2010).

- ⁴ Further information on the program is available at <http://4allnc.ncbar.org/participate.aspx> (accessed Jan. 23, 2010).
- ⁵ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reproduced *in toto* in 48 S. TEX. L. REV. 853, 854 (2007).
- ⁶ Mass. Decl. Rights Article XXIX.
- ⁷ Cynthia Gray, *When Judges Speak Up: Ethics, the Public, and the Media*, available at http://www.ajs.org/cart/thumbnail.asp?subject_id=2§ion=2 (accessed Jan. 23, 2010).
- ⁸ Available at <http://www.abanet.org/cpr/mcjc/toc.html> (accessed Jan. 23, 2010).
- ⁹ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), quoting Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*, et al. 341 U.S. 123 (1951).
- ¹⁰ 536 U.S. at 782.
- ¹¹ 273 U.S. 510 (1927).
- ¹² *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005).
- ¹³ *Avery, et al., v. State Farm Mutual Automobile Insurance Co.*, 547 U.S. 1003 (2006).
- ¹⁴ *Duke et al. v. Leake et al.*, No. 07-1454, U.S. Ct. App. 4th Cir. For further information on the status of this case, see http://www.brennancenter.org/stack_detail.asp?key=102&subkey=9457 (accessed Jan. 23, 2010).
- ¹⁵ AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, February 2005, viewable at http://www.abanet.org/jd/lawyersconf/pdf/jpec_final_commentary.pdf (accessed Jan. 23, 2010).
- ¹⁶ The 2006 Alaska voting guide, published by the state's lieutenant governor, can be viewed at <http://www.elections.alaska.gov/publications.php> (accessed Jan. 23, 2010). An overview of judicial election voter guides, compiled by the American Judicature Society, is viewable at http://www.judicialselection.us/judicial_selection/campaigns_and_elections/voter_guides.cfm?state= (accessed Jan. 23, 2010).
- ¹⁷ *Shaw v. Reno*, 509 U.S. 630, 647 (1993).
- ¹⁸ See, e.g., *Justice Scalia Defends Cheney Trip, Hints He Will Not Recuse Himself From SCOTUS Case Involving VP*, CBS News, Feb. 11, 2004, <http://www.cbsnews.com/stories/2004/03/18/politics/main607115.shtml> (accessed Jan. 23, 2010).

Afternoon Plenary Session: Roundtable on Judicial Independence

Bert Brandenburg

Hon. Kevin Burke

Abdon Pallasch

Mary Beth Ramey

Anita Woudenberg

Hon. James Wynn

Kenneth Suggs, Moderator

The North Carolina Public Financing System

Ken Suggs: Let me start with a question to Judge Wynn. The question concerns the North Carolina system of public financing of judicial elections. What changes in the types of candidates, discussion of issues, and participation of the public have accompanied the adoption of public financing of judicial elections in North Carolina?

Judge James Wynn: My good friend Professor Penny White is correct. The North Carolina public financing program won't solve all of our problems. I should also note that the suit that is currently before the Fourth Circuit¹ does not challenge the entire system of public financing in North Carolina, only some aspects of it.

You heard this morning from Janet Ward Black about how the program is set up. A candidate has to raise qualifying funds, which leaves some aspects of fund-raising in the process, as judges are allowed to directly solicit for this money. Once you have raised the amount required to qualify for public funding, you get a pile of public money, and then thereafter you cannot seek nor accept any contributions.

What this has done in my view is to open up the arena in terms of those who participate in the process of financing judicial elections. Previous to this, any one individual could have contributed up to \$4,000 in the primary and another \$4,000 in the general election, for a total of \$8,000 per person. A spouse could contribute a similar amount, and, if they had children, each child could have contributed \$8,000. So you can see that this is quite a bit of money that an individual or a group was able to contribute, whether it be the Academy of Trial Lawyers, or the insurance defense lawyers, or whoever.

What the new public financing system does, in my view, is to level the playing field. When I was campaigning I went around telling citizens that we have to have contributions from at least 350 North Carolina registered voters for us to be able participate in the process, and that they could give contributions between \$10 and \$500. I saw the smiles of so many constituents who felt comfortable with the fact that \$10 could make a difference in my election. They would scribble out a check for \$10, \$15, or \$20, and in that way they would become a part of the process.

How has it affected the candidates who are part of the process? I think that it probably favors incumbents to some extent, or at least someone who has name recognition, because a candidate still has to raise those qualifying funds. I think for most incumbent judges—and of course this only applies to appellate judges—raising a qualifying fund of \$30,000 to \$35,000 is not going to be a terribly difficult task. But a small practitioner, or someone who does not have connections politically, may find it more difficult to raise money, particularly if you are running against an incumbent in that situation. What I think also has happened is that it has opened up the field for those who want to be a part of the process, because notwithstanding all of the millions of dollars that you hear about judges raising, most judges do not raise \$1 million. Most of them have a hard time raising \$100,000. So, if someone says, “If you raise \$35,000, I will give you \$150,000,” you probably can get a lot of people to decide they want to run. I thought it was going to produce a large number of candidates. But the reality is that in the two election cycles in which the new system has been used, we have not seen what I thought might be an excessive number of candidates. And we have not seen people who were not necessarily judicially bent, seeking to be elected because they knew they would ultimately get this pot of money.

I think that, all in all, the new system, coupled with the fact that the election of judges in North Carolina is now nonpartisan—which, incidentally, has become much more contentious in terms of how it is viewed in our state than has the public financing system—will ultimately lead to a lessening of the number of candidates who are going to be seeking election, particularly if they are running against an established incumbent.

Who Will Be the Messenger?

Ken Suggs: Judge Burke, we heard something this morning about who would be the messenger for this ideal of judicial independence, and I thought a good point was made that it is not necessarily about the judges, but about the public’s right to have an independent judiciary to decide their disputes. What do you see as the role of judicial organizations or bar associations or other groups in educating the public and the media about the importance of judicial independence?

Judge Kevin Burke: I think it is a bad idea to talk about this in the context of independence. We need to educate the public about judicial *performance*. Performance is what happens in our courthouses. In this room is a group of state judges. We had 100 million cases in the state court systems last year. If we had a 100 million people leaving our courthouses feeling that they were treated fairly, no amount of special interest money could affect judicial elections. If you took just civil cases, there were 17 million major civil cases in the state court systems last year. If we assume that there were two parties in each case (and there obviously were more than that), that is 34 million people involved in major civil litigation last year—10 percent of the American public. The starting

point for any discussion about judicial independence is in our courthouses. Are we performing well with the people we serve? Most state courts do not do a very good job of taking the opportunity to educate people who are actually in our courthouses about the judiciary. If you look at most modern courthouses, the message to the public is, “Take your hat off.” There is really no sense of history.

One important group is our own employees. For the most part, state courts and bar associations have done a poor job of educating our own court employees about court performance. For example, if I grant bail in a domestic abuse case there is a chance that the defendant may re-offend, and there is at least the potential for a tragedy. It is a risk of my job. If there were a tragedy after I released someone on bail, I would like to have a thousand court employees who, if they are asked by their neighbors what I am like, will say, “Judge Burke is really committed. He really cares about making the correct decision.” So, I think that when a judge thinks about talking to the public, start with your base. Talk with your employees first. The people who are coming into your courthouses must be treated fairly and with respect, and the court employees need to know what is going on.

Use the Media

Courts need to become a little bit more sophisticated about the media. Since 1950, there has been a radical decrease in the number of people who read newspapers. A lot of information the public gets comes from television and radio. There is a need for judges to be willing to engage in public discussion on television and radio about the issues that face us. There are a lot of judges who are more than willing to go the Rotary Club, but they are absolutely hell-bent that they will not get on talk radio. Talk radio is simply another form of the Rotary Club, except that it has an advantage—almost every person on talk radio will hang up and wait for your answer. At the Rotary Club they might actually follow up with a question.

We live in an era in which a lot of the reporters are not regular courthouse reporters. Reporters have to go from covering a fire to covering the courthouse. It would help if periodically—maybe quarterly or twice a year—members of the legal profession would hold events to educate reporters on basic stuff about what is going on in courthouses. Every courthouse needs to have a plan to make sure that the reporters regularly have the opportunity to learn a lot of basic courthouse issues, process and procedure.

All courts need to hold a kind of fire drill—a “media drill,” in which they practice what they will do if there is a media crisis—like an attack on a judge, or a media frenzy over some decision. I was struck by the number of people who this morning were talking about how they had personally been involved in an attack on a decision they had made. When the media crisis occurs, panic can occur. Panic undermines the calm judgment about what to do. Even worse, when the key decision-making court leaders aren’t immediately available, paralysis sets in. In the times in which we live, you need to respond within the news cycle. That is a drawback of the bar associations’ fair response committees. Although well intentioned, they tend to be pretty slow. Even if you make a response within a few days, you have missed the news cycle. Hence, bar leaders and judges and others who are interested in this really do need to hold a fire drill so that if, hypothetically, I set bail on a case and the person kills somebody, the court leadership know precisely how they will respond promptly to the event. Much

like a fire drill, I think courts have to develop a media drill.

Next, I hope that judges will begin to look not just at the differences among the states but also at the differences among communities. Judge Wynn mentioned this morning that there are a lot of differences among the states. Minnesota, despite our contribution to free speech for judges, is much different from Alabama. Poor people and communities of color have a profoundly different level of confidence in the fairness of all of our courts. It is important for court leaders to deal with this critical issue.

Finally, this audience is mostly appellate court judges. Appellate judges have a unique opportunity to contribute to our democracy by setting the example on how to have reasoned debate—how to take on serious issues and not end up looking like some caricature out of *Saturday Night Live*. Morris Udall once said, “God gave me the grace to make my words gentle and tender because tomorrow I might have to eat them.” We need to understand that in our democracy, judges have a unique opportunity to set an example for reasoned discourse. In the end reasoned discourse will help to educate the public quite a bit.

Media Coverage of Judicial Elections

Ken Suggs: Abdon, let me follow up with you on what Judge Burke had to say about the media and their role in reporting on judicial independence, especially the part about reporters. Are they specialists, or, as Judge Burke said, are they reporting on a fire one day and a court case the next?

Abdon Pallasch: You have a lot of generalists, and that is part of the problem, so there should be a program to educate the reporters on the courthouse. I actually just finished at a good program. Loyola Law School, in Los Angeles, brings in 30 legal affairs journalists and tries to cram three years of law school into four days for us. I found it useful, but a lot of it I already knew, because this is my beat—covering legal affairs.

What I say when I am speaking to judges is to tell them that, if they get a call from a reporter, it is okay to take the call, even if it is just to say, “I cannot comment, and here is why.” Doing that will solve a lot of problems. Usually, you just do not return it, and the reporter does not know why. I know why you can’t comment on a case before you, but other reporters may not understand. You can lead them. You can say, “Here is where you might find the case law. Here is a website that might help you. If you call the law library at the courthouse, they could fax you this relevant case law document that might help you with your story.” Or, “Here is the lawyer that you ought to call.”

There are several questions here. How does the media do in general in covering judicial independence issues? Pretty poorly. We really do not reach that issue day-to-day in covering what case came up yesterday, what judge appeared to make a bad decision according to the columnists who will write about it. Even if the local bar group comes to the aid of the judge—say, if Judge Burke does set bail in that domestic abuse case and someone gets killed, and the bar group comes to his defense, and says, “Look, Judge Burke has a fine reputation, and he actually made a very legally defensible decision in this case,” it only blunts some of the criticism from some of the talk shows and columnists to some extent. It certainly does help to get that side of the story out there, of course.

I find it a challenge every couple of years to cover the judicial elections here in Chicago. I am sure you have heard of about them. They are very colorful, very dominated by the parties. All the action happens in the Democratic primary. I do not think the Republicans have won in Chicago in decades. Trying to get my editors interested, I say, “Give me some space for a story on the judicial election.” Their eyes glaze over. It is a Sisyphean task every couple of years. Sadly, the criticism is that we in media focus on the negative. That is true, but, if you think about it, it really shows that the media have a sense of optimism.

If we think everything is going well, if judges are making good decisions, if people are following judges’ orders, that is not news. That is how things are supposed to happen. It’s not news unless we have a judge who is really screwing up—that is what is unexpected. When I am doing a story on a judicial election and trying to convince the readers to be interested in it, reporting something that is unexpected is the way to grab the reader’s attention. I can say, “Here is why you should care about a judicial election: We have all this ink devoted to whether Congressman Rahm Emanuel is going to get a challenge this year, and he is one of 435 voices in the House of Representatives. That election is not going to have that direct an impact on your life. But here this judge has the single-handed power to take away your home, your car, and your children. So you should care about this judicial election.” Or, “Here are a couple of real lemons who have gotten bad ratings from some of the watchdog groups,” and tell the readers that they are not performing on the bench, and hopefully that will get the readers interested, so that when they go in there to vote they will actually differentiate between some judges who are good to vote for and some judges who aren’t. But there is very limited success.

I did a front-page story on a judge. I went to his house at 11:30 in the morning, and he was already getting home. That was his daily routine—he would get to court about 10:00 A.M. and spend about an hour on the bench and then come home and start drinking again. We did this story, and he was still reelected. It is hard.

Judicial election stories are not that easily picked up by the broadcast media. In a typical election cycle, the newspapers do a story. The broadcast media get most of the news from reading the newspaper. They pick up the story and start doing it, and then the talk shows get it, and then it seeps into the public consciousness. But with judicial election stories, if they are covered in the newspaper, they often die there and do not get picked up by the broadcast media.

We had a situation six years ago in an Illinois Supreme Court election in which one of the candidates spent a whole lot of money trying to dirty up one of the other candidates. The background was that, in Illinois, a whole series of innocent people were freed from death row because of DNA evidence and a whole lot of effort by a lot of different lawyers. So, one candidate for Supreme Court tried to blame that on the other one, and the bar group sort of reacted in unison with disgust that this candidate would try to do that. We did stories, and the TV stations did stories, and it actually worked. People noticed these stories, and the candidate who spent a lot of money trying to dirty up the other candidate came in dead last out of four. So there is hope if you can get the media engaged. Before just about every judicial election, the members of the bar and the judges’ association will come in and meet with the editorial boards, the *Tribune* and the *Sun Times*, to try and impress upon them

that it is worthwhile to cover judicial elections. It can help, but it does not always.

Taking Care of Jurors

Ken Suggs: Judge Burke, one of the things we hear about at conferences all the time is “the death of the jury trial”—that there so few civil litigants actually ever see the courthouse. On the other hand, I think that most criminal defendants and their families see a lot of the courthouse. The other group that sees a lot of the courthouse is the jurors. What do you think about the way we treat jurors generally and how that influences people’s view of judicial independence?

Judge Burke: Some courts treat jurors quite well, and some need some improvement. Most courts lose contact with the jurors afterwards, and I think that is a mistake. There are a couple of courts that have now started email newsletters to former jurors, saying “You were part of the judicial family for a brief period of time. We’d like to keep in touch.” Most studies show that jurors leave our courthouses feeling pretty good about the system—much better than they did when they came in. Given that fact, it is a mistake to not remain in contact with former jurors.

With respect to the comment about a lot of people never seeing a judge in the courthouse, that is a problem that we need to address. I will give one example—about family law. In my jurisdiction, the judge meets with everybody who files for divorce within three weeks after the case is filed, and briefly talks about what the process is going to be like. There is a commitment from the judges to insure people understand the family law process and know who might be making important decisions about their lives. When you have no contact with a judge you can have misunderstanding. Similarly, if there is a delay in a case because a lawyer for one of the parties is in a case in some other part of the country, it’s important that someone explain that to the litigant, so that the litigant won’t think it was because the judge wasn’t available. Courts need to commit time and effort to minimize any misunderstanding about what the judicial process is.

The Justice at Stake Campaign

Ken Suggs: All right, let us switch gears a little bit, and Bert I want to direct my next question to you and just first ask you to tell us what the Justice at Stake Campaign is all about.

Bert Brandenburg: Well thank you, and thank you for the invitation to be here. We do a lot of these programs, and this is definitely one of the best ones we have seen. I would say the same thing about the papers that we were given and the presentations from this morning. Justice At Stake is a nonpartisan national partnership. We are now up to more than 45 organizations who have essentially banded together to work with us. We have a full-time staff. We do our work, to some extent, on behalf of groups like the American Bar Association and the National Center for State Courts. The American Judicature Society is a partner, and so is the National Judicial College. We have a lot of legal groups, but also civic groups. Our assignment was to help put together a national coalition on behalf of fair and impartial courts, and to protect courts from attacks on their independence. So we have groups like the League of Women Voters and the Interfaith Alliance and the Committee for Economic Development and a lot of state groups from around the country, all of whom care about what has become a rising tide of pressure on the fairness and impartiality and independence of our

courts around the country. We worry about these things full-time. We have a staff of people in DC with political professional background to complement all of the judges and the bar associations and the scholars and the “good government” groups out there who are also worrying about this. So, we try to support those groups in their public education efforts, and, in some cases, their reform efforts. A lot of that work focuses on the state issues.

We also do some work on what has been going on in Washington, D.C., with attempts to strip jurisdiction from courts. A fair amount of our work actually gets to these broader message issues and culture wars and the overall open season on the courts and attacks on judges, regardless of whether or not it is a judicial selection issue. A lot of it is going on with talk shows and the like.

I will finally add that we care very much about diversity on the bench. The way we put it is that in order to be properly independent the bench needs to be diverse. We have plaintiff lawyers and defense counsel, and in fact we have the American Association for Justice as well as the defense lawyer groups in our partnership. We have conservatives and liberals. We have Republicans and Democrats. It is because this issue can only succeed in the long run if this is as bipartisan, and, frankly, as broad, as possible. Our board of directors is chaired by Roger Warren, the former president of the National Center for State Courts, and a former judge from California. We have the Chief Justice of the State of Ohio on our board. We also have Judge Wynn on our board. I feel a special affinity to those of you who deal with issues of speech and money because the board of directors of course does set my salary. We have other judges and scholars and activists, because we believe that this has to be an issue that starts with the people who understand it best and care about it the most: the judges and the bar groups. But that has to be a starting point, not an end point.

I think there has been a lot of terrific dialogue about the need to get out there and do more. I think that is what it is going to take to succeed in the long run. Finally, I will add in the way of a caveat that we never take sides in judicial elections, never endorse candidates for appointment, nor do we endorse any particular system of judicial selection. We are carefully agnostic when it comes to that theological question.

Litigating Restrictions on Judicial Speech

Ken Suggs: To come from a somewhat different perspective, Anita, you are part of a law firm and part of a group that represents folks who bring challenges to judicial candidates and codes of conduct that restrict the speech of judicial candidates. Tell us why you think that is important.

Anita Woudenberg: Just to give you a little context, our firm was actually involved in *Republican Party v. White*, the case that Professor White wrote about in her paper. We represented the Republican Party of Minnesota, and now we are bringing challenges attempting to enforce that ruling to ensure that judicial candidates can announce their views on disputed political issues, as they are permitted to under the *White* decision. The reason that we believe that judicial candidates should be permitted to speak in such a fashion is that, as I think most of us would agree, judges have at least two roles. The first is to interpret the law or apply the law, and then, in a more limited capacity, also to make law. That might take the form of public policy or areas where they have discretion.

The litigation that I participate in usually involves questionnaires that are sent to judicial candidates. Some judicial candidates respond that they cannot answer the questions because canons of judicial ethics restrict their speech. The motivation for these questionnaires is to help voters assess judicial candidates' philosophy and ensure that judicial independence is not exploited or abused. Professor Ifill talks about judicial activism in her paper. So, in an effort to preserve the two roles of the judge that I mentioned, these questionnaires are sent to candidates. We are attempting to preserve that for the voters to ensure that they are part of the process and that they know where judicial candidates stand.

Ken Suggs: What is your definition of “judicial activism”?

Anita Woudenberg: I know there are some nuances, but I think the general consensus is that judicial activism means interjecting your own opinion or standard in either applying the law or inappropriately adding to the law, rather than following the law as it is laid out.

The Tort “Reform” Movement and Judicial Independence

Ken Suggs: Okay, let me go to Mary Beth Ramey now for a plaintiff lawyer's perspective. Mary Beth, we all know that over the last decade, and maybe longer, there has been an organized effort to change personal injury law, both in the legislatures and in the courts. It goes under the rubric of “tort reform.” Do you see a relationship between the so-called “tort reform” movement and judicial independence?

Mary Beth Ramey: I see a definite relationship, and one of the things that has concerned me—and that I believe has had an incredible chilling effect—is the activist attack on judges. It started out with the trial lawyers being attacked by the first President Bush, which made it a national platform. I am sure some of you remember the “tasseled loafer” stories. Then that was not quite enough. So, the next step was about case results, and highlights of cases where all of us might agree that there was an injustice, whether it was a huge verdict for a broken toe or someone who was let free after having committed a rape and then was charged and convicted a third or fourth time.

So, then it started its shift into an attack on the system as a whole. After that, it started shifting to judges. Where the chilling effect became even worse, and became very frigid, is that the attack on the judges said basically, “If you do not agree with the position that our organization holds, we are going to call you one of those liberal activist judges.” The chilling effect on that has quite frankly been unbelievable in terms of the general public, in terms of judges themselves, and how they are going to react. They do not want to be the center of a controversy or of trumped-up news stories. By “trumped-up” I do not necessarily mean inaccurate, I mean just focusing on something that occurred in a case that a judge knows was no big deal, the lawyers know was no big deal, but it gets blown totally out of proportion in terms of the reality of what happened. What we are dealing with, as all of us know, is a lot of perception, not necessarily what actually is happening.

Some of the first things I became concerned about were the attempts to abolish judicial immunity legislatively, to allow judges to be sued or prosecuted for their official acts. On occasion there have

been some judges I myself would have liked to sue, but abolishing judicial immunity could have an unbelievable chilling effect on judges' approach to cases, to witnesses, to making decisions, to dealing with situations on the appellate level. So, these are all things that I think we need to factor in and look at when we are examining the chilling effect on the judiciary. There has been a very active attack on the judiciary in the last few years.

The Public's Differing Views of Trial and Appellate Courts

Ken Suggs: Let me address this question to both Judge Wynn and Judge Burke. Do you see a difference in the way the public perceives judicial independence between appellate courts and trial courts?

Judge Wynn: Well, I think there is no question that the public in general has very little understanding of the role that an appellate court plays. Quite often they believe we actually go back into cases and do fact-finding. So when it comes to the question of whether we are activists, because appellate judges write opinions, the things that we put out there can be studied more.

I think, though, when we ask "What is judicial independence?" the public thinks, "Well, judges are being independent in terms of their thinking. They are being activists." That's different from the concept that we have all come to understand, that judicial independence is being able to work without undue influence. As to the difference between trial and appellate courts, absolutely there is a difference, because of the fact that appellate judges write opinions. Those opinions more often than not are going to be synthesized. They're going to be analyzed. If they involve hot button issues, whether or not a judge is "independent" or "activist" is in the eyes of the beholder. As I look at the present makeup of the United States Supreme Court, I think quite often about the criticisms of the Warren Court, but, based on some of the recent rulings of the current Court, I am not concerned that there is activism. It is just a matter of perspective, in many instances, whether a court is viewed as activist or not.

Judge Burke: My shorthand answer is that an appellate judge "makes up the law," and a trial judge "makes up the facts." That is the fundamental difference between the two jobs. There is research that suggests that the public views trial courts and appellate courts a little bit differently. For example, surveys show 80 percent of the people in Minnesota say they have a great deal of confidence in the Minnesota state courts; 16 percent say they have little or none. Seventy-seven percent say they have great confidence in the Minnesota Supreme Court. That is slightly less than the confidence level for the state courts as a whole. Only 11 percent of the public in Minnesota say they have little or no confidence in the Supreme Court. Again, there is a difference in how the public views the trial courts, the state supreme courts, and the U. S. Supreme Court.

Professor Sara C. Benesh, in her article "Understanding Public Confidence in American Courts,"² argues that there are many reasons to think that support for state courts may be a function of dramatically different factors from what drives support for the United States Supreme Court. Professor Benesh's research is fascinating and at least suggests that there are reasons to believe that the public, for understandable reasons, view appellate courts and trial courts differently. The large

number of people that state trial courts have contact with every day—provides a base for the building of public confidence for all courts, including appellate courts. Public confidence is affected by the perception that people were listened to, treated with respect, and left understanding why the decision was made.

Too often judges succumb to the thinking that, because of the high volume of cases, we cannot be good 100 percent of the time. I am going to fly out of Midway Airport tomorrow morning. The air traffic controller at Midway is going to take off about 60 planes in an hour and land 60 planes in an hour—120 planes. I don't want him to get it 80 percent right! We cannot let volume be an excuse for not being right 100 percent of the time. By "right," I mean this: people have a right to come into our courts and be listened to, be treated with respect, and leave understanding why the decision was made—100 percent of the time. We need to say that that is the level of fairness that we guarantee the public, and we need to measure how well we deliver that.

Questionnaires for Judicial Candidates

Ken Suggs: Good answer. Let me go back to Anita. You succeeded in having questionnaires sent to judicial candidates. How specific do you think those questions and answers ought to be, especially for a sitting judge who may actually have a case that involves one of the issues that you ask about in your questionnaire?

Anita Woudenberg: I think there are definitely limitations. There is a limitation that is placed on judges in terms of what they can say on a questionnaire—or, for that matter, if someone were to approach them on the street and ask for their opinion on something. The limit is that they obviously cannot pledge or promise certain results in a particular case or a certain type of case even. If the judge has a pending case with the same or a similar issue, of course there is that restriction as well. I think that is a position even of the Supreme Court in the *White* decision. Both the majority opinion and the dissenting judges indicated that there is a recognized restriction that judges cannot make such pledges or promises.

Ken Suggs: What if there's a questionnaire that asks judicial candidates about a particular issue, and the public sees two completed questionnaires, one from an incumbent judge who has a case involving that issue before her at that very time, and the other from a nonincumbent judge, and the nonincumbent answers the question fully but the incumbent says "I cannot answer this question." Does that create a level playing field for the incumbent? Do you think the public is sophisticated enough to understand why the incumbent could not answer the question?

Anita Woudenberg: Well, I think the questionnaires are designed so that the judge and judicial candidate can say, at whatever length they wish, why they decline to answer. What we are seeing in our litigation at this time is that judicial candidates indicate that they would like to answer, but that they cannot. Once we get to the point where the canons do not prohibit them from announcing their views, they are welcome to answer on their own volition. If there are reasons why they think it is improper to announce their views, they are of course allowed to decline to answer. They can say that, and a lot of these organizations that post the responses will include accompanying letters from the candidate or any further elaboration that is furnished by the candidate, so that those who are viewing

it can see exactly what the response was.

Ken Suggs: Okay, just one more follow-up question. In this age anybody with a computer can start his or her own blog and send information out into “cyberspace,” so to speak. There may be very, very responsible organizations that are sending questionnaires to judicial candidates. But what is to stop the real “lunatic fringe” organizations from sending questionnaires, and publishing all of that information as well? How can the public distinguish among those organizations?

Anita Woudenberg: Well, I think it would come down to the judicial candidates recognizing their responsibility in responding to the questions. If the concern is how the question is framed or whether the information sought is appropriate, I think it is beholden on the candidate to respond accordingly—to recognize the limitations and how they can answer the questionnaires. How the information is disseminated, I do not know. I think there is nothing wrong with it being available on a website or if people want to communicate to their neighbor or to someone across the state by a blog or email about the information that they found. I think it just promotes education of the voters in terms of where judicial candidates stand on important issues.

The News Media and Public Education

Ken Suggs: Let me go to Abdon and ask if journalists feel some responsibility to educate the public? Let’s say you have a sensational story about a ruling or a judge. When you’re writing that story, do you also have a responsibility to educate the public about judicial independence?

Abdon Pallasch: It’s pretty rare to see that. In Chicago in the most recent elections, we had a group that produced one of these questionnaires that was sent out to judicial candidates. It was very specific. It was a liberal group and they do endorsements, and their endorsement does carry some weight along the lakefront in Chicago. So, a lot of the judicial candidates and others seek their support. This time the organization wanted candidates to commit themselves. They took the questionnaire language right out of *Republican Party v. White*: “Without appearing to commit yourself to any case before you, how do you feel about” I wish I had a copy of the questionnaire, because it was pretty specific, talking about abortion and damage caps and capital punishment, etc. What surprised me was the near unanimity with which the Chicago bar reacted in revulsion to this, saying to the judges “Do not answer these questions. This is improper. Just because *Republican Party v. White* allows you to do this does not mean you have to. The Illinois Code of Judicial Conduct allows you to not answer these questions.” To which the organization said, “You do not have to answer it, but you are not going to get our endorsement if you do not.” Some candidates did answer the questions; some candidates did not. It is always very easy shorthand in covering any political race—including judicial races—for us reporters to say, “Okay, here are the candidates’ stands on abortion, on gay rights, and on the Ten Commandments in the state capital building.” In the past in judicial elections, the bar used to say, “Okay, they have good judicial temperament.” Try to make an interesting story out of “This judicial candidate has good temperament, but that one only has a medium judicial temperament score.” It is much easier for reporters if they come right out and say, “Here are all their stands on the issues.” Whether or not that is good for the judiciary is something for you folks to debate.

Whenever there is a controversy over a particular ruling by a judge—for instance they set bail for somebody who's accused of a crime and they get out of jail and kill somebody—reporters ought to ask how the bar groups have rated the judge in the past. If the bar groups in the past have said, “This judge makes a lot of bad decisions,” then the reporters think, “Well, here are some warnings we should have noticed.” If they say, “This judge has had all good ratings in the past, and his colleagues have respect for him,” I think that is worth noting in the story.

Rating the Judges

Ken Suggs: The ratings issue is interesting. In my home state of South Carolina the attorneys regularly rate the judges in an anonymous survey. I am not sure how widespread that is. How many of the judges in the audience are from states where there is a regular periodic rating of the judges by either the public or by attorneys? It looks to me like half. Can conducting those ratings and making them public be an effective way to communicate with the public about the judiciary?

Judge Burke: The court I serve on has been a leader in measuring the fairness of our process. We have done over 10,000 surveys and 2,000 interviews of people served by the Hennepin County District Court. We asked litigants, “Did you understand the judge’s orders?” The National Center for State Courts found that 40% of the American public believe that judges’ orders are not understandable, and I’d guess that the same belief holds true in Minnesota. What if that is true? What if large numbers of people who leave our courts do not understand what is going on? My court has looked at those surveys and changed our behavior based on what we saw there. I do not think that we should at all be afraid of saying that the “consumers” of justice have a right to be served well by the judiciary. Asking them how well we are doing is not a bad thing to do. Then, of course, you have to change your behavior if you learn that they aren’t being served well.³

Bert Brandenburg: If I could add to that, I think the answer to your question about the effectiveness of this as a tool for the public might be different in five years than it has been in the past. I think there is a real growth opportunity here, and we are seeing examples around the country of organizations who are caring more about this. I have heard anecdotally a lot of examples in the past where a bar association or another group will do all the hard work it takes to get a good rating system out there to be very informative, and no one ever hears about it. In the age of the Internet, there is now no reason why the ratings cannot be distributed very widely—although, as we know, with the Internet, that puts it inside a very big mountain of information. I think the challenge is now to those who care about this to get that information out more. I think as we are seeing more attacks on the courts from all types of directions, the appetite has actually increased for this type of thing.

Getting Citizens Involved

Another thing I would add is that I think the challenge for anybody putting together one of these rating systems is to make sure that it is not just the bar that is doing the rating, but is also the public. Otherwise it may be seen as a joint enterprise among people who are all from the legal world—and, in the case of the lawyers, who may actually appear before these judges in court. This is not just an insider’s game. You don’t want it to be just a one-click for someone who sees at it and says, “Oh that

is just the lawyers protecting their buddies.” I would say that it is now a minimum benchmark for anybody putting together performance evaluation that you work with the bar and the others, but that you also have to have citizen involvement. It has to be seen as a joint enterprise.

Ken Suggs: How would you do that? How would you get the citizen involvement?

Bert Brandenburg: I am somewhat familiar with a program in the District of Columbia where they actually organize citizens to go into court and do some of these kinds of observations and take notes, amongst other things. The benefit, by the way, is that you are quickly educating more people about how the courts work and about all the good they do. I think anybody who has a legal background might quickly have some alarm bells going off on, thinking “How could they properly rate how the judge is dealing with evidence and all of that?” I would just add that to the issues that need to be dealt with, but it should not be a showstopper. There may be a bit of a challenge here, but I think it has to be done.

Judge Burke: I would not recommend that courts devote significant resources to find out how the public in general perceives courts. There is a place for that, but I do not think that is the judiciary’s highest priority. There are a number of ways, though, that courts can measure how people feel in our courthouses and get good data. For example, our court brought a professor of nonverbal communication into our court for a month as a “silent shopper,” and the judges learned some pretty damning stuff about our behavior.

Much of what courts need to do, though, is not just to measure public perception, but to also *do something* about it. Courts are not very sophisticated in court measurement. Typically, we figure out how many filings there were and how many cases we closed last year, and that is about it. If you really care about fairness, then the courts of this country ought to be trying to measure *fairness*. For instance, find out if people of color feel that, when they are in our courthouses, they are listened to the same way the white population is listened to. And then, if there are differences, do something about it.

The Role of Bar Organizations

Abdon Pallasch: In Chicago, based on the retention election cycles I have covered, the bar groups really do put in a heck of a lot of hours evaluating all of the judicial candidates every two years. They interview the last twenty lawyers who appeared before them to get their opinions. The problem is, how do they get these ratings out there to the voters? In 90 percent of the cases, the bar groups just say, “The judges are fine—reelect them.” But how do you get the word out about the judges you should *not* vote to retain? I get the ratings published in the *Sun Times*. The *Chicago Tribune* does not publish them, but they use them to inform their editorials in which they advise voters to vote for various judges or not.

One very effective tool to use in bar ratings is to give reasons why a judge should be retained or not—do not just give a rating, “qualified” or “not qualified.” If you find them unqualified, cite a few cases. Tell the public, “Here is where they screwed up.” If you find them well qualified, tell the public,

“Here is a particularly brilliant decision this judge wrote.” These reasons will get the attention of the journalists who are covering the elections. Tell the reporters, “Here is some stuff to write about. Here is why the judge is worth keeping or not.”

Ken Suggs: Mary Beth, we heard some comments about bar associations being involved in helping to protect judges, and helping to protect judicial independence. What is your view on the role of bar associations? Can they be affective? Does it need to be a local bar association? Can a national association do something in this area?

Mary Beth Ramey: I think the bar associations can do a lot. I think that they need to work more closely with judges. You have to be careful, though, because if a judge has a special relationship with an official of the bar association, that judge may come out with the best rating of any of the judges. We actually had that happen in Indianapolis a number of years ago where they did a survey of the trial court judges and rated them, and the judge who came out the best happened to be the best friend of the executive director of the Indianapolis Bar Association. So, I think you have to be careful in instances like that.

Educating the Public

I do believe that there is more that can be done. One of the things that has been tried with varying degrees of success throughout the country is the law-related education programs. For a period of time I was the executive director of the Law-Related Education Project at the Indiana University School of Law, and we worked with the bar association and sent law students and/or lawyers into school classrooms, trying to educate people about the legal system. It is amazing to me that you can get up and say, “I am running for judge,” and afterward a student will come up and say, “Do you have to be an attorney to be a judge?” So we have a populace that needs to be better educated and informed.

Indiana Law is not the only one that tried to work with judges and bar associations. Georgetown University Law Center in Washington has done that as well, and there are others throughout the country. Various bar associations have tried to run programs like that. I think when those programs take off that the judges need to be aware of them, and someone needs to take a look at what they are taking to the schools or to the general public, so that you can make certain that the program includes information on the role of the judiciary. You want the general public to say, “Oh yes. It is really important for them to be impartial. It is really important that we pay attention to who is running and what their qualifications are.” I think that is important. Yes, I think there are some things that can be done, but I do not think it has been as closely watched and directed and coordinated with bar associations as it should be.

Bert Brandenburg: I’d like to go back to an earlier question, which was what to do when there is a crisis or an attack on a judge, and how to respond, and the difficulties of doing that in a political climate in which the attacks are currently underway.

I think most of the challenge is in what you are doing on a daily basis *before* that crisis comes. You are not going to win all of the crises, no matter how well you do it tactically—nor should you expect to in a democracy.

On the other hand, there is an enormous amount that can be done in less sexy, day-in-day-out education about how the judiciary works, and the good news is that that actually sells a lot of your underlying message. We have seen quite clearly in our own polling by the Justice at Stake Campaign—and I think everybody who has done this can agree with this—that the more people know, even in terms of modest amounts of knowledge, the more their own mental wheels tend to turn. They end up coming back to you often with questions about the law and lawyers and judges and why impartiality and independence of the judiciary are important. Sometimes they start out with interesting misconceptions. On one occasion I can remember, I was fascinated to hear that I could have gone to law school in four days. I wish I had gone to that law school!

So it is helpful simply doing what can be done to boost general education levels about how the courts work is. There is a lot of shoe leather you can do, day in and day out. Judge Burke was identifying a lot of the tools that are out there.

The Judge's Role in Public Education

Other thoughts: Number one, judges are the sleeping giants here. I think that, in the past, judges have too often, from what I would call a professional culture standpoint, felt cabined in. You feel that you just cannot really get out there. I think that era really needs to be over. You refer to judges having two jobs. I would split it somewhat differently: one of your jobs is to decide cases, and the other is to educate people about the system if you want it to stay strong and whole in the long run. So, for instance, getting out to schools and onto talk radio shows is important. Judge Wolff of the Missouri Supreme Court, who is here, does a newspaper column regularly that I know has been a success, and more people are getting basic information.

I am going to guess that, frankly, a lot of you are better represented by those judges who are getting out there and going to the schools, etc. You could walk down the hall and maybe work on your colleague who does not get out as much but who might be a good and effective spokesperson. I view this as getting more “boots on the ground”—getting more judges out there to simply talk about how the courts work before that hot case hits, so that when it does hit, they have more cement in the foundation and are better able to resist the attacks. Again, our polling has shown that getting more judges involved in community outreach has a beneficial effect. This cuts across party lines and ideology. The more people know about the courts, the more likely they are to resist attacks on the courts even if they are upset about a particular decision.

I would just throw out as the best case study the *Schiavo* case in Florida. If you think about what happened, you had a very controversial episode. You had a situation where I doubt that people had very much knowledge—not only about how courts work generally, but particularly what a court does in an “end-of-life” case. You had what almost never happens in this very obscure field, which is that, for a couple months, you had all of the cable TV stations, day in and day out, educating people on how the courts worked. They got to see both sides of the story. They got to see the people fight it out in court. They also then got to see the political arguments being made that the courts were out of control, and then they saw this wave of political tampering with the case. What was interesting was

that Congress in rushed to tamper with the case, and when the American public saw this, there was this enormous backlash. Over 70 percent of the public said, “No. Do not do this.” They saw it for what it was, and it was because they had that education moment. Again, that does not happen very often.

Professor Ifill spoke about the importance of the relationship between the federal and state judicial selection processes. Those are education moments, too. When there is a hot confirmation hearing you can use it to talk about the state courts. But the fact of the matter is, that is not going to happen most of the time. It is the less exciting day-in-day-out stuff that I think is enormously underrated in the debate that we all face.

The thing about public education is that you never feel that you won today—because you did not. You may have talked to some more people, but you may never actually see the result. Yet the evidence is very clear that it does pay off. Again, you, the judges, are the sleeping giants, and, as I always like to say, “It’s time to get off the bench.”

Ken Suggs: That is an interesting perspective, but given the situation with judicial pay, what we are really asking is for judges to take on another job at lower wages, which may or may not happen. So in every state, I think, there are problems with getting adequate funds for the judiciary. Often, even though it is a separate and equal branch of government, the judiciary gets two to three percent of the state budget and the other two branches get the rest. If we have an education effort, who is out there who will pay for it? How could we organize it and get it funded?

Bert Brandenburg: I disagree with none of the comments that are being made about the problems with judicial pay, both in the District of Columbia where I’m from and in the states. I would say that when it comes to education, part of what I am talking about obviously is asking judges who have a full workload to spend more time getting out and informing the public. In my experience, some states do terrific work. That is the thing about judicial public outreach—as in everything else with our laboratories of democracy, no doubt there are great programs going on. I certainly run across them from time to time. Resources are going to be needed, and we need to think forward about institutionalizing things.

The “Outrage Industry”

There have been cycles in American history of attacks on the courts. What I think is different about this one is that there is now in place what I call an “outrage industry” that is there full-time, around the clock, year in, year out, trying to convince people that courts are somehow almost the enemy of American values. This involves everything from the talk show hosts we saw in the last year or two, like Nancy Grace on CNN and Bill O’Reilly on Fox, who regularly label somebody “the worst judge in America.” Each of those TV hosts managed to get impeachment threats going against judges, one in Vermont and one in Ohio, both based on criminal sentencing decisions. In both cases, legislators actually called for the judges’ impeachment, but they were sort of talked out of it. The fact of the matter is, this is a kind of rating of judges. We are increasingly seeing political consultants active in judicial elections. This is good money for them, and they are not going to give it up easily. Of course, for politicians, this is a chance to get out votes.

I think in terms of education, thinking beyond the *Schiavo* case, I found that far more organizations who care about this stuff were doing programs, and wanted to talk about judicial independence. What I always say to them, in addition to all of the other stuff, is “That’s great. Now what are you doing next year?” There is now a national permanent campaign against the courts. I think it is a job of all of us who care about the courts to think forward and to think about establishing permanent structures. I would add to your point and say that, not only are resources needed to educate, but this has to be a line item in court budgets, in bar association activity budgets, and also in outreach. It has to be a permanent partnership with your local League of Women Voters and your good government groups and your libraries and everyone else who can help.

Participant: For every email I get from the Justice at Stake Campaign, I get two from the “J.A.I.L.4Judges” organization, trying to alert me to some other judge around the country who has committed some outrage. And the news stories about the Terri Schiavo case *sometimes* did mention that Greer was a highly regarded moderate Republican judge who made his decisions after evaluating all of the science. Sometimes that got in the stories; sometimes it did not.

What’s The Greatest Threat to Judicial Independence?—and What Can We Do?

Ken Suggs: Finally, I want to put everyone on the spot now. What do you see as the single greatest threat to judicial independence today, and what is the single most important thing we can do?

“It’s the Special Interests”

Judge Wynn: I think the biggest threat to judicial independence is the impact that special interests can have in influencing judicial decisions. This is particularly true in elective settings, in which candidates for judicial office continually are being judged based upon perceptions of individuals or organizations about the type of work they have done, either as judges or in their law practice prior to being elected, which may actually have nothing to do with the way their judicial decisions are made. I think that is probably the biggest threat.

“It’s the Legislative Initiatives”

Mary Beth Ramey: I think it is a multi-layer problem. Legislation is being introduced to eliminate judicial immunity and to impose term limits, and you have judicial elections with judges getting questionnaires that can relate to cases that are before them. I think we have to look at the multiple layers, not just at one item. I agree with everything that has been talked about here today about getting the public better informed and explaining the role of the judiciary, but you are also going to have to take a look at these legislative initiatives to eliminate the protection we have had for the independence of the judiciary. That is what concerns me about thinking about “the number one issue.” Judges frequently are remiss to get actively involved, even within the organized judges’ associations. But I think that, with what we are starting to see now, it may be important to look at what the role of the judges’ associations should be with regard to judicial independence.

“It’s Fear”

Judge Burke: The greatest threat to judicial independence is fear. Fear is part of the human condition. I understand that, but the degree of fear that some judges have about doing the right thing, out of concern that the public will not relate well or favorably to their decision, can blind us from making good decisions. Judges need not fear the American public. The public does understand how important the judiciary is and how important justice is. My concern is that there is too high a degree of fear among good people who are committed judges. The fact of the matter is that the public likes us *better* today than they did a decade ago. The fact of the matter is that courts are *stronger* today than we ever were before in our nation’s history. Fifty years ago, everybody in the room here would have been an old white guy. I am not opposed to old white guys, but the judiciary is stronger today than at any point in our history. We ought not operate on the basis of fear as we go forward into the future.

“It’s Judicial Activism”

Anita Woudenberg: I would say the greatest threat to judicial independence is judicial activism. I think that without judicial restraint, any calls for judicial independence will be viewed as ways to protect judges who want to impose their own personal views, which might be contrary to the law. So, from my perspective, the only way to try to protect judicial independence is for judges to demonstrate that they are exercising judicial restraint.

“It’s the Legal Establishment’s ‘Dignified Silence’ ”

Bert Brandenburg: My big fear is that there would be an over-reliance, particularly on the part of the legal establishment, on “dignified silence” as a political strategy. I think that the days are over when you could count on looking mature by not responding to attacks. Those days are coming to a close. I hope more and more judges—and, frankly, everybody—will view this as something to be out there about, as opposed to waiting for the attack, or hoping that this week’s attack will be the last..

“It’s Reluctance to Explain Decisions”

Judge Burke: Another point in terms of responding is what Justice John Paul Stevens said. He was talking about two majority decisions he wrote, and said that if he had been a legislator he might have voted the other way, but his job was to apply the law as it was written. It is okay for judges to go out and explain decisions that way, and help defuse some of the accusations that are made about “judicial arrogance.”⁴

“It’s Weakness of Character”

Professor White: Kevin stole my first answer, which is fear. It is hard to talk like this, but I want to say the greatest threat harkens back to what was said this morning about proving that you are independent. I would say the greatest threat to judicial independence is weakness of an individual judge’s character.

“It’s Ignorance and False Outrage”

Professor Ifill: Well, I would say the greatest threat is ignorance, and what I would call false outrage. Ignorance, because I think Bert is quite right in identifying the culture shift. I post on a blog, and it is interesting for me to see the comments, most of which are insane, which reveal to me that people like having information, or feeling that they have information. What many of these groups provide to voters is a sense that they respect them enough to give them information. I think that judges have to show respect for the public in the same way. I really think that the public is not getting information about who judges are and what judges do, about the way judges make decisions, about why judges might make decisions that are contrary even to their own personal opinion or personal will. It seems to me that we might explain why a candidate questionnaire might validly ask, “What do you believe is the state of the law as it relates to a woman’s right to chose?” It seems to me that that information might be relevant to the judge’s qualifications. But “What is your personal view?” That information strikes me as irrelevant to a decision about selecting a judicial candidate for the job that judge has to do. We have a lot to do, and you as judges particularly have a lot to do, with helping the public understand what information is even relevant to deciding to select you or not to select you. You have to respect the voters enough to provide them with that information on an ongoing basis.

Then there is the false outrage. That is, we judge government by the margins at this point. We judge it by the last most outrageous thing that happened and not by the millions of very ordinary decisions that are made by judges every day. I think that is true for judges as well. That is why a case like the Terri Schiavo case can become a national *cause célèbre* as one small case—a very big case to her family, certainly, but one small case among the hundreds of thousands of decisions that are made every year by judges in their local communities. So, I think we have to give voters a chance to understand the boring stuff, the reality of what you do every day. I just cannot emphasize enough that I think putting yourself out in the community at community meetings, showing up and being involved in schools, seeing yourselves as real community leaders, is really an important way to balance out some of what I think is the false sense that some of these groups are giving in the community. They are giving them the false sense that they are the ones who really respect the voters and are willing to provide them with this information, and the public does not understand that a lot of the information they are being provided is really irrelevant, frankly, to what a judge has to do on a day-to-day basis.

Audience Comments and Questions

Ken Suggs: Does anyone from the audience have questions?

A Role for the Public Schools

Audience Participant: Just a suggestion. There's a secret about education in the public schools, that "if it ain't tested, it ain't taught"—subjects that are not covered on standardized tests just aren't taught. The problem we have with the "No Child Left Behind" program is that we are teaching children to be good economic actors, but citizenship and civics are not in there. You all are opinion leaders in your communities. Find out who is on your state board of education and ask them pointedly why they are not testing for civics. By the way, the Missouri State Board of Education just decided a few months ago to add civics to the subjects tested. Civics will now be tested.

The second secret is that very few people who teach in the public schools know very much about us. We have got to help them. We and the bar have to go to the schools and talk to them about what it is that we do. I think it is very important.

How Much Erosion of Judicial Independence is Too Much Erosion?

Audience Participant: Judge Burke gave a hypothetical in which somebody is in his court charged with spousal abuse, and, if he lets them out on bail, tomorrow they may kill someone. If his decision is criticized, the answer to why it was made is that that is what the law required. Whether it was a good thing or a bad thing, he had to set bail in a certain amount. It really does not matter whether you are a great judge all the other times. The answer is, "My discretion was limited. The maximum bail was \$100,000. I set it at \$100,000, and the defendant posted bail."

Judge Burke: My first actual experience with that kind of problem involved a judge in Minnesota who let a sex offender out on bail, and the defendant promptly went out and killed the victim. Within the news cycle, with the encouragement of the Chief Justice, I answered the media's questions about bail. The first thing I told them was, "This is every judge's nightmare." The second thing I told them was, "Ours is a state in which judges have virtually no information when it comes to setting bail. Judges get a lot of information at sentencing but none at bail hearings." The legislators who were concerned about what happened were asked to make sure that judges have adequate information to make the right bail decisions. Not responding to the media at all in that instance would have left the judge in question hanging out to dry, which would have been unfair, but more importantly, the tragedy became a learning opportunity for all of us in the state and resulted in funding a better process to provide judges with information about bail decisions.

Audience Participant: I'd like to ask Ms. Woudenberg three questions. First, do you think that the construct of the judicial independence is meaningful? Second, if so, what do you think judicial independence is? Third, is there a degree of erosion of judicial independence that would make you personally uncomfortable?

Anita Woudenberg: To answer your first question, whether judicial independence is meaningful, I would say absolutely, it is meaningful. You had followed that up asking what it is that I think judicial independence is. We have been talking about that a lot today. I think that judicial independence is something that has been granted by voters to judges to fulfill those two roles that I talked about: to interpret or apply the law, and also, in some cases, to make law. In order to fulfill these functions, judges have been afforded judicial independence to make those decisions on behalf of the voter to enforce their law and to apply the law. As to your final question, which asked whether or not there would be a degree of erosion of judicial independence that would make me personally uncomfortable, I think that, so long as those roles are followed, if judicial independence were eroded at all, I would be troubled by that because it is unwarranted and harmful to the integrity of the system. However, if judicial independence is undermined because of judicial activism, it is then that there is legitimate concern that justifies the questionnaires and the interest that the voters have in the candidates who are running for office.

NOTES

¹ Duke v. Leake, supra n.12.

² Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POLITICS 697 (2006).

³ The studies are available at <http://www.mncourts.gov/district/4/?page=396> (accessed Jan. 23, 2010).

⁴ “Addressing a bar association meeting in Las Vegas, Justice Stevens dissected several of the recent term's decisions, including his own majority opinions in two of the term's most prominent cases. The outcomes were ‘unwise,’ he said, but ‘in each I was convinced that the law compelled a result that I would have opposed if I were a legislator.’ Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005.”

The Judges' Comments

In the discussion groups, judges were invited to consider a number of issues raised by the group moderators related to the papers and oral remarks.* The judges devoted more time to some issues than to others, and they raised other interesting points *sua sponte*.

Remarks made by judges during the discussions are excerpted below, arranged by topic and briefly summarized in the italicized sections at the beginning of each new topic. These remarks are edited for clarity only, and the editor did not alter the substance or intent of any comments. The comments of different participants are separated into offset paragraphs. (Although some comments may appear to be responses to those immediately above them, they usually are not. If a paragraph includes one or more responses by judges to each other's comments, the responses are separated by two slashes (//) and distinguished with italics.)

* To facilitate discussion, and to help identify points of agreement, the discussion groups were provided with a list of questions for the judges' consideration. The questions were as follows:

Morning questions (based on the academic papers and comments of panelists)

1. In what ways do you feel your judicial independence has been threatened? Have you been subject to attacks (ads, by pundits, by other elected officials, by protesters) for decisions you have issued? If so, did it affect how you did your job in any way? How have you responded to attacks? Have others responded to attacks on your behalf?
2. Have you received a candidate questionnaire from any interest groups? If so, did you respond to it? If not, was there any reaction from the group who sent it or the public?
3. What is the recusal standard in your state? How strictly is this standard followed? Do you know of any judges who have recused themselves because of positions taken during a campaign, or because of political contributions?
4. Professor Ifill writes that too much of the debate about judicial independence centers on judges. Do you agree with her assessment, and if so, how do you suggest judges go about changing that? If not, why?
5. Do you believe that what happens at the federal court level (such as contentious confirmation hearings) affects your own independence, and if so, in what ways?
6. Do you view yourself as a political actor, or representative in the way that Professor Ifill describes? If so, how? If not, why?
7. Is there any kind of judicial training in your state along the lines that Professor Ifill recommends (i.e. impartiality training)? Should there be?

Afternoon questions (based on the roundtable discussion):

1. We'll start with a broad question- what was your reaction to what the panelists had to say?
2. Why is judicial independence so important to the rights of citizens- in other words, why should the public even care? How should we better educate the public about the importance of judicial independence? Are there any programs in your state that work to educate the public, legislators, or media, about what judges do and why judicial independence is important?
3. What is the single biggest threat to judicial independence today?
4. Do you think the public and the media see a difference between judicial decision-making at the appellate versus the trial court level? Do you think it's useful to discuss the distinction between the two with the public at large?
5. There's been a lot of discussion that focuses on the "doom and gloom" of the demise of judicial independence. What bright spots do you see in the fight to preserve judicial independence?
6. What is the "magic bullet" needed to preserve judicial independence in the state courts?

The excerpts are individual remarks, not statements of consensus—for general points of agreement that arose out of the discussion groups, please see the following section of this report. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

Judicial independence

Judges discussed what the term “judicial independence” means.

We have to be very careful of the term “judicial independence.” I don’t think it means that you’re free to do whatever you want. The freedom comes from being able to make decisions without being recalled for one decision.

Making the final call is what makes us distinctive, and if we keep doing that, then we’ll stay on. It’s when we succumb to fear that we’re going to go down the tubes.

Judicial independence means for us to call it as we see it. Sometimes you’re going to win, sometimes you’re not, but you’d like us to make that call.

I really don’t like the term “judicial independence.” I like “fair and impartial courts” better. I guess the ABA internationally doesn’t want to use “fair and impartial courts” because it doesn’t translate well, so they continue to talk about judicial independence.

People don’t understand the issue of judicial independence at all. They assume that we can do whatever we want. In my Midwestern court, roughly 90 percent of my cases are decided for me, because they are tried on the facts. So 90 percent of the time I know exactly what I’m going to do, as will every other lawyer. It’s less than 10 percent of the time that we even have a question or a legitimate issue in front of us—and nobody knows that.

Judicial independence means the freedom to give due process, and this question suggests a means of educating people about courts applying the 14th Amendment. If you know walking in the courthouse door that you’re not going to get a fair shake, then the 14th Amendment is gone. Getting due process is the whole purpose of judicial independence.

One of the things that I really appreciated from the panel this morning was moving the rhetoric to “fair and impartial judiciary.” It may not just benefit how we are seen by outsiders, but also what we focus on. The important thing is not the independence of the judiciary or protecting the independence of an individual judge. It’s a fair and impartial judiciary, which is a standard of conduct and review that we can hold ourselves and our colleagues to. // *I have to disagree with that. Justice Scalia in the*

White decision asked what impartiality could mean. He imagined it could mean “X,” or it could mean “Y”—and then he just decided that it means “X.” He picked the worst one—but the ABA left a void for him to fill.

People do not have to understand why they lost in court—they just want to know they were heard and were treated fairly and impartially regardless of their power. One of the things we learned during the campaign on term limits is that lawyers and judges speak in jargon. What matters to citizens is that judges are not going to just apply their personal views. The American Judicature Society committee discussed judicial independence with a political science professor and a frequent litigant, who told us that they do not even look at judicial independence. They look at accountability. And when they say accountability, they mean kicking out a judge who makes an unpopular decision. When I first became a judge many years ago, I was told never to reveal the truth about myself. I prize judicial independence. I think I know what it means. I do not know if the public at large agrees.

We do not talk about judicial independence. We do not use that phrase.

Judicial independence is the right to be an activist.

I don’t really know too many people who want an independent judiciary. They may say they do, but generally they want favorable decisions. When they lose, it’s judicial activism, and when they win, it’s an independent judge.

The big question with the word “independence” is: independent from what?

In my Midwestern state, “judicial independence” is code in the legislature for “judicial errors.”

The chief justice of my Western state has stopped talking about judicial independence and now talks about judicial impartiality. The word “accountability” is often used, too.

I think one good measure of success or failure as a judge is the “Jiminy Cricket” in your head, reminding you how many of your decisions you really didn’t care for as a matter of personal policy, but that you reached because that’s where you had to go.

Maybe we need to talk about judicial impartiality instead of judicial independence. //

Judicial independence is impartiality.

Judges discussed Professor Ifill’s contention that too much of the debate on judicial independence centers on judges, rather than on the interests of citizens.

I think the very words “judicial independence” make it sound like we are focusing on judges. It sounds like “judicial arrogance,” and I don’t think that goes over well with the public. I think the focus should be on the independence, fairness, and impartiality of the judicial system, not on judges. As long as we keep talking in terms of judicial independence, I think people are equating it with judicial activism.

This summer, our state's high court heard arguments in a gay marriage case, and the entire atmosphere around that case is about the perception of the judges. In fact, one editorial said that such a decision should not be made by often removed, uninformed elites. That to me says it all.

We are centered too much upon ourselves and our friends.

I don't think Professor Ifill wrote that too much of the debate about judicial independence centers on judges. I think what she wrote is that in her opinion—and I agree with it—judges tend to think about judicial independence in personal terms, in terms of job security and threats to it. We need to make clear that judges have a job to do and that that job, first and foremost, is to apply the law to the facts, regardless of the outcome. Judges are not supposed to be representatives of the majority will of a constituency with respect to the preferred outcome of a dispute.

If you use the term “accountability,” you are still focusing on the judge or the justice system. The whole idea of judicial independence *is* to protect judges, so that they can make unbiased and fair decisions. The only way you can do that is if you can take a very objective view and not feel that you are influenced by outside forces. I think it makes a lot of sense that we focus on that.

Judges discussed Professor Ifill's contention that judges are political actors and serve a representative function.

Yes, I view myself as a political actor. It is a political process.

The public does not understand that the judiciary is representative, like their legislature. The whole purpose behind polls is to find out if someone up for election thinks like me, because I will want to vote for that person. People have a right to know.

In my Southern state, the judges who are being reprimanded are by and large elected—and statistics show that negative campaigning works. We would be foolhardy to say we're not political activists, because we are.

We have to realize that our value systems are set by where we come from and how we grew up, so we approach judging from that. We need to try not to, but I would hesitate to say that there are a lot of judges who are “bad” because they are applying community standards, because that's sort of where they came from and what the community expects.

Talking about the idea of individual decision-making or joint decision-making while looking at all the issues is easy enough, but if we continue to see 5-4 divisions in the U.S. Supreme Court, with the same people, it's harder to make a convincing case that judicial decisions are different from political decisions.

Many of the problems that we have encountered in my Southern state arise from judges viewing themselves as priests of the law who won't mix with politicians, and saying sanctimoniously, “I'm sorry, we can't discuss that.” It's been a slow and difficult process to build professional and personal

bridges with other political actors, such as the governor and legislative leaders. If the only time the legislature sees judges is when they ask for pay raises, it creates a different dynamic on other issues. This doesn't mean we should violate separation of powers, or pander to other elected officials, but there are many occasions where a spirit of trust and confidence and a personal relationship among political actors keeps negative chatter down. When there's an institutional distance between the governor and chief justice or the leaders of the legislature, the salvos start to fly.

I ran a judicial association with a committee that lobbied for the judiciary with the legislature. The association recently asked judges not to take positions individually that sound like they speak for the entire judiciary, because judges were interfacing with the legislature and perhaps unintentionally (but nonetheless problematically) putting issues before the legislature that were not the position of the association. They're using the politics of the legal system. I also don't like getting phone calls from legislators asking me to support a candidate, not because it's inappropriate, but because it creates its own problem for me as a judge: If I go to one side's event, to appear impartial I feel like I have to go to every event for each side.

I believe there is less political activity in the merit selection states.

In my Southern state, the voting public is not going to trust any sort of merit selection process. If you look at our elections, you would find it difficult to criticize results, whereas you can probably find a lot of reasons to criticize some of the appointments of federal judges that are made. Until we come to grips with the fact that we're all actors on this political stage and just learn to deal with it, I don't think merit selection is going to work in my state.

I certainly think we are political actors, because we put up signs and raise money. If you have to run all the time, are you a politician? It's hard to tell the difference. On the other hand, I've just stuck with my record and never gotten into any issues.

Saying that we're representatives clouds the definition of "representative." Most people think representatives have a constituency or are particular individuals with some organized philosophy. Sure, we are in the political realm; but I think it's misleading to say we are representatives of anything. We don't represent groups—we can represent philosophies and adherence to the law, but it just confuses things to use the same word for what is really two different things.

In *Chisom v. Roemer* [501 U.S. 380 (1991)], the U.S. Supreme Court addressed whether judges were covered by the Voting Rights Act in judicial elections. The majority ruled that they are. // *But that certainly doesn't mean that we always side with the majority of voters in our positions; that would be an abdication of our responsibility.* // Absolutely.

One of the problems with using the word "representative" is caused by misunderstanding what is meant when you promote diversity in the judiciary. If your position is that women should vote for other women when they become judges and so on, then I suppose you can make the case that judges are representatives of whatever class it is that you're talking about. But I don't think that's what is meant by diversity at all.

I agree with the misgivings about the word “representative,” but we are political actors even at times when we are not running for office. For instance, when the legislature writes legislation in a way that requires judicial implementation of it, then we are political actors. We are acting in the same way they could have acted if they had chosen to do so. I can’t blame the public for wanting to know something about the orientation of the people who are given that kind of authority.

I think it’s aptly been described what people think are political actors but I think in the states where judges are appointed you are a political *reactor*. There is no real forum for a justice, no real lobby, per se. There is no venue in which we can attack our attackers. It’s unprofessional, it’s undignified, it’s unseemly many times, to even get down in the gutter when people are attacking you. So I think rather than being an actor you are a *reactor*. That’s what we find ourselves doing—*reacting*. And there is a danger in just being a *reactor*. Maybe there is more merit in being a political actor, but you can’t throw the baby with the bathwater out by going too far the other way.

If I wanted to be a politician, I would have been a politician. I wouldn’t be a judge.

Threats to judicial independence

Judges discussed what they thought is currently the single biggest threat to judicial independence.

“It’s the special interests”

I think special-interest groups are the biggest threat to judicial independence.

In my Midwestern state, the court administrator and the high court got a large part of their support financially from big businesses, which came out with some strong positions in support of the judiciary. They were not just intellectual reasons, but economic reasons. They said they want efficient court systems, impartiality, fairness, and predictability—even if they lose in court. They saw those being taken away, and therefore costing them money.

The problem is the special-interest groups, which have a disproportionate amount of resources and votes. They don’t want impartial judges. They want sure things.

Impartiality tests well in polling, but voters don’t have the intensity that special-interest groups have.

In our Southern state, special-interest groups have shifted away from voters and now go directly to the legislature to effect court redistricting, achieving the same results as if they had gotten rid of a judgment. Several years ago, my court was reduced from four judges to three judges. We were all members of the same political party, and now we’re not. They also wanted to eliminate all of the various courts of appeal and make one court of appeal, but that did not come to pass.

In response to *Roe v. Wade*, the religious right got involved, and we started seeing comments about abortion, gay marriages, and civil unions. I think that's changed recently, because business interests, seeing the success of that effort, have their own separate issues. So other interest groups are making some inroads, and I think that will continue.

I think the greatest threat is the single-issue campaigns run by special-interest groups, whether on the right or left. One of our former governors in a speech likened the body politic to a football field. He said most people play between the 40-yard lines, with some farther out one way or another. But, he said, the guys you have to worry about are those in the end zone at either end of the field. I think with the money that special-interest groups can raise, and the help of the Internet, fringe groups that before wouldn't have amounted to much now can amount to an awful lot.

Single-interest groups are the biggest threat. In my experience in my Midwestern state, people who support term limits will go against just about anything. With so many single-interest issues, they can create tremendous pressure.

That gets down to an individual decision made by judges about how much attention they're going to give to that kind of pressure and if they're going to let it influence their decisions. If you are up for retention, it's certainly hard to ignore that pressure.

Special-interest groups are the greatest threat to judicial independence. I'm not sure how to fix that, as they are not going away. They're just raising more money so they can do more damage.

A proposed ballot initiative in our state, introduced by special interests, would have limited judicial terms to eight or ten years. That would have meant that 10 or 11 of our 19 appeals court judges would have to leave. None of them had anything to do with any controversial opinion. I think these special-interest groups have become good at coming in at the last minute of an election and spending large amounts of money. That's hard to defend against.

Special-interest groups are not subject to spending limitations. Their strategy is to go to a state with elected judges where the judges have public financing and thus have a limit on spending. But the group comes in as an outsider and can spend whatever it wants. They can spend five times what a judge can. And they will beat you.

Any time you have a special-interest group, if you do not have a counter special-interest group, you are a dead duck.

We've got whole institutions that seem to be taking the position that they are divorced from the very integrity of this nation. For instance, let's say I represent this interest group and therefore I don't care whether we have a bench that has any integrity, whether we abide by the rule of law—all we care about is outcomes that benefit our constituents. That's bizarre. No one should want all of their personal views expressed in law, because, frankly, our personal views are not that attractive. It's the rule of law that keeps us civilized, and we are essentially accepting that there are whole sectors of society that can divorce themselves from the rule of law. I think that's what we have to challenge

head-on rather than treating it as a personal critique of judges. It really has to be stepping up to the interest groups and saying exactly what it is that they are doing.

You have corporate interests, you have consumer interests, or whatever you want to label them: the intention of each special-interest group is favorable outcomes. Each interest group has an incentive to do politically what it takes to maximize the likelihood of those outcomes, and I don't think judicial independence is a tool they have in mind for bringing about or maximizing the likelihood of their desired outcomes.

I think the belief that any vote against a business is evil is a very dangerous, political, and deliberate strategy that's also a terrible threat.

We should be concerned about big business putting up millions of dollars to elect the right kind of judge. But I come from a state where we are number one in spending on judicial elections.

One of my concerns is arbitration, the effort to make the judiciary irrelevant. In my Southern state, the last legislature tried, at the behest of a special-interest group, to eliminate jury trials for a host of different cases.

I think the special-interest groups that actively represent just a small part of the minority can outweigh all of the indifferent majority.

The danger is that a judge will make a decision looking over his shoulder at a special-interest group, regardless of the law.

“It's political extremism.”

It's extremists.

I think the problem is the politicization that political extremists cause. If they just existed out there, I don't think it would hurt the judiciary, but they are trying to remake the judiciary.

The primary threat to judicial independence as I see it emanates from what I would call groups on the extreme right. They have done a good job of framing the questions and defining the issues, and I think we need to work more to define the issue of judicial independence. A good way is to change the focus from judges to the interest of the public—and an independent judiciary as a bedrock foundation of our entire system of government.

The greatest threat is the extreme right, because it wants to subjugate us to its will. The greatest threat used to be the extreme left, but since the implosion of the Soviet Union, it is the extreme right.

I say both of them—far right and far left.

“It’s the news media”

One of the biggest threats is the media. The way they portray judges is detrimental to our work. In the case of the judge who made a bail decision where a perpetrator was released and then killed the victim, do you think the media mentioned that the judge followed the guidelines? Everybody would be horrified that a judge would let an abuser turn into a murderer. All judges suffer as a result of that misperception.

What they choose not to print and report on the appellate level is just earthshaking. If there’s sex or murder at the trial level, the media will likely report it. But at the appellate level, it’s just amazing the things they don’t say a word about.

The media can recognize a notorious matter when they see it. We’ll get an application for extended media coverage in the courtroom, so there will be a camera running from start to finish throughout oral argument. But then nothing is broadcast about the case because they did not understand anything they heard and what was really at stake.

The press itself can cause tremors in judges in high-profile cases. I remember when a celebrity case was in our court and I was the assigned judge. I thought about what would happen if I had to rule in the celebrity’s favor.

The media may do greater harm to judicial independence via its general lack of interest in what happens from day to day and its disinclination to explain it to its readers or viewers, on the theory that nobody is interested. That just reinforces the public’s lack of interest and ignorance and makes everybody more vulnerable to strategic hostility.

“It’s public ignorance, apathy, and misinformation.”

I’m for ignorance as the biggest threat.

Ignorance is cluelessness about the function of the judicial branch and strategic hostility. I don’t think most Americans are hostile to the idea of judicial independence if and when they ever understand what that means, but there are interest groups that wield disproportionate influence that are hostile to the idea of judicial independence. They would be perfectly happy if judicial independence were eliminated altogether.

Complacency poses the biggest threat in the long term. We need to understand that the public demands more of us than they used to, and that in this information age we need to have better means of communicating with them. We need to engage them, not simply sit back and say we do things the way we do because we’re judges. The way you communicate is very important. Not to manage that communication is abdicating an important responsibility, and ultimately will undermine our credibility. In our Northeastern state, we worked with education officials to put the role of the judiciary into a curriculum that will be tested, so that teachers have an incentive to teach it. We are also running teacher-training programs, so that they have an opportunity to visit courts.

Public ignorance is the greatest threat.

I do not think the public understands the role of judges.

The public does not understand the government as a whole.

We're seeing a real increase in pseudodata. For instance, there's a movement in our state now to track the reversal rate of every trial judge and use it to determine whether that judge is good or bad. But they haven't quite figured out how to account for whether you're affirmed in part or reversed in part, so it's simply an inelegant mish-mash of data. However, if you announce that Judge A was reversed 10 percent of the time and Judge B was reversed 20 percent, it appears that Judge B is a bad judge. I fear we are starting to see the conspiracy of data that's available in great quantities, but with very little analysis behind it on what it really says.

Public apathy is the biggest threat, because without it, all these reforms we're talking about, including strength of character, would thrive. The public just doesn't give enough of a hoot.

Misinformation is one of the big worries. For instance, we have a group in our Southern state that critiques every judge with a criminal docket, but the group doesn't understand the criminal justice system. They do not take into account the complexity of a capital case, the need to protect rights, and the different types of cases a judge handles. They can take these statistics and make a very good judge look very bad.

Ignorance and apathy are a bad combination, and they're just running rampant. Courts are also increasingly being asked to step into the mix of answering controversial questions that legislatures aren't answering. And no matter whether you decide A or B, a large number of people are going to be very unhappy.

The biggest threat is ignorance. If people are not educated in the day-in and day-out of how we make decisions, then they don't have a basis to understand cases when something sensational comes out, as it always will.

"It's elections."

I think elections are the biggest threat.

Our judiciary in my Midwestern state is threatened by those who want to do away with our nonpartisan system (we are an appointment/retention state) and put in an elected system. High court judges then would have to raise money for elections, and whoever could fund those elections would influence decision-making.

The need to fundraise is a huge threat. Judges don't even need to take money—if somebody does a TV or radio commercial because they perceive your decision is supportive of them, that's a huge threat.

“It’s threats to judges’ jobs”

There are a lot of very courageous judges who say they will not sell their souls for anything, but just do the right thing under the law. But you can’t generate data to say how much we’re influenced by the threat of not keeping our jobs.

Trial lawyers are very concerned about the trial court level. We are losing judges there like mad, and there is an economic component to it.

I think the real threat to judicial independence is when judges care more about retaining their jobs than achieving justice. If you don’t care about getting reelected, then you’re going to be independent.

I’m a good judge; if they take me down because of some issue that they raise about some decision that I’ve made, they’ve removed a valuable component of the judiciary from the public, which is the group we all serve.

The biggest threats are those who make a ruling simply on the basis of what they have to do to get reelected and to keep their political bases.

If I had to put it in one word, the threat is demagoguery. A judge may make an honest and completely correct decision, which is upheld by an appeals court, but others can intentionally and maliciously distort it for short-term political advantage.

Suppose an amendment to the state constitution is passed with 82 percent of the vote. One of the judges is up for reelection and gets assigned to a case where the plaintiff claims that this amendment violates somebody’s constitutional rights. In that position, how many of us would have the courage to decide in favor of the plaintiffs?

There’s no doubt that there’s demagoguery, but a lot of the rhetoric comes from people who truly believe what they’re saying. That may be based on a misunderstanding of the judicial system, which is something we can clarify. Even with those who disagree vehemently with my decisions, I don’t start off assuming they have a screw loose. Many folks are upset with us because they don’t really know what we do. I don’t have any panacea; we may have to slowly show that we do have rules and that we follow them.

The greatest threat to judicial independence is judges fearing that people with agendas can destroy them the next time they run, even if they do what they’re supposed to do, which is listen to the facts, read the law, and apply the law to the facts. If judges can no longer do their jobs because they fear not being reelected or reappointed, then the system is going down the tubes.

“It’s the legislatures”

The whole problem of legislative inactivity is a threat.

The danger is rogue legislators who seek to control our decision-making. That is exemplified by one state’s effort to bring judges up for a recall when they have unpopular decisions. That effort is growing, and we have got to come up with new methodologies to address it, with the bar taking a more active role in coming to our defense. I just don’t think judges need to explain the decisions they write. When I write a decision, it’s the expression of the court. It’s not mine. On my court, everybody has a hand in writing it, and you learn to compromise.

“It’s the character of judges.”

Weakness of character is a threat—for instance when you’re writing an opinion, and your chief goal is how is this going to play when you’re up for election. At the end of the day, every citizen just wants justice. And the average citizen will never be a member of a special-interest group with tens of millions of dollars to spend in judicial elections. They know that, but they still want the sense that this institution, which is supposed to mete out justice, is going to do it in a manner that’s right, just, and fair. I make school speeches, and I recognize the risk that somebody could later claim, after he loses in court, that I met him 10 years before and shouldn’t have been on his case. They may vote against me, but the benefits of my public speaking far outweigh that danger. When I was a trial judge, I talked to jurors after a case was over. Almost without exception, they came away with a deeper appreciation of what judges do. I’ve told the public that as a sitting justice, it is inappropriate for me to share my opinions on the death penalty or abortion or same-sex marriage. Citizens need to demand strong character in their judges and a commitment to doing what’s right.

The individual character of a judge counts so much. One judge can do a lot of damage or a lot of good.

“It’s ineffective administration of justice”

We are sitting here at the Pound Forum. Roscoe Pound dedicated his life to reform of the administration of justice—not whether you are for this or against that, but for the improvement of the administration of justice. People are very hungry for that to be efficient and just. Many complaints about the judicial system are really about that, not so much about substantive issues. We should reevaluate what we do in our courtrooms to see if they still work and are effective. There has never been a problem for a candidate to talk about any of this.

“It’s judicial activism and allegations of activism”

In addressing the last question, “What is the greatest problem for the judiciary,” one of the panelists said it is “judicial activism.” She defined it as a judge who substitutes his or her own personal views for the law or the facts. What ought to be done when a judge does that repeatedly? For example, an appellate judge, who is personally opposed to the death penalty, and votes to reverse every death

penalty, or the appellate judge who personally opposes *Roe v. Wade*? I know judges like that. You know judges like that. *// That's a legitimate complaint. If you do that, then as a judge you're violating your oath of office. What you should do is say, "I can't do this anymore, because of how I personally feel about this issue," and then you should resign. If you can't take seriously an oath to do your job, I don't think you should be on the bench. //* That's an example of *actual* judicial activism, as opposed to when a judge simply does something differently than I would have done it.

I am still not clear what an activist judge is.

Judges are called upon periodically—at both the trial and appellate levels—to do what you might regard as “making law.” Our legislatures, bless their hearts, think way too often. You might be surprised by the number of laws they’ve passed that have never been followed by our high court. So they are making an initial interpretation, which might be different from what the trial judge says. Thus, we are “making law.” Does that make us activist judges?

The problem is judicial choice, when you have law on one side and law on the other side. You can write your decision and say I’m following the law and cite all the cases favoring your point of view, but you may be just an activist with support that goes with everything that you’ve written. For example, the Roberts Court is no less an activist court than the Warren Court. If, for instance, executive privilege came up in a case, that term is not in the Constitution. You have to import some type of reasoning and policy there, and when you do so, you are not following a black letter law anywhere, but what you believe based on your reading and interpretation of the law. Every decision we write probably has something activist in it, because if the black letter law was clear, the case wouldn’t be before us.

Frankly, judges from time to time do make law. We want to have judges who only “follow the law.” But sometimes the law is not clear, and we’re asked to step in. That’s what the common law is all about. We just need to be very careful when we’re making constitutional decisions that are hard to change.

If another person disagrees with you, you are an activist judge.

Mandatory sentencing gives us some problems. I had a case of a kid in high school, a basketball player accepted to a good college, who did something foolish at school. Nobody got hurt, but he was charged with a serious felony that carries a mandatory seven-year sentence. I wrote probably the dumbest decision I’ve ever written in my life, reversing his conviction—but it was also the best decision I’ve ever written, because I did the right thing for the kid.

The biggest threat to judicial independence is activist judges.

We need to recognize that in fact there *are* judicial activists out there, before we tell our citizens that this isn’t what we’re involved in.

The U.S. Supreme Court decides that you cannot execute juveniles, and the reasoning is that 30 states have banned executing juveniles. It takes 37 states to pass a constitutional amendment to eliminate

executions. It bothers me that a judge can say, “Because 30 states are going this way, I am going to change the law.” I do not think that is right. // *Conservative judges on the U.S. Supreme Court did that. To me, that is judicial activism.*

Nobody likes judicial activism unless it’s something they agree with.

It depends on what result you want. If there’s only one answer because you’re following the law and applying it logically, how do you get split results?

We had a situation in our Midwestern state where a judge was very pro-defendant, and the state’s attorney decided that the judge should not hear any cases. And that creates, really, a lot of heartburn for some people. He made a big stink about it. He said, “Hey, you know, you can’t do this. You can’t just across the board.” And so it went off to the administrative office of the courts, and a lot other people are involved.

When issues of activism come up, judges take it pretty personally because we view ourselves as public servants. We do the best we can. But we have to recognize that such criticism indicates that the public is interested and concerned about its courts. I think the term “judicial activism” is polemical, and so we react to it somewhat negatively. Although most of us try as best as we can to separate our personal convictions from what we are required to do, we have seen decisions that are not particularly well reasoned or justified.

“Activist” is not a legal term. It’s a political term. The first time I heard it, President Nixon was describing the Warren Court justices, and of course they *were* activists, because they changed the constitutional law of the nation. But there is no legal definition; it’s a political term that lawyers and judges adopted. Generally speaking, it is the duty of all trial judges to follow precedent. Appellate judges have some freedom in changing precedent, and that’s uniformly acknowledged. If that’s activism, then it’s legitimate activism.

I would say that Anita Woudenberg probably hit it on the head when she said the greatest threat is judicial activism, because several recent court decisions in our Western state that were controversial were viewed by one group as judicial activism. As judges, how do we get across in our opinions how we got there and how we are honoring our judicial oaths? Then how does the court system get that message out? We all say that we are not activists—which is right. I am sure we have all met judges who are ideological. They will throw the book at someone or be pro-plaintiff. When they make that decision, they have already figured out the outcome because of their bias, and they are justifying it.

There are a lot of demands on the court system to do things not done before by the court system. You have people who want specialized courts, whether for mental health (because states have abandoned treatment), or drug courts (because there is a drug problem), or courts for domestic relations and custody. Some of those courts have a totally different role for trial judges. Are the judges who set those courts up “activist” judges, or are they improving the administration of justice? Using the word “activist” to describe these judges makes them appear to be doing something bad.

Attacks on the judiciary

Judges discussed attacks on themselves and on other judges.

We had a situation in our Southern state, where an opinion of our state's high court commented on the justices of the U.S. Supreme Court in a very disparaging way. Who are you that you can take on and impugn the justice system by jumping on a decision of the Supreme Court you don't like?

Let me respond as a judge from a large city. Our solution is to have an active local judges' association. You have to get as many judges as you can to get onboard with you and get active to understand a threat. If you can get your judges associations active and get involved in projects, I think that helps.

One person pointed out that appellate judges could help trial judges, or at least the image of the judiciary, by not taking pot shots at each other. I also thought that Bert Brandenburg had a significant point when he said that although judges have always been attacked, today you have a special kind of attack with special-interest groups and consultants entering the fray. I do not necessarily agree that fear or weak character is the problem, because you have that all the time and it's covered by the code of judicial ethics. We need to put out more information in whatever way possible and be more representative. I remember when I started out as a trial judge and was told to not respond if attacked. Judges have to be proactive and explain the judicial process to the public.

In our Western state, special-interest groups used capital punishment as the focus of the campaign, even though their agenda was really different. By the time the bar woke up and debated what to do, it was election day.

We are easy marks for legislators who want to make speeches about how judges are not tough enough on crime. They pass a bill that raises the penalty for something a couple more years and run back to their constituents and get a lot of points. We are also easy marks for newspapers, which give print to interest groups that are screaming out about something a judge did.

We also have attacks within our own system separate from the media, separate from political attacks. How do you maintain your independence in a system that allows oversight of you as an intermediate appellate judge? That is more of an authority issue. What I see is judges writing for our high court as opposed to writing for themselves. That, to me, is the challenge of independence. Do you have the integrity to write for yourself, or are you going to try to bulletproof your opinion for the high court? In a case where we wrote in favor of a prevailing wage act, we noted those times when legislation was brought forth to change the wage act—and the 13 times it failed! Typically, you wouldn't write that in an opinion, but one of the judges wrote a concurring opinion that put all of that information in. So, I feel sometimes as an intermediate appellate judge you have to look at who you are writing for. Many times, it is your own high court. That is a pressure that affects the independence of the

judiciary.

We declared the present school funding in our state unconstitutional, and the legislature went berserk. After they failed to comply with our order, the legislature came after me in my election; then, when appropriations were up for consideration, and everybody in state government got a raise between 8 and 18 percent, the courts got a two percent raise. Before that budgeting, they called the whole court over to the legislative subcommittee, and the chair said that when something comes up that's as important as this school funding case, we should confer with them. My opponent then wanted to talk about that school case, and he said that the *Republican Party of Minnesota v. White* decision gave him the right to talk about it. Then, eight days before the election, automated telephone calls began coming in against me. We could not find out who was doing it. They called the same people 15 times, at all hours of day and night. We have not determined who was responsible.

A judge in our Western state went through judicial evaluation before her retention election. Her polls were perhaps not the highest, but they were certainly good enough that she was certified by our supreme court to be retained. About two months before the election, during a hunting violation hearing, she made some immoderate statements about her dislike of hunting and guns. Her opponents, including the NRA, got the video transcript of the hearing and put it on YouTube. She was defeated.

A similar incident happened to a colleague, also in a retention election. He had signed a decree to dissolve a Vermont civil [same-sex] union. For some reason, the far right started saying that he was in favor of same-sex marriage, and they ran a substantial campaign waged against him. A lawyer's committee put out some good information about what he did, and it was counteracted. He also was a very good judge, but it was the first time we'd had that happen.

About five years ago, a colleague in our Western state was subject to an attack ad simply because he signed on to an opinion that I issued that did not favor gun owners. Neither of us is anti-gun, but the local pro-gun community took out ads on the radio and printed bumper stickers. They did it in the name of the president of a local gun organization who was only identified as a private citizen and who alleged that the judge was corrupt. People we consulted with thought the best course of action would be to not engage in a public battle and just let it roll. Our largest circulation newspaper did a pretty decent editorial in the judge's favor. Fortunately, the attack ads were only on radio, with less audience than television.

In our Western state we had television ads attacking our chief justice for, among other things, his age and the fact that he supported a colleague who had been charged with driving under the influence. They ran in expensive time slots, and we did not have money to counter them. The opponent also picked certain cases and misrepresented them to the press. I talked about the cases when they asked me about them and tried to correct the misperceptions in the press.

In my Midwestern state, my predecessor's opponents hired people to go door to door all weekend, and signs appeared overnight three weeks before the election. The bar association tried to get money, but couldn't put anything together fast enough.

In the last election, right after the *Republican Party of Minnesota v. White* decision, my opponent accused me at every voter forum of not supporting plaintiffs. He said, “Elect me, and I will make sure that the little man wins cases.” I responded by saying that, as judges, we cannot do that.

The worst nightmare is when the opposite party runs ads calling a judge a pedophile because the judge decided a case where a pedophile got a new trial. The wife of one of our appeals court judges saw that ad and, although she’s known the judge for years, asked her husband if the judge who wrote the opinion really was a pedophile!

In my Southern state, one judge’s opponents raised \$3 million to create a phony story that she was a liberal activist—despite her rating as her court’s second most conservative judge in criminal matters. They ran ads with two guys pulling stockings over their heads before robbing somebody—the guys were saying they wanted her elected because if her opponent was elected they would not be able to commit these crimes.

As a candidate in my Southern state, you are subject to the judicial ethics canons. You have to make sure that what you say is accurate and exhibit the kind of behavior expected of judges. Still, I was subjected to some brutal attacks.

Last fall in my Midwestern state, \$150,000 was sent from a Northeastern state to a political consulting company to use against a candidate. A lot of it was used in the last three weeks, so he had no chance to respond or raise any money. The consulting group did not use judicial activism as an issue, but rather showed pictures of a widow the judge had ordered evicted and a disabled person whose electricity the judge had cut off. It was just pure, raw political tactics having really nothing to do with the issues that the group was interested in. One of that consulting group has appeared in front of several bar associations in the state and openly acknowledged he is for hire and said that he can beat any candidate for judge or succeed in electing any candidate for judge that money is willing to buy.

In my Southern state, we are elected by our legislature, so we can’t defend ourselves against attacks because we are not allowed to raise money. I was attacked, not for anything to do with any judicial opinion that I have written while on the bench, but with my supposed political views years ago. And it all happened two weeks before the election.

Years ago, we made a controversial decision in our Northeastern state. We got no attacks within the state itself either by newspapers or any of the people. The attacks all came from out of state.

I’ve never been attacked.

In my Western state, there was an effort to set term limits on appeals court judges, and in another, there was the “J.A.I.L.4Judges” initiative. If activist groups can get things like this passed in one state, then they will keep going in other states. In my state, the bar and the business community came up with more than a million dollars to oppose a campaign for term limits, and the measure was defeated. But it is very clear that will not happen again, because it is very hard to come up with that amount of money. Privately financed extremists are willing to throw down a lot of money to tamper

with the judicial system.

We should bring these things to the attention of the public at large. But we cannot continue to bear alone the financial weight of educating the public on the danger of special-interest groups coming in and trying to hijack a system or target a particular judge. We need to find somewhere else to go to make common cause.

If they attack you early, and it's a long campaign, the bar can be very helpful. The trouble is that the attacks often come at the very end of a campaign, and then the bar is useless because it takes them too long to get organized.

In one case, concerning the posting of the Ten Commandments, I had protesters out in front of the courthouse, and I got threatening letters. Then, too, in cases concerning gangs, their members will show up in the courtroom and sit there, with the intent of intimidating me.

In my Midwestern state, the greatest problem for judges is militias. They like to file liens on a judge's property and basically raise havoc with the judiciary. They believe that they are not bound by the judiciary. *// We had that in our Midwestern state, too. I think our attorney general found some criminal violation.*

We are judges. We are subject to fair common criticism. Shouldn't we be talking about the *unfair* criticisms that may very well affect decision-making? We are going to be criticized by people, in fair common criticism. You take it. You roll with it. It is gone in a week. I think that is a fair distinction.

In our Southern state, a group often paints judges as too lenient on crime. But even though it sounds like this group has the best interest of the public in mind when it criticizes judges for not doing their job, they use that same vehicle to influence how a judge behaves. The whole idea behind this is to get the judge to consent to extremely high bonds on people they consider really bad criminals.

Unfair criticism is intended to influence judges. As judges, we ought not to respond to this nonsense. We do not respond to criticism personally. We let others do it for us. We should let the bar associations do it. In many states, when there is unfair criticism of judges, the bar association will step in and make a statement to correct it.

This is where the bar associations have to be vigilant.

When I was running for reelection, I was attacked, and my life was turned upside down. It was done by design. If they pick you off one by one by one, it has a chilling effect.

I don't agree that criticisms are here today and gone tomorrow. They might go away for a month, but then they come back and get worse. Over time, it overwhelms you. What we have done in our Northeastern state is to create a media judiciary committee that has press representatives. It discusses issues the way we are doing here, and then that committee sets up a response team so that if a judge is unfairly attacked, we will get something in the newspaper, usually the next day, that explains the

situation. If judges feel they might come under attack, our association will participate. The press loves to do this because it gives them insight into what we do, but it also gives them an opportunity to be fair.

Unfair criticism will not go away—it is not just aimed at individuals, but at the system as a whole. The only hope you have got is to minimize the attack. For the long term, there is education. Educating people how we really do our job and how the system works will make criticism ineffective. And if it is ineffective, it will not be supported financially.

In our Western state, we have had several recalls of judges. Bar associations or attorneys supporting the judge will contribute to help the judge, but \$1000 in donations from 100 lawyers is insufficient for running a campaign to defend a judge. Bar associations cannot do it alone.

In our Western state, our court has been subject to criticism by elected officials who, when we have deemed certain practices or statutes unconstitutional, seek to amend the state constitution to overrule us. You could regard this as simply the separation of powers, but when we had a new governor from a party long out of control, she wanted to appoint members of the judiciary. So, she began to attack our court as an institution. Our chief justice defended us successfully in the legislature.

I have worked in some rural areas of my Midwestern state, where everything you do as a judge is in the paper every day. So you have to be prepared to be confronted about your opinions. Our approach has been to educate people by talking about the system and due process. You try to do it in terms that convey what people would be losing if they moved away from the system.

After our court issues an opinion, we discuss how objections to it will be raised. But I try not to think about that before issuing the opinion.

We had an unpopular decision in which the judge said that we would follow English law as it stood at the time the 19th century legislation we were considering was written. The law stated that 12 year olds could have common law marriages, and so there were news accounts that said we allowed 12 year olds to marry. Simply saying, “We write decisions, we don’t explain them” is a terrible mistake. In a case like that one, you should acknowledge both sides very plainly, noting that were we to write the statute today, we might not write it the same way—but the legislature has written it that way and we are obligated to follow it.

Some newspapers have an agenda and will push their stand on it. Period.

We are challenged by the emergence of anonymous blogs, where there is absolutely no editorial control or accountability. If a statement is out there, it is often regarded as true. It can be the same person under thirty different names, but that lends the persuasiveness of multiple sources.

If you are doing what you are supposed to do, you are going to make a decision that will be attacked. It goes with the territory.

Judges discussed a variety of responses that have been made to attacks on judges.

I don't think the antidote to this threat is to impose rules on how we conduct our debates. I think the answer is to more effectively combat it by getting other information out, rather than passing rules to restrict how you do certain things. The challenge is to be just as wise, cagey, and strategic as the other side. You build your storehouse of goodwill every day, especially in how you treat jurors. They remember good court experiences during elections.

I had an election opponent who did not like my decision to deny one of his motions regarding the release of a violent video game. To respond to his attacks, I said, "I make my decisions based on the law. For instance, I saw the video game and said that while it was not a game I would want my child or grandchild watching and should have limitations on who buys it, the makers had a First Amendment right to sell it."

Our state bar, our area's minority bar, as well as the NAACP and some church groups have come together to respond to crazy statements against a particular judge. It has been very effective.

Our state bar association issued a cease-and-desist letter against ads run against me. The ads had used the state bar's logo, as if to say that the bar had endorsed the ads—which was not true. In response, they took out the part of the ad with the state bar logo. Our state bar now has a committee that asks you to sign an agreement that you will not run untrue ads. But in the last two court races, those agreements were signed and then disregarded.

Remember that judges overall have about a 70 percent approval rating with the public. Doctors are at about 84 percent. So, it is harder to knock off an individual judge, but opponents can use court-bashing constitutional amendments. They can also use campaigns against individual high court justices, even in a retention state like mine, to get the disapproving 30 percent to come out and vote. It does not matter if the effort to limit judges' terms succeeds or fails, as long as you can get the angry 30 percent to the polls by rallying them around something. I think that "something" is sometimes us. So, it does not necessarily matter what we do in our jobs. What we really need to be doing is talking to some of the opinion leaders in our states and making sure that when those efforts happen, they get labeled as alien and unacceptable.

You respond to specific attacks regarding fairness and equal protection, because an attack on a judge is an attack on all judges, and you promote the code of ethics every time. If you do not respond every time, then the credibility of the system is affected. Bar associations or crisis committees do not always work, because they are not always prompt and don't always have adequate resources. You have to take action. You have to come back to your community and go back to the same senators and representatives who are friends of yours who can speak on those issues. You alternate that with the available judicial liaison officers, who can regulate some of the language that comes out of the court. That way it is not the individual judge speaking, but it is on behalf of the court. We have done that.

There are ways to do it. You have to be smart enough to put together a program for that.

The bar in my Western state was very reluctant to oppose the "J.A.I.L.4Judges" initiative there,

because they didn't want the public to perceive the opposition to it as lawyers trying to protect their own. But I think the "J.A.I.L.4Judges" opposition gained momentum when citizens began to understand that it wasn't just the judges who are adversely affected. If you served on a jury, you were subject to the same kind of attack.

If there is unjustified criticism of the judicial branch, our bar association committee steps in and responds. It has done that for a long time, and it's been very helpful.

It doesn't even have to be an election issue. Anytime a judge is criticized legitimately, our bar responds. It has worked very well.

In my Southern state, we formed a judicial response committee. If there is an unfair attack on a judge by the media or a group, then this committee has the ability and the gravitas of its membership to respond on behalf of that judge immediately.

I think that when attacks happen, it has to be made clear that it is not about one judge, but about something else. We need community groups and friendly legislators who understand that this is an attack on the system. This threat to the rule of law is out there before elections. We need to keep responding to it—not just to specific attacks, but in a kind of standing process happening at all times. We must marshal an army to protect the rule of law.

Judicial Elections, candidate questionnaires, and voter forums

Judges discussed their experience with judicial elections

I think it's possible to win after running a strictly positive campaign. I think people are just totally turned off by negative ads.

In our Southern state, we've had three or four judges removed from office for campaign violations regarding obvious promises they made. This surprised me, because after *Republican Party of Minnesota v. White*, our state's high court initially had a timid approach toward disciplining judges for this, which hurts the public's confidence in the judiciary. But the court's more aggressive stance now has a prophylactic effect, because in the past if you did all these bad things and still got elected, there was no penalty for it.

When our legislature eliminated, and courts affirmed, the end of straight ticket voting, the percentage of people voting for retention went up, and retention numbers went up. There was now a reason to go to the end of the ballot and find out whether judges were running for retention.

I think that those of us who are elected probably have to just forget about the pressures on us and decide to do what we are supposed to do. If they throw you out, you go on to something else. I think the threat, though, is that good people, mid- to late-career, are going to say, "Why should I put up

with that? Here I am, 48 years old, at the peak of my earning powers. I am going to go on the bench for 10 years, not get a pay raise, and then they are going to throw me out or impeach me? Why would I do that?"

The level of qualification for office usually is so low and irrelevant to the public that someone can get elected simply by using a negative campaign or hoping for the ignorant vote. So it's impossible to weed out people who don't have strength of character.

I did run against an incumbent, and deciding to do so had nothing to do with judicial independence or any other lofty ideal. I was a practicing lawyer, and it was taking forever to get decisions out of the appeals court. I ran on a very simple platform: I'm younger and can work faster and harder. I didn't run a negative campaign and didn't talk about my opponent's qualifications, but just noted that if you're satisfied with how the court's working, he's the guy you should vote for. The public was very receptive to the idea that there is accountability and it's clear that if you have to wait a long time for a decision, people get fed up.

I believe negative campaigning has been shown to work, unfortunately. That's of course why campaign managers do it.

It's cheaper to get resonance from negative campaigning. It also generates free media play, which positive campaigning doesn't. If you run a negative ad, then you'll push media outlets to investigate and comment on it, generating a lot of publicity that you don't have to pay for.

The other two branches of government represent majorities. In some senses, courts represent minorities. That really is not evident to the public, especially if judges are elected and thus subject to majority rule.

During our last election in our Midwestern state, one judge refused to raise any money. He told voters he wasn't bought, but there to be a good judge. He lost. As there's no way you can fight against big money, I think you have to educate the public. For instance, our county has a website where five different bar associations interview the candidates and then rank them, so people can vote on qualifications.

We have associations that evaluate every judge who is up for retention or election. But since 90 percent of the people they rate as not qualified get elected, I'm not sure what the answer is except that the public does not appear educated or interested.

Professor Ifill was quite on target when she made the observation that the electorate tend to assume that candidates for judicial office are fungible with candidates for other types of office, in that they have an agenda and are responsive to particular special interests. But in my experience legislators who are not lawyers make the same mistake and have virtually no understanding of how the civil and criminal justice systems work. That leads to a lot of legislative action that subverts judicial independence.

I'm getting a little worried. I hear a lot of paranoia here. I have an abiding faith in Americans,

particularly the people of my Southern state: they are able to cut through all of that junk and do the right thing. I also believe in our system. I think the way you get rid of bad apples is by defeating them at the polls; they can be beaten if they're not doing what they ought to be doing.

Judges discussed whether or not they had received candidate questionnaires from interest groups.

In my Midwestern state, we have nine major media markets, and each newspaper and bar association, the League of Women Voters, and any number of television stations submit questionnaires. So if you run in a statewide election, you will receive at least 50 questionnaires with a variety of questions—everything we have been discussing here, plus asking about DUI convictions and bar disciplinary actions. You must respond to those questions. Candidates have varied in their responses. One opponent filed a challenge to the judicial conduct code because he wanted to take positions on every contested issue that the court had ruled on or might rule on.

I did not receive any questionnaires.

The U.S. Supreme Court has made sure that we're going to get questionnaires by defining the McCain-Feingold Act so that the law will not stop them anymore.

In appointive systems, you're really not going to get questionnaires.

In our Southern state, we even have questionnaires in retention elections where we don't have opposition and the vote is just "yes" or "no."

In my first election in which I had an opponent, before the decision in *Republican Party of Minnesota v. White*, I got a questionnaire. I thought it was inappropriate and didn't answer it. Since then, I've never been opposed, and have never received any questionnaires.

Judges discussed what they believed were the motivations behind questionnaires.

A lot of questionnaires come out of a desire to know more about what we do, so we really ought to look at this as an opportunity, not a threat.

I suspect that the voters want to know where judges stand personally on issues. They are interested in that information, even though a judge may also say that it will not affect his or her decisions.

The public wants people who will decide cases the way they want them decided. That is what we have to fight against. In our jobs, we do not see much of the public. When we look at questionnaires about us, what they are really asking is how we are going to decide. You have to decide whether you need to answer each question and how to retain your own sense of impartiality.

Part of the problem is that organizations do this kind of push through their mailing lists. So, the general public does not react. Are we supposed to go to Planned Parenthood, say, and tell them to send out a notice to their mailing list?

I think the ideological views of judges are relevant. I am not saying that all questionnaires are equally deserving of response. I think that some of them are written with an agenda.

I think voters want to know what judges think because they want to vote for somebody more like them. I am not a particular fan of questionnaires, although I am not quite sure how we convince voters that questionnaires and the information they are designed to elicit are irrelevant to whether a judge would be good or bad.

I am sure that all of us had a negative reaction to some of what was said in the plenary session, but I think we need to be real careful. We cannot blame the messengers. Even though I am sure some of the people who send them would find it offensive if we asked about her religious beliefs, when we get questionnaires that ask about ours, they want us to answer them. But I think we have to listen to the people who send us the questionnaires. We don't have to agree with them—just listen and understand. They are saying something that you can benefit from being informed about.

Judges discussed the content of questionnaires they received.

A lot of the questions you just can't answer. For instance, some asked if you are or ever will be in favor of additional taxation. What that's got to do with courts, I don't know. When they asked if I'm pro-family, I simply said I would follow the law.

Questionnaires co-opt language. Illegitimate groups with questionnaires get the media to pick up on them, and the media says, well, these people know what they are talking about. So, in attacking one judge, they attack the entire judicial system. I really throw a great deal of the blame for this at the feet of our Southern state's high court. In an attempt to say how strong we are on judicial ethics, they do not say how many good judges throughout the state do their jobs every day. We have seen this happen over the last 20 years with "tort reform." I do not know if you can reform a process anymore, but every year they want to have "tort reform." They pick these little simple phrases that are Orwellian. Right now, if you criticize the government, you are "unpatriotic" because of the spin machines that operate 24/7. And with blogs, people can attack anonymously.

There are also the traditional questionnaires that have been going on for years. They interview candidates to decide whether they are going to endorse you. I consider this acceptable. I don't think they asked any questions that I felt would prejudice me while I was on the bench. One, for instance, was about a court decision on releasing a police officer's family's personal and social security numbers. I agreed with the decision and provided advice to a state agency in conjunction with it. I don't know if it was in response to not answering some of the questions, but I started getting lots of emails asking for my specific attitudes on hot-button issues. I just continued to share my judicial philosophy. I also got phone calls where some people said we won't support you if you won't tell us. I said that's fair comment.

The overwhelming majority of questionnaires I received—none of which I answered—were from groups that clearly had an agenda. Most of them had questions like, "are you in favor of a woman's right to choose, yes or no." Or "do you believe in abortion, yes or no." They didn't give room for nuance, and it's not hard to see where they were going. How does a judge properly respond to that

when they just say, for instance, “do you believe in a woman’s right to choose?” Well, I may personally believe in that, but clearly the law of the land is *Roe*, and until and unless the U.S. Supreme Court changes it, my personal view is pretty irrelevant when it comes to how I’m going to apply the law.

In our Southern state, religious groups sent out questionnaires asking if you have ever received or accepted a donation from Planned Parenthood.

I got one from a gay and lesbian group in my Southern state when I first ran. Judicial experience was their issue, including how many trials I presided over and whether I had been a judge before. This was also true of a lot of questionnaires coming from bar associations and other groups. I did not answer any.

Questionnaires put a real burden on judicial candidates. Every time I went to the mailbox I had a new one. Which should I answer: the one from the League of Women Voters? The one from the Republican Party? The one from the Chamber of Commerce? What about waiting until a case comes to me properly briefed, and me listening, reading, and trying to decide that case on the facts and the law that two lawyers have presented to me? As a judge I have written a decision that allowed the use of state monies for abortion. As a Catholic, I didn’t agree personally with that decision. If it had been left up to me alone, I would have done differently. If you are going to fill out questionnaires, they should give you leeway for answers.

Judges discussed how, if at all, they had responded to questionnaires.

I wrote in response to the questionnaires I received that I disagreed with them, that my judicial code of ethics prohibited me from participating, and that I did not want them to contact me again.

In my Southern state, I saw a number of letters that judges and judicial candidates sent back in response to questionnaires. They noted their birthplaces and schooling and said they did not answer any of the questions on the questionnaire.

Years ago, when I was running for retention, I was asked by one group how I would redirect legislation in the state court. I did not answer the question. Another question the group asked was what I thought was the most pressing problem facing the judiciary. Their phrasing was very pointed. Let’s face it—some of the groups are asking for promises about future decisions.

I tell judges in our state that if you are not going to answer questionnaires, do not cite the code of judicial ethics because they will file a court challenge to the code. Just do not answer them. Most judges who get questionnaires are well advised to write a letter back saying, “Here is who I am, where I come from, where I went to school, and this is my legal career.”

I did not fill the questionnaires out, but I live in a place where the likelihood of my not winning reelection is low.

I don’t think questionnaires are inherently inappropriate, but I think that the questions that are

actually asked are silly and inappropriate.

During our Southern state's first bout with questionnaires last year, judges decided that we would all do the same thing, which was not to answer. Although two judges answered anyway, most of us wrote letters in response saying we were not going to answer the questions, but explaining why we ought to be re-elected. The groups posted the letters on their websites.

After analyzing *Republican Party of Minnesota v. White*, the judicial ethics advisory committee that I chaired advised that it was completely up to individual judges whether they wanted to respond to questionnaires. But we advised them that our commitment prohibition in our rules of judicial conduct was very much still in force and was not modified by that decision.

Many of our appellate judges who received questionnaires agreed that we would not respond, and some of us just wrote a letter explaining why we ought to be re-elected.

I did not respond to questionnaires. In a recent one, they wanted to know which U.S. Supreme Court justice I most admired and which I least admired. I just threw it in the waste can.

I have received two questionnaires and did not respond because criticism from not responding in my large district will likely not affect me. We are all required by our judicial rules of conduct to muzzle our comments and not talk about how we feel about anything. We should just tell them what our qualifications are.

I rephrased the questions on the questionnaire and answered them.

As a result of my not responding, the local newspaper decided not to endorse me and came out strongly in favor of my opponent. My opponent lost.

I was before the state medical society for a debate with my opponent, and we were asked our position on "tort reform." I cited the rule that I am not supposed to state my positions on issues that may come before me. My opponent said, "I am in favor of tort reform and here is why." Although we still have that rule, we have four judges on our high court right now who answered that question.

Last year, all judges in my Southwestern state received a lengthy questionnaire from a high-profile conservative group. They published the answers, but so many judges had no response that I'm not sure it had a great impact on the election. I and many others just wrote the group a letter saying we didn't feel it was appropriate to respond to a bunch of loaded questions. But I did talk about my background, what I've done in the past, and asked them to share that with their group. Although this questionnaire did not have much impact, questionnaires are probably the wave of the future.

I got a questionnaire from a "family values" group. They asked questions that were written to bring something out but still be legal, so I could answer it. For instance, they asked who my favorite President was and who I most admired on the U.S. Supreme Court. They also asked what charities I have given to, so I listed two or three pages and sent it back. If it had been more pointed, then I

would not have responded, but I did not see anything particularly wrong with it.

I have gotten many questionnaires and trashed them all. Some would call and ask if I received them and if so, what I was going to do. I would say, well, I've already done it. One, a family values group, printed answers on their website and listed who did not respond.

I responded to one such questionnaire and said I declined to answer and shared with them my judicial philosophy because I thought that was germane to the campaign. On their website, they attached the letter to my refusal to respond, and they did so for other candidates who answered that way.

In our state, mailers went out from an organization, saying that the five of us up for retention had refused to answer the organization's questionnaire. We had people calling our offices.

In our Southwestern state, we all talked about a questionnaire that had been send to us and decided not to respond, so they couldn't single out any individual judge.

Judges discussed public “voter forums” sponsored by interest groups.

I know some people are turned off by this, but I go to every candidate forum because I think it's important to meet the voters wherever they are.

We have a public television station in our Western state that airs candidate forums. Our state bar developed a website with the candidate forums and evaluations from minority bars.

Judges also discussed whether appointment or election makes a difference in judicial independence.

We have a problem with our legislature, because even though we are appointed, they can withhold approval. They hold hearings on nominations and they look at everything, asking for complete employment records. One legislator asked for disciplinary records and then questioned the judge on every single complaint he ever filed as an attorney. They wanted to see what kind of volunteer work judges did. We have some openings now, and some people say they are not going to accept nomination to be judges because they televise the hearings.

I believe in election of judges, but there ought to be stringent requirements as to how the campaigns are conducted, and if a judge or a lawyer is putting out false or scandalous material, I think they ought to answer for it.

Even in a purely appointed system—the one under which I've operated for 30 years—there's still a serious question of judicial independence because an unpopular decision made by a high court justice that does not curry favor with the legislature can wreak havoc for that particular justice and the entire judiciary. Because the legislature holds our purse strings and has power under our state constitution to have a role in judicial rule-making, they can act on that. In fact, they recently subpoenaed our high court justices to appear in hearings.

In my Southern state, if we had a nominative process set up by the governor, only the governor's friends would get nominated.

I agree completely with Professor Ifill's point that the fact that, in a given jurisdiction, judges may be appointed rather than elected doesn't make the process apolitical.

State legislatures

Judges discussed their relationships with their state legislatures.

When I was in the legislature, I would have some judges contact me and say, "Here is a problem." I would sponsor a bill to correct it. Most judges will just write an opinion and say, "Here is the law." They do not take the next step and make the legislature aware of it. How many of us judges have taken the trouble of calling the state senator or representative and saying, "How about changing this?"

Our state has a judges association. Quite frankly, it is a labor union, to which almost all judges belong. We pay \$500 dollars a year for membership and have lobbyists. When bad legislation comes up, our lobbyists file counter legislation.

In my Western state, we let the legislature know what's going on. For instance, we spend a lot of money on our judicial performance review commission, which evaluates all judges, and invite legislators to attend meetings and be part of the committee. Some of the legislators seem not to want to become very educated about it, as judicial performance is like a ball they prefer to keep in the air.

Not only children need lessons in civics—so do legislators. In my Midwestern state, our judicial conference has developed a program to encourage judges and legislators to communicate more often, because it's a two-way street. We need to understand their function as they need to understand ours. Except with judicial pay raises, we have found that our rapport with the legislature had been pretty good, and they've been willing to fund our judicial conference generously while we provide them with position papers on pending legislation. I do think that this may expand to schools, as many young adults don't really understand the judiciary, either.

In our Western state, we have a program at the beginning of each legislative session called "Law School for Legislators," and everybody is invited, but only a small percentage attend. At least three faculty members from our state law school lecture on making statutory law and understanding its relationship to the Constitution.

We have had propositions from our legislature to limit the courts' jurisdiction in cases involving funding and taxes. They have thus far been defeated. But I do not think, at least in our Midwestern state, that the legislature is working for the middle anymore. I think that has very profound implications for our judiciary.

You think you can stop legislators from criticizing judges? You can't. You can only mitigate its effects and bring some balance.

The main threat comes from the legislature, when we decide something that they feel treads on their prerogatives. A few years ago, for instance, we authorized "clean elections," which means no more contributions. The legislature refused to fund it. So we enforced it by selling off state property until they repealed it. Their retribution was no pay raises.

In my Midwestern state, one of the trial attorneys took it upon himself to become very active in improving judicial pay. It kind of boiled down to someone who was not a judge asking for money and noting that the public was not paying for what it was getting. It was very effective, and as a result we got a pay raise for the first time in seven years. The perception among the judiciary is that the attorney did this not for the purpose of winning cases.

It's public money, a public service, public compensation. I don't see anything wrong with a judge going before the legislature and testifying for increased compensation.

Let's face facts. None of us got to the position that we are in without some reputation in our communities and our states and some insight with the powers-that-be. When my friends in the legislature are on a committee that's considering some issue that affects rights and things that we would be interested in, they'll call me up and ask for my thoughts. Sometimes I'll pick up the phone and say they have gone down the wrong road and ought to consider such-and-such. I don't think we should underestimate our influence with legislators if we do it the right way. They need that input. It doesn't mean we're always going to get our way, but they need the input.

Public perceptions of the courts and the judiciary

Judges discussed public perceptions of the judiciary.

People still respect what we're doing in the judiciary, and polls show that. Even though we have to step in at times and do what the legislature should be doing, people feel comfortable with us making the final call.

I thought Judge Burke's example of the e-mail newsletter sent to people who had served as jurors was a brilliant strategy—as well as the comment about your employees being your protectors and messengers.

In my Western state, appellate judges are required to give a reasoned written decision. If you get it across that there was a principle involved and a fair process, some people will feel that they were treated fairly even if they disagree.

I think people are confused about how the process works. I think people understand that in your typical case, particularly trial court cases, you are talking about a judge who is making a call based on the facts. I think the public would support independence to some degree there. But when you're talking about judicial issues that have public policy consequences, I think their understanding—and mine—is a little less clear. In my Western state, for instance, a trial court judge ruled on a case of gay marriage, and conservative groups challenged the decision on constitutional grounds. They lost—but, as a result, there was an effort to recall the judge. In a situation like that, people are led to believe that a judge's personal views on the subject may affect the outcome—and for some people, that may not seem like a bad thing.

One of the big problems is not in the judiciary, but in our society in general: There is little nuance or gray. There's a lot of polarization into right and wrong, black and white, yes and no.

The trial judge is the first judge most people see. Trial judges talk directly to jurors, so they give the best impression of judicial power.

I think sometimes we're our own worst enemy. If we're appellate or high court judges, then we really need to take the time to explain our decisions. For instance, when we might want to write a summary opinion, if it's a sensitive issue, maybe we need to flesh it out more. If you're a trial court judge, you have to fully explain the reasons for your decisions and insist on professionalism and control the courtroom. I think that would help improve the public's perceptions of us.

I think many people *think* they know what we are supposed to do, but they do not understand it. There is a significant population that expects us to protect the Constitution and individual rights, but they are being told that we are not doing that.

People expect judges to be disinterested, but they are being told that this judge or that judge is not.

We're not protecting the Constitution and individual rights. Judges are protecting citizens.

The more we try to reach out and make it clear that we are protecting citizens, the more vulnerable we are to political attack.

Judges really are very seldom seen as doing something positive.

I think if the public perceives that the process is working, we will instill confidence in the courts. The public expects us to adhere to the rule of law.

Judges discussed the effect of public apathy about the legal system

I think what we're doing is very important and that we have to continue to fight for judicial independence. I have to say I'm just not optimistic. Voting rates in America are abysmal. My Western state has the worst in the nation. Most people don't know what judicial independence is, they don't know why it's important, and frankly they don't care. I think in the main, corporate America is not really supportive of judicial independence: What corporate America wants are outcomes that are beneficial to corporate America, just as evangelicals want with decisions on same-sex marriage or abortion. Judicial independence is really an impediment that stands between these people and what they want. Americans tend to think we exist outside of history, but we don't. Empires rise and empires fall. And they rot from within. I think the erosion from judicial independence is a symptom of rotting from within. I'm just afraid of what we are going to look like in 50 years.

The disconnect between the general population and the judiciary is not just about judges. It's about the entire legal profession. Most people just don't see lawyers at all. They might see criminal defense lawyers in certain urban areas, but in rural areas they see no lawyers. So there is no way in which to bridge the gap until they have to go see a lawyer about a legal problem.

I think one of our problems is the fact that the general public could care less about judges. The only real defenders we have had historically are legislators, who are largely lawyers. Who else is left to defend the judicial system?

One of the problems is simply public indifference. In our Midwestern state, a poll showed that 60 percent of the people feel that judges vote according to who contributes money to their campaigns, and the same number of people want to retain the elective system of judges. Is there even any public concern?

Some very smart person once said that all politics is based on the indifference of the majority, and that, combined with the activism of the radical left and right, is what's causing the problem.

Judges discussed the degree of public understanding of the difference between judicial decision-making at the appellate v. the trial court level.

I do not think there is a distinction in the public mind between the two types of courts. I think there might be with the media, but not with the public.

I would say the public and the media do not see a difference between judicial decision-making at the appellate versus trial court level.

When I have campaigned both for election and for retention, people are totally confused. In a campaign for my appellate court seat, for instance, people think that I can help them with their traffic tickets. If it's explained, then they understand it. They can, however, assess strength of character and intelligence and maturity. And once it's explained, they can decide that one person may be better able to do the job.

Most everyone has heard of our trial judges—they even know them by name because they’re holding murder trials, for instance. But they don’t know appellate judges, so when I’m talking to groups, I just pick up on that—for instance, describing what happens after someone is convicted at the trial level. I go through the whole process of the briefs being filed, the record being brought before us, and how we review it. I describe the whole process all the way to our opinion and beyond.

The public doesn’t even know what the appellate courts do. Nor do they perceive the difference between state and federal judges.

Even the lawyers don’t know that much about us. Twenty-five percent of the lawyers in our Southern state cannot name all five members of our high court.

The public thinks we do what Judge Judy does.

It’s good if people understand how courts work, but in terms of judicial independence, I think they just need to understand that judges ought to be free to do what’s right under the law, without fear of reprisal and retribution. And I think they can understand that without being able to understand what an appellate court is.

There are *lawyers* who don’t understand the distinction!

Sometimes trial judges themselves do not understand the restrictions on the exercise of their power.

I think it is useful to discuss the distinction between the courts with the public at large for two reasons. The first concerns civics and the need to enlighten people. Second, if people understand what appellate courts do, it takes some of the heat off of the criminal court judges because people see that we provide some measure of accountability. If a trial court decision is wrong, we correct it. I think it helps people understand that trial judges are restrained.

I think it’s important to explain the difference between the courts, because when you do that, it shows people that everyone is subject to review. You know, “I review the trial courts, and the high court reviews me. We’re not above the law. We’re subject to it like everyone else, and we’re subject to review like anyone else who is employed.”

Judges discussed the influence on the state courts of the well-publicized (and often-contentious) confirmation hearings for federal judges, especially those nominated to the U.S. Supreme Court.

I think the Alito hearing set a terrible model. Some want to see that at the state level, and hearings in our state are ratcheting up just like they are on the federal level, because legislators expect that the people want them to do it.

In my Midwestern state, judges run every six years, and the governor fills vacancies. So I don’t see how contentious hearings on the nominations of U.S. Supreme Court justices somehow affect me. // *I agree with that. I don’t think the federal confirmation process is bad. It’s not a judicial process, but*

a political one. Both sides have the right to either oppose or support the president's nominee. At times, that right is abused, but so is every other process of decision-making, including the judicial. I sit on my state's highest court, and I see cases from trial judges where the decision-making process of the judiciary was abused. You could see community influences from the record.

Explaining judicial independence is made harder with judicial confirmation hearings in Congress, where questions are presented by people who supposedly know how the system works. A voter may well ask why he or she cannot ask the same questions.

Outreach to the public and the news media

Judges discussed outreach to and education of the general public on the importance of judicial independence.

There is value in simply going out and showing the voters who you are.

Jury trial experience is absolutely essential. It's a great way for citizens to regain a belief in the court system that they might have had as kids and lost later on. But if we have fewer juries during trial, we're going to lose that opportunity.

I agree that we have to educate. Lawyers say to their clients (unhelpfully), that they will not win with this judge because of X, or they talk to the media. But it is always about things that have absolutely nothing to do with the case, but rather what the clients want to hear in short spans of time. What happens to us as judges? When we deny a motion, the client becomes upset. That goes back out to the community, and they believe that judge is only there because of X. You see on the news lawyers trying their cases in the press and talking about evidence that they know cannot come in the courtroom. So we really have to take on this responsibility as a profession.

I think most citizens would be positively impressed if they had a chance to listen to us talk about the judiciary and what we do every day and how we do it. You don't have to tell them that you're for or against abortion or the death penalty or same-sex marriage. They want some sense that this is a guy they can trust to do the right thing.

People remember when you tell them that there have been lots of cases where you go home sick to your stomach over something that you've signed off on, because you don't personally agree with it. I think that we have an obligation to educate the public about the courts, why it is important that they remain independent, and that independence means doing what's right, as opposed to just doing what you would like to do.

I belong to groups, as do my friends and family. If they invite me to speak, I talk about judicial philosophies of decision-making at an appellate level that are what I try to reach and then

philosophies that I think are inappropriate, which are result-oriented. Some of my colleagues are more inclined to dissent than I am, whereas for some, it's very important to reach a resolution. I try to explain those different philosophies, which I think are very legitimate, and then I talk about the actions we try to avoid, such as dissenting or taking pot shots. I also explain that if we were legislators, we might decide an issue differently.

It's always good when the light bulb goes off for just one or two people. We need to continue to get out there and make those connections, because people remember that and have respect on some level for most judges—even if they don't know what kind of judge you are or the difference between federal and state courts or appellate and trial courts. When you make some kind of connection with people, either one-on-one or with a group, you're leaving them with something important that they otherwise wouldn't have.

Most of the public's reaction to judges is based on misunderstanding or ignorance about what judges do. Most people simply want to understand this system. But if they don't know it, they won't trust it. If they have an opportunity, whether through a formal program or something else, to hear what a judge says regarding the rules that we follow, people may realize that, while they may not like a particular decision, the judge is like everyone else. Their comfort level goes up. It is so easy, as a judge, to stay behind your desk and say, "I've got opinions to write." Talking to a group may not get you reelected, but it's one part of it.

Yes, I never turn down an invitation anymore. I always go out.

Most law students I've talked to can't tell me how many justices sit on our Southern state's high court. And average citizens just don't know—they're worried about light bills or their kids' report cards, and they don't sit around their kitchen tables talking about our high court. We're not nearly as important to them as we think we are. It doesn't mean they're not bright people—they just can get through life without ever having to encounter courts. Thus, the average media person who reports on what we do often doesn't know the difference between a verdict and a summary judgment.

I think we have to explain everything.

People are going to be more receptive and more likely to act if they feel they have a stake in the action.

I was a reporter for 13 years before law school, covering courts, and as a result I think people generally don't know anything about the courts. As a judge, I put together a judges' speakers bureau for community organizations. At the time, our prosecutor was attacking us as being too lenient in sentencing. We explained the judicial decision-making process and started to see the light bulbs turning on. Until people understand how we make our decisions, we're just fighting a losing battle.

When you reach out, the public no longer sees just those anonymous black robes up there. We become Uncle Ed at the church picnic. We become my other Uncle Ed, who brought the senior class down to the courthouse. It is all about participating inside the community. In less populated areas,

you become the face of justice. // *I come from a community of six million. I cannot be Uncle Ed to six million people. // But you could probably become Uncle Ed to 60,000 people.*

If trial lawyers go out by themselves to express interest in impartiality, it will be read as impartiality that favors their side. But if national and state defense bar organizations, and news organizations, were to join in attempting to preserve judicial independence, that would be seen as credible. Judges can't defend themselves, and for some reason we took out of the code of professional responsibility the old provision that said that lawyers have an obligation to defend the court. They made it into a footnote, which I think is just a disgrace. I'm all in favor of efforts to educate the public, and the courts ought to do that.

Every court in my Western state is required to submit a community outreach plan funded by the state. Many of the courts of appeal, including the one I serve on, do remote oral arguments, even at high schools. We also go into classrooms in association with that.

Our Midwestern state's bar association has just started seminars to train lawyers and judges to go out to the community.

Our court's judicial outreach program ensures that every speaker includes—regardless of whatever other subject he may be speaking about—a discussion of the impartial judiciary and accountability.

Our court puts out a monthly newsletter that I edit, and it features different things about the court and new developments. We try to hit one legal topic that we put into layman's terms that tries to explain things that go on in the court. // *What happens if one of your colleagues disagrees with what you said? // Our newsletter has a board. We submit articles and allow just about everything. We all understand the code of conduct. The purpose is to get out information to the public so the public doesn't feel alienated from us. The articles have our bylines.*

On our court, we would never have a consensus among the twelve of us as to what we would say. // *I could see putting a newsletter or article out without bylines, but once you have a byline you almost have a commitment. // It's very generic. Our last issue talked about the election of a new judge and had pictures of the swearing-in and her bio. Or we may talk about how domestic judges may discuss protective orders or show who in our court to go to if you need help with protective orders.*

How about something on arbitration, say, where you're saying the U.S. Supreme Court is pushing arbitration on all the courts to try to take away all court power? // *We don't take positions; we offer information. We might say that arbitration is available if you want it, and here's how you go about it, but we never take a position on an issue. And the public has responded very well to it. We mail and email it and post it in bins near the courthouse elevators so people just grab it.*

The biggest problem we have in traveling the circuit is internal. Our security people say that they cannot give us security at a place other than the courthouse.

Judges discussed outreach and education through schools—including law schools.

We have a very large outreach program where we go into schools, or the schools come to us, and are briefed by the judges. We always mention the appellate role and the high court's role. It is very important to do that to give a full picture of the system.

For the last five or six years in our Midwestern state, we have invited legislators from a district covered by an opinion to participate in asking questions about an opinion or arguments in a case. We have also been to colleges, high schools, law schools, rotary clubs, and independent living centers. They get to see what we do. We actually had a public education person for our court. We also produce summaries of the case to be heard, and bios of the judges and lawyers.

In our Western state we commissioned the writing and production of a video that addresses judicial independence by showing what the life of a person wrongfully accused of a criminal offense would be like without judicial independence. Schools use the video quite a bit.

In one Southern state, a judge started a program in which high school teachers are taught by judges about judicial independence and judicial decision-making. Teachers then take this information back to their classrooms. Thus, they understand why you can have principled positions opposed to one another.

In the past, vehicles for education were not as developed as they are today, so you would not have been able to inform the public about, for instance, the number of signatures that were collected in the attempt to "Impeach Earl Warren," whereas today you can. Nowadays, with all the blogs out there, if you can get kids interested in an issue that deals with law or the judiciary, you would be educating hundreds of thousands of them within a week. It's amazing what technology has made available that isn't even tapped into yet.

Our Midwestern state, for instance, has a very extensive high school and junior high mock trial program, and our judges and lawyers work with students all the time. I'm just amazed how the kids will say, "I didn't realize courts work like that." I think that's one of the most valuable things that we have done. Of course, sometimes the parents are educated, too. We're already trying to insist that they come to practice rounds and understand what their children are doing.

Our court has for a decade held oral arguments at least once or twice a year at one of the colleges or universities in our district. The universities always invite us back because it really helps the college students understand how the system works. They didn't understand the appellate system at all, because you don't see that on television.

We do that three times a year in high schools in different parts of the state. Between 500 and 1000 students have heard us each time.

We make sure the cases are appropriate, and then we have lawyers there who we know are very good, who spend a lot of time with the students before and after the argument. It's been very successful.

The American Judicature Society just developed a curriculum for high school that includes the legal system. It is available for free on their website [<http://www.ajs.org/hsc/>].

Our Southern state's high court sponsors a civics day, with 50 civics teachers invited to participate. We organized a program around our Constitution Day, to get bar members and judges into classrooms to talk about the court system. We also had videos that used teenagers to talk about specific decisions in our Midwestern state. With legislators, we do legislative "ride-alongs," where we get them to spend a day with a judge and educate them about what we do. I never turn down an invitation to a classroom, and I try to tailor my visit to what the teacher wants. Normally, they just want an overview of our state system. I give an overview of the federal system, too, so they get some general understanding of the two, as well as what appellate judges do. Most people hear the word "judge" and think everyone's a trial judge.

We designed a program to educate the public about what appellate judges do in our Western state. Because our district comprises a lot of territory, and doesn't have a lot of people, we started holding oral arguments in high schools throughout the district. It becomes a road show. We first schedule cases from those areas where we have arguments, then prepare materials to summarize the basic facts of the case and distribute those to the high school ahead of time. The panel hearing the case then goes to the high school and makes a presentation about what we do. That evening, the bar association hosts a reception, at which we get to know the local bar. The next day, the cases are heard at the school. Afterward, the panel answers questions—not about the cases, but about the process. That's gone really well. I used to believe that we really shouldn't mix it up and that we were above it all, but I'm slowly becoming persuaded that we have to get ahead of this parade in some fashion. I don't know if we've done more than two in a year. But the goal is to hold arguments in every county within our district.

In our Southern state, we held remote oral arguments for the first time this year with three cases. One judge, who was not hearing the case, gave the high school students a preview of how we function. Afterward, another judge answered questions for them. The student participation was fantastic, and I was astounded—attorneys do not pay as good attention as those students!

We generally hold oral arguments at all of the law schools in our state throughout the year—then, as our budget permits, we go to the districts the bar associations are in.

We also go to law schools in our Southern state and travel to other universities and high schools. We always have the bar association sponsor a reception afterward and encourage all judges to attend. The administrative general counsel also issues press releases when something is happening that we think is good for the court and citizens.

Our programs have limited impact because we have very few participants, but we have what we call a "class action program" in our state's high court. Once a month during oral arguments, two high school classes come in. They get briefs and limited portions of the transcripts ahead of time, and after they hear the arguments they have some fairly cogent questions about the process. We make the lawyers stay there. Although we tell the students we cannot answer anything about the case that just got argued, they do ask some fairly insightful questions.

We used to go to all the law schools in our Southern state, but it has little impact because of the small number of participants.

Our effort was well promoted by the high school civics teachers. The schools themselves took it on, and all we had to do was go hear the cases we would regularly hear. The press covered it— and not just local publications, either.

Judges discussed the use of television, radio, and the Internet to acquaint the public with the work of the courts.

I've been on the appellate bench for almost 20 years now, and I've seen a lot of changes. The biggest one is the Internet. People who really want to find out who you are can find out more than ever before. I've had strangers—not lawyers—talk to me about an opinion I wrote, when I don't even remember the opinion.

We're putting our high court's cases, and soon our intermediate appellate court's as well, on the Internet, complete with oral arguments.

One of the best things anyone could do for the independence of the judiciary would be for all the legislatures to require all the appeals courts—appellate, federal, and state—to open themselves up to television and have their oral arguments televised.

I think TV coverage would serve as another way of education, but the danger is the potential for grandstanding by counsel. I've never seen studies about it, but my perception is the benefit would far outweigh the few times of grandstanding.

When we have cameras covering an oral argument, I am aware of it for about 10 seconds and then I forget. It would seem to me that anyone who watched conscientiously would come away with the realization that this is technical, complex, and professional.

Our Midwestern state's bar associations and attorneys found a problem with public perception of lawyers and judges. So they are spending money for radio spots and billboards to talk about the judicial system, including judicial independence. Our state courts also have television programs and a speaker bureau.

The people who are going to watch appellate arguments on television, gavel to gavel, are the ones who watch CSPAN now—and they are not the problem. The fear that I have in televising is how it would be used by the news media. They may be there for the entire argument, but what comes on the broadcast is 20 seconds or less with their spin on what happened, and it's usually neither terribly helpful nor harmful. But I don't know that it performs quite the educational function that we might hope.

People who avail themselves of the opportunity to watch court proceedings on TV probably already know a lot and are not those who we worry about.

The reality is that people expect to have access to this information, and they are not in awe. It's *not* having access to it that makes them distrustful of the judiciary.

If televised presentations were out there, we wouldn't be spending so much time explaining what we do.

I've done lots of speaking in service clubs in high schools and grade schools, but this effort needs to be from the top down. Thus we have a judicial branch website, which students can access, but which also has speeches for judges to give to service clubs. It's got materials appropriate for teaching civics at different grade levels, and anything you want to know about the court system.

Judges also discussed some (unintended) "outreach" aspects of mediation and arbitration.

Therapeutic justice works. Twenty years ago, if a judge suggested to the district attorney that we could talk to the victim, the response would be, "We cannot do that. It is a crime against the state." But victims just want to get their say. After they got their say, they were happy. If you worked the disposition out in the back room and sent them home, they were angry.

The reason mediation works is that 90 percent of what people want to tell us is inadmissible and irrelevant, and win or lose they leave frustrated because they did not get to have their say. That is why mediation does so much. We really need a little old lady to talk to everybody before they go to court and say, "Oh, really? I know how you feel. That is terrible. I cannot believe it took so long to get here." I did not realize when I was practicing law how important that was until I saw that my clients spent all of their time talking to my secretary, who was very empathetic.

Judges discussed their involvement with the news media.

I was troubled by the comments in the plenary session about what is news. In our elections, we tried to really get people to understand what we were about—not necessarily to endorse what we were doing, but to understand what we were doing. I was very troubled by some in the media who see this as a fight between special-interest groups and some judges. I see this as an attack on laws and democracy and the system. I cannot imagine why the media would not be interested.

One of the problems is that not many people read newspapers anymore. In my little Midwestern county 100 years ago, there were 15 newspapers. Now there's one. Everybody gets their information about what judges do from television, and we're not portrayed very well. You can speak to a government class, but then turn on the television only to hear how some judge has not handled something very well. I think one of the real challenges for us is to try and figure out ways to get ourselves portrayed accurately in the media.

Judge Burke gave that example of the judge who essentially went on the record to explain to the media the decision to release a sex offender who eventually killed his victim? How do we feel about

going out there and talking about a decision that a colleague made? // *It might be difficult for the appellate court to explain a decision of another appellate judge on the same court, because a decision is supposed to speak for itself, and I don't think it would be appropriate for another judge on the same court to try and explain it.* // What about the process, though? I think what he was talking about wasn't so much the decision itself, but how the decision was reached.

I don't have any problem with a trial judge going a little bit beyond the record to explain a decision, if a reporter asks. You know what's in the record of the case you decided.

We have lawyers on staff with our communications counsel. Every decision has a clear, short summary for the media. The lawyers are available to take calls from reporters as well. Our media rarely get our opinions wrong.

We have a public relations expert for the state judiciary who is involved in the high-profile cases. But we may need to get smarter about writing our opinions so that the public can understand them. Fifty years ago, the only place you could get our opinions was West. Now you can go online. We need to adapt to this new, media-intensive environment.

We regularly communicate off the record with the major papers of the state, mainly because I think that they are good citizens. We get routinely good editorial support when we are unfairly attacked. No matter the readership of newspapers, opinion leaders of communities still tend to read editorials, and lots of people read letters to the editor. I think it is important to talk to members of the bar about having people in the community who are willing to sit down and write a letter to the editor about an article that is off-base.

Up until about 20 years ago, we had six major media markets in our Southern state. That filtering process, to separate the wheat from the chaff, so to speak, is now gone, and we have no reporter assigned to the courts in any media market. And it's difficult to get the attention of the media to tell the whole story. When judges do that, we're seen as self-serving and they invite a critical salvo. Thus you have to find surrogates with an independent standing in the community who are empowered to say "Wait a minute" whenever a decision is questioned.

It is far more interesting for the media to say, "I wonder if they are going to convict the defendant." That is what makes their news. They really do not care about the rest of what we do.

I know one judge who is pretty savvy at dealing with the media. He makes a statement prior to sentencing in just about every case he knows is going to be controversial. He writes out exactly what he is going to consider in making his sentencing decision, and the court's public information officer hands it to the reporters. Somebody complained and said, "He can't do that." What ethically is the problem with giving that to reporters? You are giving them information, making their job easier and protecting yourself as well.

I think judges are very reluctant to return calls from the media. I always have my heart in my throat if I have to call a reporter back. But we can no longer afford not to.

I don't return media calls. I just give them to our public relations people on the court.

There is nothing worse than getting a call from the media, giving them what you think is a very bland answer, and then seeing in the paper the very next day that you said something other than what you really did say.

For 13 years while I was on a trial court, only one newspaper reporter would try to find out which cases we thought were interesting and why and would write articles about some based on substantive analysis. I've never seen it before or after, but that's what newspaper reporters ought to do.

We had a judicial media summit, and one of the subjects was how the media viewed their responsibility with respect to disseminating information—covering motions to suppress, for example. That would include evidence that the trier of fact was never going to hear. But that was pre-trial, and generating the risk of prejudicing potential jury panels. We asked, “What about a defendant's right against self-incrimination?” The response that we got from the media was “The Fifth Amendment is your problem; we're concerned about the First.”

I can go around and give 15 speeches, but somebody can do 60 seconds on television and reach 10 times as many people. We have to use the media and any opportunity to explain to reporters how the judicial procedure works, the language used, the difference between a verdict and a summary judgment. That enhances a reporter's ability to share information with the public, and they're the ones who will be doing so.

Explaining decisions to reporters has an added benefit: The next time somebody characterizes one of your opinions as unfair and does not tell the full story, that reporter will be much less inclined to be unfair to you.

We have to have a much more sophisticated approach overall to education; we've got to use the Internet and do it from the top down. We have judicial departments with spokespersons who are not afraid to visit with the media about issues of the day, and I think that's the answer.

I am moved to ask: Is it all about communication and education and public relations?

Every one of these issues is taught at my state's new judge school: How to deal with the media, how not to be ambushed, how to treat jurors and lawyers. If you follow those principles, you're not going to have the media spin against you.

On my multi-judge court, we cannot individually speak for the court, and our chief justice will not do that because it's improper. We hand down a decision, and it's up to the press to interpret it, but if a member of the press calls me and promises to hear me not for attribution, I always explain the court's opinion. I'll do that routinely because I want to maintain a good rapport between the press and my court.

Recusal

Judges discussed the recusal standard in their states.

In my Southern state, the appellate standard for judges is the judge's own decision. There is a statute for trial judges that if a reasonable person would think whatever you've alleged might affect the outcome, the judge must recuse. We get a lot of writs of prohibition to enforce those that have been denied. Once in a while we grant them because our high court ruled that the trial judge can't comment on the merits of any allegation, and trial judges often want to comment and say the allegations are not true. In such cases, we are required to grant writs of prohibition.

In my Southern state, the judge who is being asked to recuse can make his presentation to another trial judge. On the appellate level, impropriety or the appearance of impropriety can force recusal, and there are a lot of opinions that set forth what's improper and what appears improper.

In a small community, most of these motions have one of two different reasons: judge shopping or a real need to disqualify a judge.

In our Western state, when recusal is denied, the person filing the motion to recuse can file a complaint with our state's judicial fitness commission, saying that the judge violated rules for fairness and impartiality. Most cases are resolved favorably for judges, but it is another step in the process for a party that really wants to take it out on a judge. To me, this is related to attacks on us for a position that we take. Some of that comes from the legislature, and most of it results from a lack of knowledge of the judiciary.

Most states allow an attorney to at least once file a recusal motion on the basis that a judge is discriminating. I really question the use of that word—it is more a case that he or she apt to be abusive, which is probably the primary problem I have experienced. If you get a lot of those cases assigned to you after they have been to Judge X, and you see that there has been a recusal by this motion, you know there is a problem with that judge. Lawyers do not really complain about this.

In my state recusal is up to the individual judge.

We have two standards in our Southern state, one for trial judges and one for appellate judges. For the former, any litigant can file a recusal motion based on the standard that, if the facts alleged were true, it would cause a reasonable person to have some concern about the judge's fairness. On the appellate level, ours is more like the federal system, which states that if judges feel that they should recuse themselves, they do.

Obviously, in an appointive system, the likelihood that there will be a motion to recuse based on a publicly stated policy position is minimal. My Western state doesn't even have a recusal statute or rule; what authority we do have is limited to the matter of disqualification and the canon of judicial

conduct that deals with the usual pecuniary interests both for judges and relatives or an actual bias against a party. The code of judicial conduct extends that to a personal bias concerning a party or a party's lawyer, and so the criteria for recusal are essentially common law or judge-made, such as the appearance of impropriety or partiality. We rule somewhat routinely on denials of motions for recusal, but it's not a big problem in our state.

In my state, a judge just filed a concurring opinion where he castigated another judge on the court for not having recused himself in a case. It was pretty tough. Our state's judicial qualification division has charged the judge who castigated the other judge with judicial misconduct.

In our state, if someone wants to disqualify any judge, it goes directly to the chief justice. Almost all are denied.

Judges discussed the reasons—stated and unstated—for which judges recuse themselves.

If someone files a petition or motion for you to recuse yourself and it says only that you go to church with the opposing lawyer, live in the same neighborhood, serve on the school board, or other innocuous things—why would you want to stay on that case?

I have seen what perhaps can be called a weaker judge use recusal to step away from a more controversial case.

In our state, I've noticed that more appellate judges are willing to believe that a judges' comment on evidence as it is received is an indication of judicial bias. That really bothers me.

We had one judge in our family law division who automatically recused on any divorce involving a lawyer. It just drove everyone crazy, but I couldn't unrecuse the judge.

I see judges deny this, but personally, if anybody said I was in a fraternity years ago with someone who is now involved in a case before me, I'd be happy to give them another judge.

One of my concerns is that with recusals, judges may simply be lazy. For instance, in an incredibly complex insurance action, the judge recused himself. But nobody had an interest except some large insurers, and he said the briefs were "really, really thick."

In large part it depends on how big your community is. I live in a county ten times larger than the one I grew up in, where my dad was a judge. He knew almost everybody there and over the course of his career had prosecuted half of the county population or their relatives. If he started recusing himself from everybody he knew, he wouldn't have any work.

I had a motion to recuse filed against me by someone who was in an altercation with me during poll watching nine years before (and before I was a candidate). So I recused myself. He filed a second motion to recuse when he had another case before me, but I had already ruled on it in his favor before the motion was brought to my attention. In a third case, he filed a motion for me to recuse, and I refused because it became clear to me that he just did not want me sitting on his cases. There was

nothing in my records as an appellate judge that he could reasonably use to say that I had been unfair to him. He then asked the full court to review my decision, the court supported me, and then he asked our state's high court. But he lost there. Our high court's standard is that if a judge is asked to recuse himself and refuses, there is no review. The more you recuse yourself, the more you'll be asked to recuse yourself.

Judges discussed the “duty to sit”—the obligation they have to hear cases, unless to do so would create an appearance of impropriety.

The most recent ABA Model Code of Judicial Conduct [2004 Edition] has a provision [in Canon 3, available at http://www.abanet.org/cpr/mcjc/canon_3.html] on the “duty to sit,” and I know states will be struggling over which parts to adopt. There's also a provision that says that, if a lawyer in a case before you has made a contribution to your campaign and leaves the space for how much it is blank on the disclosure form, then you cannot sit on the case. Of course, it doesn't take a law firm long to figure out that they can get rid of you on a case by contributing that amount of money.

The litigant is entitled to an experienced judge. I'll always worry about recusal. I want to avoid the appearance of impropriety, but on the other hand, I don't like the idea of manipulating the court.

But why do you run for an office knowing that you're going to have to recuse yourself? If you make a campaign promise on, say, the death penalty, then you will have to recuse yourself on every death penalty case. Is it fair to the system, and is it fair to your colleagues to have a judge who really can't perform 100 percent of his or her duties? I think not.

There is this attitude that something is wrong with recusing or holding on to a case. If I think there is any question about whether we are being fair and impartial for whatever reason, I'm out of there. On the other hand, we take an oath that we will hear and decide cases, so I also take that seriously. If someone contributes to my campaign and I know about it, or they know my aunt, or saw me drinking too much, I think what has been lost in this conversation is that we take an oath to hear every case and make an opinion, and we are obligated to be impartial and avoid the appearance of impropriety. I believe that everybody takes this seriously, so I don't see it as a contest of keeping a case or getting out of it.

Judges discussed recusal based on positions taken during election campaigns and on campaign contributions

I think you've got a moral obligation to let people know about contributions. Let's say that I got \$50,000 from a big law firm, and now that law firm has a case in front of me. I think I owe it to the world to say, “Well, you know, these guys gave me \$50,000, so I'd better not hear their case.”

I know many judges who have recused themselves because they have received political contributions. I know many judges who say that if you give more than \$150, they will not hear your cases, because it gives an appearance of impropriety.

In our Southern state, we have varying limits that you can voluntarily put yourself under each time you are up for election. You have to make a disclosure at the bottom of your campaign literature if you are electing to do so, so that contributors know your position.

I was on our Western state's commission on judicial performance, reviewing compliance and misconduct by judges who refuse to recuse. In the four years I was there, I don't recall a huge number of recusals related to positions taken during electoral contests.

You hear jokes about, "Well, if you want to be treated fairly, give \$10,000."

In our Southern state, you cannot run a campaign in large counties for less than \$250,000. So one of the corrosive problems we have is that you've got to raise a lot of money, and I think we all know who can make those kinds of contributions. Also, a couple of new judges have had lavish investiture ceremonies sponsored by law firms, while recusing themselves for a year or two from these firms' cases. Justice Rehnquist wrote about our duty to recuse, but also the duty to hear cases and that we shouldn't run from a case simply because somebody might feel that we will not be fair and impartial. It makes a lot of sense.

To avoid the appearance of impropriety, our Midwestern state restricts the amount of contributions that anyone can make. The limit is, I think, \$500. But anyone presuming to make a \$200 contribution toward a judge's campaign could not possibly expect to overturn a verdict.

Judicial training, supervision, evaluation, accountability, and discipline

Judges discussed formal judicial training, including the "impartiality training" suggested by Prof. Ifill.

Socrates said long ago, "Unfortunately, we have to make judges out of men." That doesn't increase intelligence or diminish prejudice.

There are no judges who lack biases. We all have to strive to recognize them and let everybody start in every case from the same starting point.

We require our judges to go to judicial colleges. There are sessions on decision-making, but there are also sessions on what loosely is called "diversity"—talking about how you relate to different people who may come before you from a standpoint of race, gender, and issues of equality. Those things get us in trouble because insensitivity in some places reflects on us all.

We have an appeals court association with three seminars a year. We have a 20-hour education requirement. The seminars focus on substantive issues. I think it's assumed that you know what you're supposed to do.

I think the only formal national program is the New York University Institute of Judicial Administration, which is a week-long program. But in most states, there are so few appellate judges that you are on your own.

Yes, there should be judicial training.

Candidates for judgeships should go through training before they're elected.

Our state has some basic training for judges after they are elected. But there is no training for candidates, and it would be helpful if they were given a class by the local bar association on what our judicial conduct rules require. That might help control debates during some elections.

In my Western state, we have mandatory, semi-annual judicial education conferences. A lot of what we take up tangentially relates to Impartiality. A person elected or appointed to a judicial position would likely have some rudimentary sense of what impartiality means. We may fall short from time to time and need reminding, but if we don't understand impartiality, we shouldn't have become judges in the first place.

Judges also acknowledged a lack of training in some jurisdictions

I ran for election in 1986. Nobody told me a thing. I got on the bench, and still nobody told me a thing.

I think training—to have new judges start questioning themselves about their objectivity and their biases—is an excellent idea and not yet implemented in my Southern state.

Our state has no training for the appellate court necessarily. You hope that some people will mentor you.

Judges discussed mentoring and supervision

We have a role as high court judges supervising lower court judges. We should straighten out problems between ourselves instead of letting it get publicly messy.

We thought that our African-American judges ought to have mentoring programs since most of us were first-generation judges, with no one to talk to. We found tremendous success by just giving those judges the phone number of somebody they trust. In one year, we found that the complaints about those judges slowed. A criminal court judge, for instance, had a problem with the district attorney and called my office. I said, "You two need to get together and have a conversation." Just little phone calls like that will smooth problems out. The next step is to have the judiciary commission, the prosecutor, the chairman, and the high court representative talk to these judges face to face, so that no one will believe the commission is out to get us. Most importantly, we have to be big enough to say to judges who are having difficulty, "Well, maybe this is not your profession."

All new judges in my Midwestern state have mentors. They go to judges' school and to traffic court as their first assignment, learning how to be a judge in a court with lots of cases. Presumably, when they come out after four or six months, they will know how to deal with the public. Every jurisdiction should do this.

Judges discussed various means of judicial accountability

In my Southern state, we have very urban areas and very rural areas; in the former, the electorate doesn't know these judges, so you have a lot of incompetence, whereas in rural areas, they know them because they go to church with them and see them at the store. I think that's really the issue of what we're talking about here.

We all hear these horror stories of bad things that happen to good judges and elections that don't produce good results, but we have to admit that we're not all perfect. Those of us at this conference are hard workers, but we all know judges who are burned out, who don't do their work, who stay on the bench too long. How do we throw out just the bad, and not the good, and tailor a system that really targets those judges who need to be targeted?

In terms of accountability, we talked about public performance evaluations, but there are also internal administrative reviews. Publicly published judicial accountability surveys may or may not be good. But with internal administrative reviews, chief administrative judges feel a duty to monitor issues of productivity and attendance, attention and behavior, and so on. In my Northeastern state, for instance, if a judicial evaluation indicates a problem, it is treated like a traditional internal corporate personnel matter. It is all private, because otherwise it would be like disclosing personnel records.

Our state wants the public to believe again that it has a fair and impartial judiciary. Judicial tenure commissions have done a lot for this. I got on the bench 21 years ago and never heard from them. Now, you watch what you say, watch what you do. We are being held accountable now far more than we used to be.

The perception is that we have absolute power and are ideological beasts. The fact is that we are not. Judges are servants of the law and the system. I think part of our public education effort is to show that there is another way to have what power we have. Also, the public needs to be aware of all the checks on our power—the disciplinary commission, the performance evaluations, the election process, the appellate process, and precedent, rules, and statutes. We are far from unbridled.

What troubles me, and some of my colleagues as well, is that my state has a very active judiciary commission. As a result, it's difficult to reach out to any group and articulate any subject that may come before the court, because the commission may send you a letter about it. For instance, if I speak before a club, regardless of what I said, if that club happens to come before the court on something, I may have to recuse myself.

We have not looked at misconduct a great deal. Too often, the problem is that all of us are talking about judicial independence, and we do not talk about accountability.

Although you use the term “accountability,” you are looking at it in terms of judicial misconduct. When “misconduct” is used by the public, do you think they believe it is the judge not ruling the way they thought the judge should?

The first rule of accountability is accountability to the law. I am accountable to the law.

Judges discussed the evaluation process that is used in some jurisdictions

My Midwestern state’s bar association has just adopted a model mid-term evaluation plan. Each local bar association can choose to do it.

Our Midwestern state’s evaluation plan is run by the administrative office of the state courts.

I’m a big advocate of judicial evaluation. We’ve had it for years in our Midwestern state. The year before an appellate judge is on the ballot for retention, all lawyers in the state are asked to weigh in on whether we should be retained. I do a lot of outreach, and when somebody tells me that he can’t find any information about a judge, I say, here are two websites, including our judicial branch website. Biographical information about every judge in the state is there, including a link to the lawyers’ evaluations.

Even though I’m glad we have the evaluations, they really don’t affect voters much.

I think these evaluations are important because judges might say, hey, this guy shows up late or drunk. He falls asleep on the bench. He doesn’t know the Rules of Evidence. Then you can send the judge somewhere to learn.

One complaint the bar has about our survey is that our publicized results have a broad range. Last year, for instance, one judge had a 40 percent approval rating and another, 98 percent. But this does not seem to have much impact on what the voters do in elections. When 65 percent of us say Judge X shouldn’t be retained, why is he retained anyway?

Our bar is comprised primarily of civil lawyers, so their evaluations result in lawyers voting on judges they’ve never known. What happens when that is publicized? There’s your opponent telling you that the bar association prefers him 75 to 25.

The same voting public that says they can’t stand lawyers and don’t care what they think still accords them tremendous influence. I think at some point the public recognizes that they should ask lawyers who should be a judge.

One point that has not been addressed is that only 20 to 30 percent of those who vote in the governor’s race vote in judicial elections. Generally, anybody who trusts a lawyer with his money would trust a lawyer’s recommendation on who to vote for.

Judges discussed several issues in judicial discipline

The first time I reported a lawyer for a behavior problem was the hardest thing I ever did. This fellow had emotional problems—he would talk about being followed by the sheriffs. But turning him in was the kind thing to do, because our bar has a program to help in such cases. We also have a method to help judges in such situations.

More troublesome are those things that do not rise to the level of removal or even reprimand, such as being chronically late. They do not necessarily get reflected in statistics that somebody could measure.

What was unsaid is that most of us are not any better at policing ourselves than the bar is in policing themselves. Most judges are very reluctant to even turn a lawyer in for misconduct. Most of us are not very good about talking to a colleague who is acting strangely.

Is there a “magic bullet?”

Judges discussed whether there is a “magic bullet” that can preserve judicial independence in the state courts.

There is no magic bullet.

The multi-prong approach, I would say, is the magic bullet. It’s not just educating the public. It’s educating ourselves, particularly judges who deal directly with the public. If they treat jurors poorly, they can do a lot of damage to all of us. So it’s very important that we have this training: If you treat the public and lawyers right, you’re not going to have lawyers saying you’re just an accident judge. That may indeed be a perception that they base on their experiences, but we’re all struck by such critiques.

The magic bullet is to abolish political extremes.

The magic bullet is adequate education of citizens. If they understand what we are doing, why we do it, and why we have to be independent, it will help a lot.

Just do not issue any controversial decisions. // *We all have colleagues who do that. They can spend a whole career under the radar. As a chief judge, I think that is always a problem.*

I think the solution is to get involved. We have some judges on our court who clearly want to go home at five o’clock. They do not want to be in the public, and that is fine. I think that at least some of us have to take responsibility to maintain the American judicial system. We cannot just say, “Bar association, you do it. Supreme court, you do it.” I think individually we all have to be involved and

recognize that when we take the oath to support and defend the Constitution, it applies not only when we are making decisions, but when we are simply members of the community.

The magic bullet is “eternal vigilance.”

“Bright spots”

While acknowledging that there had been much “doom and gloom” discussion about judicial independence, judges discussed what they saw as “bright spots” in the fight to preserve judicial independence.

“J.A.I.L.4Judges” lost—that’s a bright spot.

One bright spot is that judges are being retained at a very high rate. In my Southern state, this is true despite all the negative spin that special-interest groups put on judges in general.

The judiciary, by and large, does have strength of character. There are a couple of clowns here and there that mess us all up, and then we have to rebound.

The motivation for public service is the most encouraging part of our current scenario. Any one of us could have gone into private practice years ago and not even bother with public service. You still need diversity and people who can question one another on the bench. You don’t need people all of one mind.

It’s the high quality of our judges. In my Western state, the obligations on trial court judges in civil cases are heavy. It is a little tough if all you have done is felony court for six years and then somebody throws you over there to handle private liability and malpractice actions. There are few law clerks on the trial court level, too. So it is a miracle that we have such good people on appeals courts when you consider these realities, where they do not have to take these jobs and have alternatives. That is the most positive thing we have.

Sometimes we’re the most vulnerable branch because the legislature is afraid to act. I deal with issues involving “the right to die,” or “the right to live,” or artificial insemination and what it means for parenthood. Legislators just don’t want to get into it, so we’re forced into it, and suddenly we’ve become “activist judges.” But even when we have to step in, polls show that people still respect what we’re doing in the judiciary. They feel comfortable with us making the final call there.

We had an unsuccessful attempt in my Midwestern state to unseat a high court judge. It wasn’t for any particular decision—the group just thought he would be vulnerable. He was retained pretty easily, so at least they’re not winning yet.

The Terri Schiavo case really was a bright spot. Judge Greer did what he should have done. It got in the news. People saw it. I think they admired it. That probably did more to educate the public than any one thing.

I think one of the brightest spots is that, despite a lot of effort and money, special-interest groups have only had a limited success so far. If their success continues to be limited, they will take their money and go back to the legislative area.

One bright spot is that the judiciary is finally realizing that opposition to the courts is our problem, not just society's problem. It becomes not only authorized but necessary to do what's in the bounds of reason to ensure that society understands what we're doing.

I'm always heartened when the public doesn't vote for retroactive term limits. I think that the majority of the public is on the side of judicial independence—they would not necessarily describe it that way, but if you look at polling data, you see that the public doesn't want an overwhelming political influence on the judiciary. It's now up to us to mobilize forces to recognize this as an important moment in which we are fighting for the preservation of the rule of law and the independence of the judiciary.

I think it's also encouraging that the corporate world is beginning to understand that it's important to have a transparent system.

All of the polls show that by far the most respected brains of government are in the judicial branch. Six months after the controversy of *Bush v. Gore*, poll numbers for the U.S. Supreme Court were what they had been before—somewhere around 65 percent of people had confidence in what the justices were doing. I think that goes across the board even on state courts. Even though there's certainly a reason for concern, I still think that in the overall scheme of things the judicial branch is doing pretty well.

What makes me hopeful is this: I went to Azerbaijan to teach them about judicial ethics. They want to follow the American legal model because they think it's the best in the world.

Points of Agreement

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it could be achieved—on issues raised in the Forum. At the closing plenary session Dr. Richard Marshall, executive director of the Pound Institute, summarized points of agreement noted by the moderators. Most, but not all, of the standardized discussion questions were mentioned, and several other relevant topics not covered specifically in the standardized questions also received attention.

- **Threats to judicial independence.** Judges are seeing more threats to judicial independence. Judges identified the public’s ignorance of what judges do as one major threat. One example is misunderstanding of the difference between what trial and appellate judges do. Many judges felt that improved public education would help to alleviate ignorance, especially education in civics.
- **Judicial selection methods.** Judges had a wide range of opinion on the best method of selecting judges, and varied in their views on elections.
- **Money.** Judges felt that money is an overwhelming and corrupting influence in judicial election campaigns.
- **Judicial candidate questionnaires.** Many judges in states where judicial elections are held have received candidate questionnaires that ask their opinions on a range of legal and social questions. Some have chosen not to answer them, in some cases because they believe that it is not ethical to do so. A few have answered them, but only in a general way, e.g. by discussing their overall judicial philosophy.
- **Judges and politics.** Professor Ifill wrote that, in addition to their traditional roles in adjudicating disputes, judges also are political actors and representatives of the legal system, their communities, and their own legal and moral philosophies. Asked if they viewed themselves in that light, some judges answered that all judges are political actors—and in some cases “political *reactors*.”
- **Recusal standards.** The recusal standard most often cited by the judges is the “appearance of impropriety” standard. Some judges did not recall any recusals in their courts. Some judges had seen some. Usually these were in situations in which a litigant—not necessarily a lawyer—in a case before the court had been a contributor to the judge’s campaign.
- **Strategic hostility.** Some judges perceived that “strategic hostility” is fomented by what they called “extreme special interest groups”—either to induce voters to vote against judges the groups oppose or to intimidate judges into making decisions consistent with the groups’ political or social agendas. Related to this is the phenomenon Professor Ifill calls “false outrage”—the tendency of the public and pundits to judge courts by the “last outrageous

thing” they are perceived to have done, rather than by the vast majority of well-founded, uncontroversial decisions they make.

- **The role of the news media.** Some judges consider it important to understand the changing media landscape, which has expanded from television and radio journalism to radio and television talk shows open to public participation, the Internet, Web logs (“blogs”), and other media. They feel that, just as those developments have affected the outside political world, they will increasingly affect politics related to the judiciary.
- **Impact of tort “reform” campaigns.** Some judges saw connections among tort “reform” campaigns, attacks on the judiciary, and the overall politicization of judicial elections.
- **What is judicial independence really about—judges, or citizens?** Professor Ifill wrote that too much of the debate about judicial independence centers on judges, and that the emphasis should instead be on courts. Some judges agreed with her assessment, and said the important goal should be to have fair and impartial courts. They admitted, however, that it is difficult to define or explain the concept of impartiality.
- **Bright spots in the fight to protect judicial independence.** Some judges consider the Terri Schiavo case in Florida in 2005 a bright spot, in that, despite the intense feelings and political maneuvering that resulted from it, the case helped the public to see the danger of political interference with the judicial branch. One group considered public confidence in the judiciary to be a bright spot. They felt that the public has greater confidence in the judiciary than it does in the legislative or executive branches, although they believe this is so in part because the other branches have led the public to expect little from them.
- **What judges need to do to protect judicial independence.** Judges said they and their colleagues need to connect to their communities more and participate more in the process of educating the public about the legal system.

Appendices

Faculty

Paper Presenters

Sherrilyn Ifill is Associate Professor of Law at the University of Maryland School of Law and has received national recognition as an advocate in the areas of civil rights, voting rights, judicial diversity and judicial decision-making. She teaches Civil Procedure, Legal Writing, and a seminar on Reparations, Reconciliation and Restorative Justice. Professor Ifill has also taught Constitutional Law, Environmental Justice, Complex Litigation, as well as seminars on Voting Rights, Equal Protection, and Judicial Decision making. Professor Ifill co-founded the Reentry of Ex-Offenders Clinic with Professor Michael Pinard.

Professor Ifill writes about the importance of judicial diversity and impartiality in judicial decision-making. Her articles on race, judging and judicial selection have led to Professor Ifill's recognition as an expert on these subjects. She has appeared on NBC Nightly News as well as local network news broadcasts as a consultant and expert during Supreme Court confirmation hearings. Professor Ifill also writes about the history of racial violence and contemporary reconciliation efforts. Her book about truth and reconciliation commissions for lynching entitled, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the 21st Century*, was released by Beacon Books in February 2007.

Prior to joining the Maryland Faculty in 1993, Professor Ifill served as an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. in New York, where she litigated voting rights cases, including *Houston Lawyers' Association v. Texas*, in which the Supreme Court held that judicial elections are subject to the provisions of the Voting Rights Act. During her tenure at Maryland, Professor Ifill has continued to litigate and consult on cases on behalf of low-income and minority communities. She received her B.A. from Vassar College and her J.D. from New York University.

Penny J. White is the Interim Director of the Center for Advocacy and Associate Professor of Law at the University of Tennessee, College of Law. Before joining the faculty there in 2000, Professor White served as a Justice on the Tennessee Supreme Court and has also served in the trial and appellate courts of Tennessee.

Since leaving the bench, Professor White has authored benchbooks for Tennessee Circuit, General Sessions, and Municipal Court Judges; she has taught judicial education programs in 38 states and has spoken and written frequently on the topic of judicial independence. She has served as a member of the faculty at the National Judicial College for 15 years, where she teaches courses for judges on the subjects of evidence, criminal procedure, and judicial ethics. She recently completed a one-year term as Chair of the Faculty Council at the National Judicial College. In addition, Professor White has served as one of the faculty on the College's Capital Punishment Improvement Initiative, a project that provides training and education to trial judges on the trial of capital cases.

Professor White served as Director of the Virginia Capital Case Clearinghouse while teaching at Washington and Lee College of Law, held the William J. Maier, Jr. Chair of Law at the West Virginia College of Law, taught at Denver University College of Law, and was a visiting Professor at the University of North Carolina School of Law. Her work has been published in numerous law reviews and legal publications. She received her B.S. from East Tennessee State University, her J.D. from the University of Tennessee, and her L.L.M. from Georgetown University.

Panelists

Janet Ward Black is a principal in the Ward Black Law of Greensboro, North Carolina, which she established in 2006. She was recently installed as president of the North Carolina Bar Association. She serves on the Board of Governors for the American Association for Justice (AAJ), and is a Fellow and Trustee of the Pound Civil Justice Institute. She has served as president of the Rowan County Bar Association, and as a member and co-chair of the Z. Smith Reynolds Foundation Advisory Panel, and as a Trustee for Hood Theological Seminary. She was the first female assistant district attorney in Cabarrus and Rowan counties, serving in that capacity from 1985-88 before entering private practice in Salisbury, where she practiced until 1992. Ms. Black is a graduate of Davidson College, graduating cum laude with a degree in economics. She received her law degree from the Duke University School of Law.

Bert Brandenburg is the Executive Director of Justice at Stake Campaign, a nationwide, non-partisan campaign for fair and impartial courts. Justice at Stake brings together more than 30 judicial, legal and citizen organizations with the intent to “educate the public to work for reforms to keep politics and special interest groups out of the courtroom.” Prior to joining the Campaign, Mr. Brandenburg was the Justice Department's Director of Public Affairs and chief spokesperson under Attorney General Janet Reno. He served in policy and communications positions for the U.S. Secretary of Agriculture, the National Performance Review, the 1992 Clinton-Gore campaign and presidential transition team, Congressman Edward Feighan, and the Progressive Policy Institute. Mr. Brandenburg was Vice President of International Programs for the Santé Institute, and served as an observer during the 1990 Pakistan national elections. Mr. Brandenburg serves on the National Ad Hoc Advisory Committee on Judicial Campaign Conduct and the Alliance of the American Bar Association's Coalition for Justice. He holds a J.D. and B.A. from the University of Virginia.

The Honorable Kevin S. Burke is a District Court Judge in Hennepin County, Minnesota, where he was Chief Judge from 1992-1996 and 2000-2004. He is a past member of the Board of Directors of the National Center for State Courts, and presently serves as an Adjunct Professor of Law at the University of Minnesota. He was appointed to the bench on 1984 and was elected in 1986, 1992, and 1998. Before becoming a Trial Court Judge, he was an Assistant Public Defender and worked in private practice. For a number of years, Judge Burke chaired the Minnesota State Board of Public Defense. During his tenure, he was one of the leaders in the effort to improve and expand the state's public defender system. In 1998, Judge Burke was awarded a Lifetime Achievement Award by H.E.A.R.T., for leadership in the cause of freedom for people afflicted with chemical dependency, and in 1997, he received the Director's Community Leadership Award from the FBI. In 2003 the National

Center for State Courts awarded him the Distinguished Service Award. He has also been a William H. Rehnquist Award recipient, an award presented annually to a state judge who exemplifies the highest level of judicial excellence, integrity, fairness and professional ethics. Judge Burke is a graduate of the University of Minnesota Law School.

The Honorable Gordon L. Doerfer is an Associate Justice of the Massachusetts Appeals Court. He served as an Associate Justice of the Superior Court from 1977 to 1981 and from 1990 to 2001. Before serving on the Boston Municipal Court from 1973 to 1977, he was an Associate at the firm Nutter, McClennan & Fish. He also was a partner at the firm Palmer & Dodge from 1981 to 1990, specializing in civil litigation. Judge Doerfer was an instructor at Boston College Law School from 1974 to 1977 and has taught trial advocacy at Suffolk Law School since 1994. He is the Treasurer of the American Judicature Society and holds leadership positions in the American Law Institute, the Boston Bar Association and the Boston Inn of Court. He is a Trustee of the Flaschner Judicial Institute and served as a Trustee of the Massachusetts Bar Foundation. He has published in the area of arbitration, equity practice, trade secrets and the conduct and management of trials. He has served on the board of editors of the Massachusetts Lawyers Weekly and is a frequent participant in various continuing legal education programs and other bar-related activities. Judge Doerfer received his B.A. from Amherst College and his J.D. from Harvard Law School.

Dudley D. Oldham is a retired senior partner and current Of Counsel in the Houston office of Fulbright & Jaworski L.L.P., having joined the firm in 1966. His significant litigation practice consists of complex litigation primarily in the areas of energy, patent infringement and trade secret litigation, commercial and business matters, class actions, arbitration, securities, aviation, insurance disputes and mass torts. He has been lead counsel in many large, complex disputes in federal and state courts, both internationally and domestically. A Certified mediator and arbitrator, he is also a member of the AAA Texas Large Complex Case Panel and CPR. Mr. Oldham is a Fellow of the American College of Trial Lawyers; member and president of the Houston Chapter, American Board of Trial Advocates; he is a member of the National Board of Directors; the American Bar Association; the State Bar of Texas, and the Houston Bar Association. Mr. Oldham has served as Chair of the Standing Committee on Independence of the Judiciary for the American Bar Association. Mr. Oldham received his B.A. from the University of Texas and his J.D. from the University of Texas School of Law.

Abdon M. Pallasch covers legal affairs for the Chicago *Sun-Times*. He has also written for the Chicago Tribune, Chicago Lawyer magazine, the Tampa *Tribune*, and United Press International. Mr. Pallasch is a Director of the Chicago Headline Club chapter of the Society of Professional Journalists. He won the Peter Lisagor Award given out by the Headline Club in 1998 for his coverage of a plane crash legal settlement and in 2002 for his work on the R. Kelly scandal. Mr. Pallasch has appeared frequently on Chicago Public Radio, providing commentary on Chicago judicial elections and other legal issues in the news. He has recently appeared on panels at the Illinois Judges Association discussing ways in which judges can communicate better with reporters, and at the ABA National Conference on Professional Responsibility, looking at the issues involved in lawyers using investigators to probe information such as the source of leaks to the media. He is a graduate of Northwestern University's Medill School of Journalism.

Mary Beth Ramey is a partner in the law firm of Ramey & Hailey in Indianapolis, Indiana. Ms. Ramey was named one of the nation's outstanding trial lawyers by the *National Law Journal*. Ms. Ramey was the first woman elected as President of the Indiana Trial Lawyers Association, first woman elected an Emeritus Director, and first woman president of the prestigious College of Fellows. She was an Indiana Supreme Court appointment finalist in 1999. She has been named Indiana Trial Lawyer of the Year. Ms. Ramey also has been designated for inclusion in *Best Lawyers in America* and *Super Lawyers*. Currently, Ms. Ramey serves on the AAJ Board of Governors. Ms. Ramey is licensed to practice in all courts in the State of Indiana, Colorado, and District of Columbia. She also is admitted to the United States Court of Appeals, 7th Circuit, 6th Circuit, and 4th Circuit. She served as Chair of the Dalkon Shield Claimant's Creditors Committee in the mass tort Chapter 11 involving A.H. Robins Company. She has authored several articles on medical device litigation. Ms. Ramey has served on the Advisory Board to the Indiana Civil Rights Commission as well as on the AIDS Litigation Project. She received her Bachelors, Masters, and Law Degrees from Indiana University.

Anita Y. Woudenberg is an Associate at the Indiana law firm Bopp, Coleson & Bostrom. Prior to joining the firm, Woudenberg had an externship with the Honorable Andrew P. Rodovich, U.S. District Court of Northern Indiana, Hammond, Indiana, and was a Law Clerk for the Honorable Robert W. Gilmore, Jr., of the LaPorte County Circuit Court, in Indiana. Her practice areas include Election Law, Constitutional Law, Civil Litigation and Civil Appeals. She received her B.A. with honors from Calvin College and her J.D. from Valparaiso University School of Law. Ms. Woudenberg is a member of the Christian Legal Society, Blackstone Fellowship, and Phi Delta Phi.

The Honorable James A. Wynn, Jr. is the senior Associate Judge on the North Carolina Court of Appeals. He first joined the North Carolina Court of Appeals in 1990, and was an Associate Justice on the North Carolina Supreme Court in 1998. He returned to the Fourth Circuit Court of Appeals in 1999 and has been there ever since. Prior to joining the Courts, Judge Wynn practiced law with Fitch, Butterfield & Wynn of Greenville, NC from 1984-90. He was a North Carolina Assistant Appellate Defender from 1983-84 and served as a U.S. Navy JAG Corps, Naval Legal Service Office at the Norfolk, VA Naval Base from 1979-83. He is also a Certified Military Trial Judge with the U.S. Navy Reserves. Judge Wynn is an active member of the American Bar Association, National Conference of Uniform State Laws, American Judicature Society, American Law Institute, Justice At Stake Campaign, North Carolina Bar Association, North Carolina State Bar, North Carolina Judicial Conference, North Carolina and the Association of Black Lawyers. He has published on the topic of judicial oversight and independence. Judge Wynn received his B.A. from the University of North Carolina—Chapel Hill and his J.D. from Marquette University Law School. He also received a L.L.M. degree from the University of Virginia School of Law; his Naval Justice School, Newport, RI, UCMJ Art. 27(b) Certification and a UCMJ Arts. 42(a) and (b) Military Judge Certification.

Discussion Group Moderators

Sharon J. Arkin practices law in Lake Forest, California, concentrating on business torts, ERISA, HMO, and insurance bad faith actions. She received a B.S. from the University of California, Riverside, and a J.D. from Western State University School of Law. She was a contributing author of *Business Torts* (Matthew Bender, 1991). Ms. Arkin is a past president of Consumer Attorneys of

California (CAOC), Editor-in-Chief of CAOC *Forum*, and the chair of the CAOC Amicus Curiae Committee. In addition to being chair of AAJ's Legal Affairs Committee, she is a Fellow and Honorary Trustee of the Pound Civil Justice Institute.

Kathryn H. Clarke is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received a B.A. from Whitman College, an M.A. from Portland State University, and her J.D. from the Northwestern School of Law of Lewis and Clark College. Ms. Clarke serves on the AAJ Board of Governors and is chair of AAJ's Amicus Curiae committee. She is a past President of the Oregon Trial Lawyers Association and a Fellow of the Pound Civil Justice Institute.

William A. Gaylord is a shareholder in the Portland law firm of Gaylord Eyerman Bradley, P.C., specializing in major products liability and medical negligence litigation. He received his B.S. from Oregon State University and his J.D. from the Northwestern School of Law of Lewis and Clark College. Mr. Gaylord is a past president and current governor of the Oregon Trial Lawyers Association (OTLA) and a member of the Washington Trial Lawyers Association (WSTLA). He is member of AAJ's Board of Governor's, as well as vice chair of the AAJ Legal Affairs Committee. Mr. Gaylord is a Fellow of the Pound Civil Justice Institute.

Richard D. Hailey practices law in Indiana and Colorado in the areas of personal injury, medical malpractice, products liability, and class actions. He earned his J.D. from Indiana University, and a L.L.M. from Georgetown University Law Center. He was the president of the Association of Trial Lawyers of America (ATLA-now AAJ) from 1997-1998, becoming the first African-American to hold that position. Mr. Hailey has served on the Board of Directors of the Indiana Trial Lawyers Association. He is a member of the American Law Institute, having been inducted to that prestigious organization in 1996, and has been named to *Best Lawyers in America* every year since 1998. He is a Fellow and Honorary Trustee of the Pound Civil Justice Institute.

Betty Morgan is a member of the firm Epstein, Becker, and Green, P.C., in their National Litigation practice in the firm's Atlanta office. She received her J.D. at Emory University School of Law, where she was a member of the Order of the Coif, and earned her B.A. at the University of Florida. Ms. Morgan is chair of the Business Torts Section of AAJ. She was named as one of the top 50 women attorneys in Atlanta, as selected by Georgia attorneys. Ms. Morgan teaches Trial Techniques at Emory University School of Law. She is a Fellow of the Pound Civil Justice Institute.

Ellen Relkin practices law in New York City, where she concentrates on pharmaceutical products liability, toxic torts, medical malpractice, and women's health issues. She received her B.A. from Cornell University and her J.D. from Rutgers University, where she served as executive editor of the *Women's Rights Law Reporter*. She is a Fellow of the Pound Civil Justice Institute.

Larry A. Tawwater practices law in Oklahoma City, specializing in products liability, aviation, and general negligence litigation. He received both his B.A. and J.D. from the University of Oklahoma. He has served as president of the Oklahoma Trial Lawyers Association and is a member of the Board of Governors of AAJ. He is a member of the American Society of Law, Medicine and Ethics, the American Judicature Society, and the International Society of Barristers, and is a Fellow of the Pound Civil Justice Institute.

Pound Civil Justice Institute Officers

Gary M. Paul, the President of the Pound Civil Justice Institute, practices law in El Segundo, California, specializing in products liability, professional malpractice, business torts, insurance bad faith, and class actions. He has served as President of the California Trial Lawyers Association, and is co-author of a five-volume treatise, *California Tort Practice Guide* (Clark Boardman & Callaghan, 1995) and a frequent presenter at legal symposia and continuing legal education seminars. He is a member of the Board of Governors of AAJ, where he serves as Parliamentarian. Mr. Paul is a member of the State Bar of California, the International Academy of Trial Lawyers, the American Board of Trial Advocates, the Consumer Attorneys Association of Los Angeles (CAALA), and the Consumer Attorneys Association of California (CAAC). He has served on the Board of Governors, and as president of both the CAALA and CAAC. He has been recognized thrice for outstanding service to the legal profession and his community by the CAALA and CAAC, including being selected as Trial Lawyer of the Year by CAALA. Mr. Paul received a B.S. in Engineering from Arizona State University and an M.S. in Engineering from UCLA, and worked for 10 years as a missile and space engineer before attending Loyola Law School, Los Angeles.

Kenneth M. Suggs is the Vice President of the Pound Civil Justice Institute. He is the Immediate Past President of AAJ. He is also a member of AAJ's Legal Affairs Committee and serves as co-chair of AAJ's Public Affairs Committee. In 2006 Mr. Suggs received the "[Advocate of the Year](#)" award presented by the [South Carolina Appleseed Legal Justice Center](#). He has also attained recognition as a Fellow of the National College of Advocacy. He has served as President of the South Carolina Trial Lawyers Association in 1981 and currently serves on its Board of Governors and Legislative Committee. Mr. Suggs was also awarded the South Carolina Trial Lawyers Public Citizen Award in 2002. Mr. Suggs served as president of the Richland County Bar Association in 1999 and is a member of the American Board of Trial Advocates. He is an Attorney Benchers for the American Inns of Court, John Belton O'Neill Chapter, and a Fellow of the American College of Trial Lawyers. He has also served as a member of the US District Court Advisory Committee and was a co-draftsman of the South Carolina Rules of Evidence, later adopted by the South Carolina Supreme Court.

Mr. Suggs graduated from Clemson University with a Bachelor of Arts in Economics. After graduating from Clemson, he served four years in the United States Navy, including two years in the Vietnam Theater. Following his return from the service, Mr. Suggs earned his J. D. from the University of South Carolina School of Law. His alma mater, the University of South Carolina School of Law, selected him as the recipient of the Compleat Lawyer Award in 1998. He served on the Clemson University Board of Visitors (2000-2003), and was selected as a Clemson University Alumni Fellow in 2000.

Executive Director, Pound Civil Justice Institute; Closing Plenary Presenter

Richard H. Marshall, Ph.D., is the Executive Director of the Pound Civil Justice Institute, located in Washington, D.C. From 1997 to 2001, he worked as a Research Analyst for ATLA, studying the civil justice system from an empirical perspective. Before working at ATLA, he served as a Visiting Assistant Professor at the University of Illinois, teaching courses in public policy. He taught constitutional law and civil liberties and served as pre-law advisor and faculty member at Eastern Illinois University. As Executive Director of the Pound Institute, he develops and oversees the Institute's Annual Forum for State Appellate Court Judges, the Law Professor Symposium, Regional Judges Forums, and serves as editor of the *Civil Justice Digest*. He is the editor of several of the Reports of the Annual Forum for State Appellate Court Judges: *THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE* (2001); *STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?* (2002); *THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS* (2003); *STILL CO-EQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS* (2004); *THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULE MAKING IN THE STATE COURTS* (2005), and *THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY* (2006). Dr. Marshall received his B.A. degree *cum laude* in Political Science and English from the University of Delaware, and his A.M and Ph.D. in Political Science from the University of Illinois at Urbana-Champaign, where he was a Charles W. Merriam Fellow.

Judicial Attendees

Alabama

Honorable Tennant M. Smallwood, Jr., Judge, Jefferson County Circuit Court

Arkansas

Honorable Donald L. Corbin, Associate Justice, Supreme Court

Arizona

Honorable Philip Espinosa, Judge, Court of Appeals

Honorable John Pelander, Chief Judge, Court of Appeals

California

Honorable Thomas E. Hollenhorst, Justice, Fourth District Court of Appeal

Honorable Thomas I. McKnew, Jr., Judge, Los Angeles County Superior Court

Honorable Vance W. Raye, Associate Justice, Third District Court of Appeal

Colorado

Honorable Russell E. Carparelli, Judge, Court of Appeals

Connecticut

Honorable Lubbie Harper, Jr., Judge, Appellate Court

Honorable Flemming L. Norcott, Jr., Associate Justice, Supreme Court

District of Columbia

Honorable Warren R. King, Senior Judge, Court of Appeals

Florida

Honorable Kenneth B. Bell, Justice, Supreme Court

Honorable Edwin B. Browning, Jr., Appellate Judge, First District Court of Appeal

Honorable Gary M. Farmer, Appellate Judge, Fourth District Court of Appeal

Honorable Ronald M. Friedman, Judge, Circuit Court

Honorable Richard B. Orfinger, Judge, Fifth District Court of Appeal

Honorable Juan Ramirez, Jr., Appellate Judge, Third District Court of Appeal

Honorable Morris Silberman, Judge, Second District Court of Appeal

Honorable Craig C. Villanti, Appellate Judge, Second District Court of Appeal

Georgia

Honorable Anne Elizabeth Barnes, Judge, Court of Appeals

Hawaii

Honorable Simeon R. Acoba, Jr., Associate Justice, Supreme Court

Honorable Steven H. Levinson, Associate Justice, Supreme Court

Honorable Paula A. Nakayama, Associate Justice, Supreme Court

Illinois

Honorable Thomas R. Appleton, Judge, Fourth District Appellate Court
Honorable Robert Chapman Buckley, Justice, First District Appellate Court
Honorable Calvin C. Campbell, Justice, First District Appellate Court, Division Four
Honorable Robert L. Carter, Judge, Third District Appellate Court
Honorable David Donnersberger, Judge, Cook County Circuit Court
Honorable James K. Donovan, Judge, Fifth District Appellate Court
Honorable Richard P. Goldenhersh, Justice, Fifth District Appellate Court
Honorable Alan J. Greiman, Justice, First District Appellate Court
Honorable Thomas E. Hoffman, Justice, First District Appellate Court, Division Two
Honorable William E. Holdridge, Justice, Third District Appellate Court
Honorable P. Scott Neville Jr., Justice, First District Appellate Court
Honorable Patrick J. Quinn, Justice, First District Appellate Court
Honorable Maureen Durkin Roy, Judge, Circuit Court of Cook County
Honorable Alexander P. White, Judge, Circuit Court of Cook County

Indiana

Honorable Michael P. Barnes, Judge, Court of Appeals
Honorable Terry A. Crone, Judge, Court of Appeals
Honorable Patricia Riley, Judge, Court of Appeals
Honorable Margret G. Robb, Judge, Court of Appeals

Iowa

Honorable Rosemary Sackett, Chief Judge, Court of Appeals
Honorable Gary Wenell, Judge, District Court
Honorable Vance Zimmer, Judge, Court of Appeals

Kansas

Honorable Daniel A. Duncan, Judge, Wyandotte County District Court
Honorable Gerald T. Elliott, Judge, Johnson County District Court

Kentucky

Honorable John William Graves, Justice, Supreme Court
Honorable Donald C. Wintersheimer, Justice, Supreme Court

Louisiana

Honorable Roland L. Belsome, Judge, Fourth Circuit Court of Appeal
Honorable Burrell J. Carter, Chief Judge, First Circuit Court of Appeal
Honorable Robert D. Downing, Judge, First Circuit Court of Appeal
Honorable Marion F. Edwards, Judge, Fifth Circuit Court of Appeal
Honorable John Michael Guidry, Judge, First Circuit Court of Appeal
Honorable Charles R. Jones, Judge, Fourth Circuit Court of Appeal
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About the Pound Civil Justice Institute

The Pound Civil Justice Institute is a national legal “think tank” created by pioneering members of the trial bar and dedicated to ensuring access to justice for ordinary citizens. Through its activities, the Institute works to give lawyers, judges, legal educators and the public a balanced view of the issues affecting the U.S. civil justice system.

The Institute was established in 1956 as the Roscoe Pound—American Trial Lawyers Foundation by a group of lawyers to honor and build upon the work of Roscoe Pound (1870–1964). Pound served as Dean of the Harvard Law School from 1916 to 1936, and is acknowledged as the founder of sociological jurisprudence—an interdisciplinary approach to legal concepts in which the law is recognized as a dynamic system that is influenced by social conditions and that, in turn, influences society as a whole.

Dean Pound was a true renaissance figure. Originally educated as a botanist, he maintained a lifelong interest in the natural and social sciences, jurisprudence, linguistics, and literature. He was admitted to the bar in his native state of Nebraska after completing only one year of Harvard Law School. His connection with the consumer bar was cemented when he was engaged in 1953 to serve as the editor-in-chief of the law journal of the National Association of Claimants’ Compensation Attorneys (NACCA)—the precursor to the Association of Trial Lawyers of America (ATLA®) and today’s American Association for Justice (AAJ). After Dean Pound retired from that position, a group of NACCA members established the Roscoe Pound Foundation, and Pound himself was active in setting out its mission. He donated his home in Watertown, Massachusetts, to house the *NACCA Law Journal* offices and to preserve his extensive library. In 1969, the Foundation funded the construction of a new building in Cambridge to house itself and ATLA, and Chief Justice Earl Warren laid the corner stone.

Activities—Throughout its history, Pound has tailored its activities to the changing needs of the judiciary and the legal academic community, with emphases on supporting the principle of judicial independence and adding balance to the often-lopsided debates on the U.S. civil justice system. These activities have included:

- The annual Chief Justice Earl Warren Conferences (held between 1972 and 1989), in which jurists, academics, practitioners and other experts participated every year;
- Diverse publications, including (in the early-1970s) a series of films about the U.S. justice system; the quarterly *Civil Justice Digest* (1994-2003); and occasional books, monographs and reports on such diverse subjects as the American jury system, health care and the law, injury prevention in the workplace, the safety of the blood supply, the firearm industry, court system funding, and others;
- Support for academic research through grants to scholars working in areas of interest to the consumer bar;

- Law school symposia for legal academics on medical malpractice and mandatory arbitration;
- Recognition of achievements of law professors and students through awards in the areas of health care law, environmental law, and the teaching of trial advocacy; and
- The annual Forum for State Appellate Court Judges (see below).

The Judges Forum—The centerpiece of Pound’s present program is the annual Forum for State Appellate Court Judges—a full-day educational program open only to judges, which was first held in 1992. The Forum provides a direct, intensive substantive experience, with original papers written by prominent academics, commentary by experts from both sides of the courtroom, and group discussion sessions. Judges attend as guests of the Institute, at no cost to themselves or their courts. The Forum is an opportunity for judges, legal scholars, and practicing attorneys to come together for an open conversation about major issues affecting civil justice in America. Each Forum’s papers—and its subsequently published reports—are posted on the Pound Web site (<http://www.poundinstitute.org>) and are available for free downloading, providing continuing resources for the judiciary, academics, and practitioners. The Forum is the consumer bar’s most significant outreach to the judiciary.

Our past forums have covered some of the most important issues that judges and the consumer bar face. Past topics have included separation of powers, the civil jury, secrecy in the courts, judicial independence, federalism, mandatory arbitration, rulemaking and electronic discovery, judicial selection, summary judgment, and the preemption doctrine. Selected Forum topics have also been reprised at several regional forums held in conjunction with the American Judges Association and other judicial organizations. The topic for the 2010 Forum (the 18th in the series) will be the effect of two recent decisions of the U.S. Supreme Court (*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*) and the defense-side campaign to induce American courts to abandon the “notice pleading” regime that has served consumers so well since the 1930s.

The Pound Forum is accredited by all state mandatory CLE authorities, and we are told that the program “continues to give” long after judges return home from it. Typically, over 80% of the judges who attend the Forum rate it as “excellent” or “very good” on our evaluation forms. More specific written comments by judges are equally encouraging. Some examples:

- “The Forum is really the only place and time most judges have an opportunity to think about and discuss these topics in depth.”
- “Each year I return to my court more knowledgeable about ‘hot topics’ in the law.”
- “The Pound Institute seminars have consistently been the best of all the CLE programs I have attended during my 32 years on the bench.”
- Even a prominent defense lawyer who served as one of our faculty members wrote that “I was tremendously impressed! . . . I understand now . . . why the Institute’s programs have such a

good reputation. I found myself thinking about things I have ignored or taken for granted for years.”

Another important form of validation is the increasing frequency with which courts and academics cite Pound Forum materials in court decisions and journal articles.

Pound’s Membership—The Pound Institute’s work is supported by its members, who are called “Fellows.” Some of those on our roster of over 1,000 Fellows have been associated with the organization since its inception, and some are of the second or even third generation of the modern American trial lawyers. But in the fifty-plus years of Pound’s existence, the Institute’s membership and leadership have also come to reflect the increasing diversity of the nationwide consumer bar. It includes younger lawyers, women, minorities, and others historically less well represented in bar leadership roles. This diversity has strengthened our programs and has helped the Institute’s work evolve—much as Dean Pound believed that the law itself must evolve.

Joining and Supporting the Pound Institute—Every member of the bar who is in good standing and who supports a strong American civil justice system is invited to become a Pound Fellow. There are several classes of membership, with dues starting as low as \$95 per year for lawyers who have been in practice for five years or less. There are also opportunities to support Pound’s activities beyond the regular dues structure through tax-deductible contributions. (Pound is a §501(c)(3) organization.) To inquire about becoming a Fellow or supporting Pound in other ways, please contact our executive director, Jim Rooks, by email (jim.rooks@poundinstitute.org) or phone (202-944-2841).

Through an emphasis on excellence in legal research and education, a commitment to open debate among all those who love the law, a practice of including accomplished practitioners from the defense side in our judicial education programs, and a focus on multidisciplinary explorations, the Pound Institute helps to continue the legacy of Dean Roscoe Pound—truly, one of the giants of American law.

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