

AN INDEPENDENT JUDICIARY

"If the federal courts alienate the public and lose its support and participation, they cannot carry out their appropriate role."

Judicial Conference of the U.S., December 1995

"...the most essential safeguard of a free society"

Senator Sam J. Ervin, Jr., 1970

REPORT

OF THE

COMMISSION ON

SEPARATION OF POWERS

AND

JUDICIAL INDEPENDENCE

AMERICAN BAR ASSOCIATION

JULY 4, 1997

AN INDEPENDENT JUDICIARY

Report of the

ABA Commission on Separation of Powers and Judicial Independence

July 4, 1997

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Opening

Throughout the history of our Republic, there have been recurrent occasions when charged political debate has focused on the judiciary. This was anticipated by the drafters of the Constitution when they distributed power among the three branches of government and provided a system of checks and balances in order to protect against arbitrary rule. As a result, the federal judiciary, initially viewed as the "weakest branch" since it had "neither the power of the sword nor the purse," was provided two protections in Article III to compensate for its "natural feebleness" and susceptibility to being over-powered by its coordinate branches — life tenure during good behavior and undiminished compensation. Concern for the judiciary's weakness has been allayed over the years, since judicial decisions are accepted as law even by those who strongly disagree and are routinely enforced by the President and respected by Congress. The need for an independent judiciary, however, remains as critical today as in the past.

An independent judiciary with judges who decide issues under law without fear or favor is a necessary means by which to accomplish both real and apparent justice for all. Judicial independence is not a talismanic slogan to be invoked whenever judges or the judiciary are criticized; in fact, there are few agreed-upon bright lines that define a trespass on such independence. However, the concept is so vital to our constitutional form of government that any developing series of events that may undermine the concept should be examined and discussed.

In the past, cycles of heated judicial criticism have passed without serious constitutional crisis. This is indeed a tribute to the public officials of all branches who have understood the constitutional wisdom of diffusion of powers and have not pressed the power of their particular branch to its outer limit.

A new cycle of intense judicial scrutiny and criticism is now upon us; one that has been forming over the last decade. Although academicians recognized the developing cycle early in its formation, popular attention has only recently focused on it as a result of several recent events. These include:

- highly critical remarks by the President and the then Senate Majority Leader of a judge's decision to suppress evidence in a criminal drug prosecution, which led to calls for the judge's impeachment or resignation;

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- intensified Congressional inquiry into the judiciary's governance;
- a statement by the Chief Justice of the U.S. Supreme Court in his 1995 Year-End Report cautioning against congressional micro-management of the judiciary; and
- increasingly strident political criticism of particular judicial decisions and activities, including allegations of "judicial activism," threats of impeachment and calls for judicial term limits by members of Congress.

As in prior cycles, these events have provoked assertions that fundamental concepts of judicial independence are being threatened.

While there is nothing new about judicial criticism, there are aspects of the present cycle of political debate that are relatively new and lack clear precedent. For one, Congress has become increasingly interested in the internal management and operational efficiencies of the judiciary. There has been a remarkable growth in the size of the judiciary, the administrative services necessary to support the judicial system and the budgetary support for the judiciary authorized by Congress. This has naturally attracted the attention of Congress, especially in times of national fiscal austerity. The judiciary's growth is occasioned by the growth in the number of cases filed in federal court, largely due to litigation arising out of legislation enacted by Congress, and to the federalization by Congress of causes of action which traditionally have been maintained in state courts.

During the 1970s and 1980s, the inter-branch relationship over budgetary and administrative matters was generally harmonious and the judiciary welcomed the informed, constructive oversight it received from Congress. In recent years, however, an unfortunate shrillness has often marked the

tenor of inter-branch discussions. This new skepticism has caused some to fear that Congress is seeking to over-regulate the courts in ways that are not in keeping with a truly independent judiciary.

An assessment of whether the events that are shaping the present cycle and those that may follow constitute a threat to judicial independence depends upon a number of considerations. It depends, in part, on the understanding that the political branches have of the role of the judicial branch as established in the Constitution and developed through history. It likewise depends on the respect that each branch has for the powers of the others and the recognition that each branch is simultaneously separate from and dependent on the other branches, which requires a spirit of cooperation and comity.

Overview

The constitutional protections for judicial independence should be cherished, not challenged. Over two hundred years of experience confirm the wisdom of our nation's founders that judicial independence is "the most essential characteristic of a free society."¹ The constitutional protections of tenure during "good behaviour" and a compensation that may not be diminished, coupled with a procedure permitting removal from office only after impeachment by the House of Representatives and conviction by the Senate, are vital to the preservation of judicial independence. Efforts to amend these protections are short-sighted and should be opposed.

Judicial independence makes a system of impartial justice possible by enabling judges to protect and enforce the rights of the people, and by allowing them without fear of reprisal to strike down actions of the legislative and executive branches of government which run afoul of the Constitution. Independence is not for the personal benefit of the judges but rather for the protection of the people, whose rights only an independent judge can preserve.

A truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches; that receives an adequate appropriation from Congress; and that is not compromised by politically inspired attempts to undermine its impartiality. When so viewed, the core health of our federal judiciary remains essentially sound. There are, however, potentially serious threats which, if not identified and addressed, will infect this system. This is not the first time that judicial independence has been challenged; history reveals the recurrent nature of the attacks on judicial independence and counsels vigilance to ensure that such attacks are unsuccessful.

Judicial independence includes the independence of an individual judge as well as that of the judiciary as a branch of government. Individual independence (otherwise known as decisional independence) is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security.

Branch independence (otherwise known as institutional independence) involves matters affecting the operation of the judiciary as a separate branch of government. The impartial administration of a justice system requires that the judiciary be given a significant degree of independence from other branches of government. But the framers recognized that "[t]here could never be realized in practice the complete separation of the judicial from the legislative power in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter."²

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¹Sam J. Ervin, Jr., Separation of Powers: Judicial Independence. 35 LAW & CONTEMP. PROBS. 108, 121 (1970).

²THE FEDERALIST, NUMBER 79 (Alexander Hamilton).

The framers, for example, delegated to Congress the power to control the judiciary's budget. The tension caused by the dependency of an equal and independent branch on another branch for its appropriations is inevitable in a government of separated powers. Mutual respect, restraint and understanding is, therefore, required to maintain equilibrium in our system of government.

With respect to branch independence, the paradox of independence and accountability is broader than the independent judiciary's dependence on Congress for its appropriations. The judiciary's independence must likewise co-exist with the Congressional powers to establish the courts and regulate their operations.

In recent years, there has been a significant growth in the federal judiciary, in terms of both personnel (judges and staff) and other resources.³ Congress has responded with a legitimate interest in understanding how additional appropriations are spent, and in exploring ways that justice can be administered more effectively and efficiently. It is noteworthy, and indeed salutary, that, in the course of this process, Congress has never attempted to interfere with the judiciary's appropriations because of disagreement with particular decisions.

In the past year, Congress enacted legislation to enable the president to veto budgetary line items in legislation presented to him for signature — including line items affecting the judiciary's appropriations. The law was immediately challenged on constitutional grounds and the case quickly made its way to the U.S. Supreme Court. Just days ago, the Court declined to decide the constitutionality of the executive "line-item veto" on procedural grounds, thereby clearing the way for the President to begin to use this

unprecedented executive power. The Supreme Court left open the possibility of another constitutional challenge once the line-item veto power is actually exercised by the President. In the meantime, the Commission recommends that legislation be enacted to exempt the judiciary's budget from its scope, in large part because the executive branch is the most frequent litigant in the federal courts and an executive veto power constitutes an unnecessary potential intrusion into the judiciary's control over its own operations.

While Congress has been responsive to the judiciary's overall increased budgetary needs, it has not responded regularly to requests from the judiciary for increased compensation. The Commission recommends that favorable consideration be given to these requests, especially those involving cost-of-living adjustments and de-linkage of judicial pay adjustments from those of members of Congress. We expect a great deal from our judges. Not only are they charged with the grave responsibility of exercising impartial judgment in their judicial role, but they have to fashion their lives so as to avoid even the appearance of partiality. In addition, the nature of their duties inevitably puts their personal safety at risk. To those from whom we expect so much, we owe much; in that light, the existing requests for compensation adjustments are modest and deserve support.⁴

Over the past decade, there have been a series of legislative actions by Congress which have changed the administration of the judiciary and, in some cases, reduced the discretion of judges. These Congressional actions reflect dissatisfaction with various aspects of the administration of both criminal and civil justice. This Report chronicles

³JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN OF THE FEDERAL COURTS 9 (1995).

⁴See Linowitz, Sol M., *THE BETRAYED PROFESSION* 184 (1994).

these legislative actions which have exacerbated underlying tensions.

Congress has considered its actions to be proper and not intrusive upon the judiciary's independence. Many members of the judiciary, however, consider those same actions to be threats to independence principles, even if they have not risen to a constitutional dimension. Some, however, see them as self-inflicted wounds resulting from a lack of sensitivity to popular dissatisfaction with such matters as mounting court costs and delays and inexplicable disparities in criminal sentencing. There is no easy way to resolve these different views. They point, however, to the need for interbranch respect, ongoing constructive dialogue, and reflection over whether a particular legislative initiative is prudent or whether the perceived problem can be otherwise addressed by the courts themselves. It is important that lessons be learned from recent interbranch altercations, so as to prompt better discourse and understanding between the branches.

It is noteworthy that the judiciary has publicly recognized the need for positive communication and coordination with the political branches, and that judges have developed programs for informal communication at the district and circuit levels with their legislators. To improve further the quality and continuity of the communication, we join with the Judicial Conference of the United States in recommending the establishment of a permanent national commission on the federal courts, consisting of members of the executive, legislative and judicial branches of the federal government, to study and make periodic recommendations regarding matters pertaining to the federal courts on an ongoing basis.

With respect to individual decisional independence, it is universally accepted that our Constitution has made federal judges

independent, but ultimately accountable to the people. The Constitution thus gives the Supreme Court jurisdiction to review the decisions of the lower courts, and it provides a procedure for removal of judges. A judiciary consisting only of judicial angels, no matter how selective the process for appointment, was never contemplated. Even though our founders recognized that on rare occasion, the misconduct of a particular judge could impair respect for the judicial system, judicial removal was reserved for those egregious situations involving "Treason, Bribery, or other high Crimes and Misdemeanors." Disagreement with a judicial decision was not — and is not — a ground for impeachment. This Report, therefore, contains a recommendation urging political branches to refrain from using impeachment threats to "control" a judge who has issued opinions with which a legislator disagrees. The Commission believes such suggestions are improper, without constitutional support and contrary to the well-reasoned precedents of Congress.

In cases where problems with judicial behavior arise outside the context of particular decisions, additional procedures administered within the judiciary have been developed to discipline errant judges. Procedures for the processing of complaints against judges are not well known, however, and the Report includes a recommendation encouraging the organized bar to make information available regarding such procedures.

In addition to impeachment, independence is further constrained by a judge's obligation to decide a case according to law — not personal preference. Judges and academics have pointed out that individual judges can be the single most significant threat to their own independence if their decisions go beyond the law and involve imposition of their personal beliefs.⁵ This

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⁵See e.g., Judge Gerald E. Rosen, Judicial Independence in an Age of Political and Media Scrutiny, Remarks before Kalamazoo College (Nov. 21, 1996) (on file with the American Bar Association). ("I believe the greatest long-term threat to judicial independence

debate over whether particular decisions go beyond the proper judicial function and trespass on legislative or executive functions has been waged since the establishment of our democracy. At one time, decisions seen as excessive were described as "judicial legislation"; now the authors of these decisions are pejoratively described as "judicial activists" or, occasionally, "judicial imperialists."

In recent years, our courts have increasingly been forced to decide contentious social legal issues such as abortion, affirmative action, the reach of religion into public life, as well as those regarding crime, drugs and violence. Decisions on these issues inevitably frustrate significant interests and fuel strong emotions which result in criticism, not only of the decisions themselves, but of the judges who make them. Often, when a judge says to the people, to the Congress or to the President that an action which reflects the will of the majority is unconstitutional, his or her decision is countered by a suggestion that the judiciary should be made more responsive to the wishes of the people by removing life tenure and substituting some form of a term limit.

Contemporary carping and criticism of individual judges and challenges to the existing protections of independence are fueled by the charge that too many "activist" judges have personally politicized the law and intruded on legislative prerogatives by undertaking to create social policy. It is true that judges can be a threat to their own independence if they are not constrained to decide cases and issues according to law, but it is equally true that "activism" has become a code word for a personal, political or ideological difference with a particular decision. Labeling judges "activists" simply because they make unpopular decisions is unjustified

and only serves to undermine public confidence in the judiciary.

The recent criticism against individual judges continues to attract considerable attention. While the stridency and viciousness of some of this criticism is unnecessary and inappropriate, it is no worse than past judicial attacks in our country's history. It has been observed that bashing judges has a long and distinguished tradition; indeed, many of our esteemed presidents, including Jefferson, Lincoln and both Roosevelts, rebuked judges of their day. Criticism of our legal system and of particular judicial opinions can serve a vital corrective function and should not be discouraged; such criticism need not be viewed as a threat to the principle of judicial independence. However, dangers arise when the expression of opinion becomes an attempt to influence the appropriate exercise of judicial discretion or exhort unwarranted disrespect of the judicial process.

Some of the recent criticism aimed at judges has focused, for example, on the unpopular results of particular cases while ignoring their facts and underlying legal reasoning. It has also, at times, taken the form of personal attacks. This criticism is inappropriate, particularly when it contains misinformation or is intended to interfere with the judges' ability to exercise their discretion and decide cases based upon what they believe to be right under the law, no matter how unpopular the result.

We are disinclined as a Commission to participate in the debate regarding whether a particular decision or its author evidences "judicial activism" or "judicial imperialism" or whether particular criticism is warranted or misleading. We offer, however, two observations, in light of the overall judicial work

⁵(...continued)

comes not, in the first instance from politicians, the radio talk show hosts or the media. In the long run, Judges themselves pose the greatest threat to their own independence.").

performed by the almost 1000 members of the Article III federal judiciary. First, there are very few decisions which trigger that sort of debate. Second, we caution those who enter the fray to verify the basic facts on which the debate is based; frequently, the basis is factually flawed.

Judges properly are reluctant to respond to personal criticism, whether appropriate or demagogic. The judge speaks through his or her opinion; and ethical restraints generally prevent the judge from making extra-judicial statements. One judge has succinctly remarked that silence in the face of criticism is the price of Article III independence. Given that silence is normally the judge's only appropriate course, it is not fair to leave the judges without allies in responding to unfair, demagogic criticism. Neither the bar nor the informed public should stand mute in the face of unfair, misinformed attacks on judges, their decisions or any part of the justice system.

We recommend that the organized bar at all levels — national, state and local — work in conjunction with the judiciaries and other concerned groups to develop response mechanisms appropriate to their communities to answer and correct unfair, misinformed criticism of judges, their decisions and the judiciary as an institution. If the evil of unjust criticism is that it saps public confidence in our judicial system, the answer must be to provide the public with the accurate information it needs to maintain its faith in the courts.

Discussions about effective methods of responding to unfair attacks on judges reveal a deeper problem — the decline of public confidence in and respect for justice systems, both state and federal, throughout the country. The Judicial Conference of the United States has recognized that

Preserving the power of the courts to do what is right while sustaining their legitimacy in the eyes of the public is one of the most delicate balancing acts of our constitutional system. If the federal courts alienate the public and lose its support and participation, they cannot carry out their appropriate role.⁶

There is mounting evidence not only of a loss of confidence and respect but also a diminished understanding of the role of judges and an independent judiciary in protecting and enforcing the rights of the people. It is unacceptable that many in our society, both powerful and powerless, have lost confidence in the guarantee of equal justice under law. We therefore recommend first that research and investigation into the causes of this erosion of confidence and respect be undertaken by the American Bar Association in conjunction with other concerned groups and institutions. Second, based on these findings, a coalition of such groups should address identified problems and initiate educational programs that emphasize the values of independent and impartial judicial systems.

The judicial appointment process involves nomination by the President and confirmation by the Senate, thereby providing the most significant popular influence on the federal judiciary. This process should assure that there will be an adequate number of judges, both at trial and appellate levels, to carry out the myriad of judicial tasks which are placed upon the judiciary with impartiality and fairness. The process should not contribute undue delay to filling vacancies.

If the judicial branch is to do its job, an adequate number of qualified judges is required and it is incumbent on both the

⁶Judicial Conference of the United States, LONG RANGE PLAN OF THE FEDERAL COURTS 9 (1995).

executive and legislative branches to provide them. A chronic failure to fill needed judgeships would manifest a disrespect for the judicial branch and result in an inability to perform the required judicial function, and therefore threaten the independence of the judicial branch. To this end, we urge that judicial vacancies be filled without delay and that the recommendations of the 1996 Report of the University of Virginia Miller Center Commission on the Selection of Federal Judges, which are summarized in this Report, be given careful consideration.

Our Commission's original assignment was to examine the vitality of the independence of the federal judiciary in light of a series of events which gave rise to concerns that independence was threatened. Early in our work, we were urged to enlarge our inquiry to include judicial independence concerns in the several states, even though the constitutional provisions for protection of such independence varied state by state. As we heard anecdotal evidence from various states, we recognized that the threats to independence at the state level were, in many instances, often more significant and pressing than those at the federal level.

Issues of special concern in state judiciaries include the methods of financing judicial elections — particularly when key contributors are lawyers, law firms or litigants that will frequently appear before the judge in question; the lack of legislative deference to the judiciary's budget requests; and unjustified criticism of particular judges, single decisions and the judiciary generally.

Time has not permitted the Commission to undertake a detailed study of the intrusions, both real and apparent, on the independence of the state courts. We have confirmed, through our hearings, our research, and a poll of bar leaders in the states and major metropolitan areas, that such problems exist. We urge as a priority that the ABA, in conjunction with state and local bars and

other concerned groups, proceed to study and address these problems.

Recently, a unanimous U.S. Supreme Court decided that the President of the United States, during his term of office, must respond to civil litigation involving his alleged personal conduct. Although some disagreed with the decision, both the President and the public acknowledged that the decision of the Supreme Court must be observed. Such clear deference to the rule of law, as interpreted by the courts, is the mark of a sound and independent judiciary. By addressing the potential problems that have arisen in the recent past, as recommended in this report, we are confident that our federal judiciary will remain one that would make our founders proud.

The Commission

I.

The Commission on Separation of Powers and Judicial Independence was established in August 1996 by American Bar Association President N. Lee Cooper. The Commission was created to study judicial independence and accountability, to evaluate a number of recent events perceived by some as threatening judicial independence, and to make recommendations.¹

In furtherance of its charge, the Commission gathered information from a range of sources. First and foremost, the Commission received written and oral testimony from twenty-eight witnesses in three hearings conducted in Washington, D.C. and San Francisco, California.² Witnesses testifying before the Commission included (in alphabetical order):

- The Honorable Shirley Abrahamson, Chief Justice, Wisconsin Supreme Court;
- Nan Aron, President, Alliance for Justice;
- The Honorable Marvin E. Aspen, Chief Judge, United States District Court for the Northern District of Illinois;
- Stephen Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School;
- Andrew Coats, Dean, University of Oklahoma College of Law and President, American College of Trial Lawyers;
- Erwin Chemerinsky, Legion Lex Professor of Law and Political Science, University of Southern California Law School;
- John C. Domino, Director of Programs, American Judicature Society;
- The Honorable Albert P. Dover, California state trial judge and representative of the California Judges Association;
- Kevin Fong, partner, Pillsbury, Madison & Sutro and past president, Asian Pacific Bar of California and Asian American Bar Association in the Greater Bay Area;

¹The Commission's focus was, of necessity, limited to the federal judiciary appointed pursuant to ART III of the U.S. Constitution. Our life-span and resources were insufficient to permit adequate investigation into the many and varied issues affecting the independence of federal judges appointed pursuant to ART I; and similar considerations precluded us from conducting a systematic investigation of judicial independence issues affecting state, local and other administrative judiciaries.

²The hearing transcripts and this Report are accessible on the American Bar Association's Internet site at: <http://www.abanet.org/govaffairs>.

- The Honorable Stephen J. Fortunato, Jr., Associate Justice, Rhode Island Superior Court (who submitted a statement for the record in lieu of a personal appearance);
- Fred Graham, Chief Anchor and Managing Editor, Court Television;
- Thomas Jipping, Director, Center for Law and Democracy at the Free Congress Foundation;
- Robert A. Katzmann, President of the Governance Institute, Visiting Fellow in Government Studies at the Brookings Institution and Walsh Professor, Georgetown University;
- Daniel J. Meador, James Monroe Professor of Law Emeritus, University of Virginia School of Law and former Assistant Attorney General, Office for Improvements in the Administration of Justice, U.S. Department of Justice;
- The Honorable Thomas Moyer, Chief Justice, Ohio Supreme Court and immediate past President, the Conference of Chief Justices;
- The Honorable V. Robert Payant, President, the National Judicial College;
- The Honorable Louis Pollack, Senior Judge, United States District Court for the Eastern District of Pennsylvania;
- Drucilla Ramey, Executive Director and General Counsel, Bar Association of San Francisco;
- Charles B. Renfrew, partner, LeBoeuf, Lamb, Greene & MacRae, former Judge, United States District Court for the Northern District of California and former Deputy Attorney General of the United States;
- Constance L. Rice, Western Regional Counsel, NAACP Legal Defense and Educational Fund;
- The Honorable Joseph H. Rodriguez, Judge, United States District Court for the District of New Jersey, and representative of the Judicial Conference of the United States;
- The Honorable William W. Schwarzer, Senior Judge, United States District Court for the Northern District of California and former Director, Federal Judicial Center;
- The Honorable Norma L. Shapiro, Judge, United States District Court for the Eastern District of Pennsylvania;
- Jerome J. Shestack, partner, Wolf, Block, Schorr and Solis-Cohen and President-Elect, American Bar Association;
- Daniel Troy, partner, Wiley, Rein & Fielding and Associate Scholar of Legal Studies, American Enterprise Institute;
- The Honorable Mindia G. Ugrekheidze, Chairman, Supreme Court of the Republic of Georgia;
- The Honorable John M. Walker, Judge, United States Court of Appeals for the Second Circuit and immediate past President, Federal Judges Association;
- Stephen Wermiel, Professor, Georgia State University College of Law and former Supreme Court correspondent for the Wall Street Journal;
- John Choon Yoo, Acting Professor of Law, University of California at Berkeley and former General Counsel, United States Senate Committee on the Judiciary.

In addition to the hearings, Commission members interviewed the United States Senators and Representatives who chair legislative committees or subcommittees with jurisdiction over the courts. The Commission corresponded with federal and state judges, bar leaders and academicians. It conducted a survey of state and local bar presidents and executive directors. It participated in a colloquium at the University of Pennsylvania Law School, where the Commission's tentative findings and recommendations were discussed. Commission members attended or participated in other conferences on judicial independence and accountability. Finally, the Commission compiled and reviewed an extensive array of books, articles, newspaper clippings, unpublished papers and symposia transcriptions.

Over the course of a series of meetings, the Commission evaluated the information it received from the above-described sources and prepared this report.

Origins of the Current Tensions: An Overview of the Judicial Independence – Accountability Debate

III.

The Greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.

John Marshall³

The founders of our Constitution established the judiciary as an independent, co-equal branch of government for two enduring reasons:

- First, making the judiciary independent of inappropriate outside influence within and without government would better enable the judiciary to render impartial decisions in individual cases — hence the need for decisional judicial independence.
- Second, making the judiciary a third branch of government independent of the legislature and executive would enable the judiciary to check over-concentrations of power in the political branches — hence the need for institutional judicial independence.

In both cases, the operating assumption was that an “anti-democratic” judiciary—one independent of the electorate and its representatives — was needed to preserve the democratic values the electorate and its representatives held dear — a paradox that Alexander Bickel coined “the countermajoritarian difficulty.”⁴ The framers also realized that in a system in which the powers of government are separate from and independent of each other, unchecked independence and separation would enable one branch to usurp power from the other two. To keep the judiciary in check, it was essential that the Constitution include provisions making the judiciary accountable to both the political branches and the electorate.

The Constitution thus creates a tension between judicial independence and accountability that some have called a contradiction.⁵ It makes the federal judiciary independent of the political branches, by giving “the” judicial power to the judiciary alone, by granting judges life tenure during good behavior, and by providing that a judge’s salary may not be diminished. At the same time, the Constitution makes the judiciary dependent on, i.e. accountable to, the political branches, by giving to the political branches the powers to nominate and confirm federal judges, to

³PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30 at 616 (1830).

⁴ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (2d ed. 1968).

⁵Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571 (1988).

impeach and remove federal judges, to constitute the lower federal courts, to regulate court jurisdiction, and to make any laws necessary and proper for the exercise of the foregoing powers, which include the powers to fund and oversee court operations. Congress and the President thus possess the means to impose the majority's will on the judiciary to some degree, judicial independence notwithstanding.

Interbranch conflict arising out of the inherent tension between judicial independence and accountability is not new.⁶ There is, however, reason to suspect that the points of conflict have proliferated in recent years.

Over the course of the past generation, the political branches have delegated some of the nation's most pressing problems to the federal judiciary. They have furthered the nation's civil rights agenda by creating new, private causes of action in the federal courts. More recently, they have waged "wars" on crime and drugs by federalizing criminal offenses previously prosecuted almost exclusively in the state courts.

To meet the demand of increased federal judicial workload, the number of judges and support staff has almost doubled, while the judicial branch's budget has increased by 170%.⁷ As a natural consequence of this growth, occurring as it has, in a time of fiscal austerity, the political branches have begun to monitor all of the judiciary's operations more closely than before in an effort to ensure that the courts are performing their assigned roles as efficiently and effectively as possible. It has scrutinized the judiciary's perceived budgetary needs more closely, and sometimes skeptically, in the course of overseeing courthouse construction projects, appropriating funds for judicial operations and enacting legislation to increase judicial

salaries, create new judgeships, and regulate senior judge status. Congress also has become increasingly involved in the regulation of the judiciary's governance by circulating questionnaires to judges concerning their work habits, passing legislation establishing a system of judicial self-discipline, and compelling each district court to develop its own civil case management plan.

Each of these forays into the judiciary's affairs has given rise to complaints that the political branches are threatening judicial independence. In response, each of these complaints has prompted the rebuke that the political branches are merely seeking to ensure judicial accountability.

As the political profile of these interbranch skirmishes has risen, public officials, as well as interested members of the press and public, have begun to take sides. Some members of Congress have disagreed with the way some judges are deciding cases, particularly those involving crimes and drugs. They and the president have called for the impeachment or resignation of judges who make rulings at odds with the nation's anti-crime or other current political agendas, and some have suggested that would-be judges who do not accept such agendas should not be nominated or confirmed. This has resulted in the emergence of another issue: whether and to what extent judicial criticism, within and without government, constitutes a legitimate threat to judicial independence.

A review of the independence-accountability debate reveals that both sides purport to favor judicial independence and judicial accountability. They draw the line separating independence from accountability in different places, however, and designate particular events as falling on one side of the line or the other on an "I know it when I see it" basis.

⁶See, e.g., WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

⁷JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* at 11 (1995).

The problem, then, is that the current debate between independence and accountability is proceeding without the benefit of a systematic and sustained analysis of what those phrases mean and how they interrelate. It is the task of this Commission to provide this much needed analysis.

To this end, the Commission begins its analysis in Part III, below, with a brief summary of the history and evolution of judicial independence. In Part IV, the Commission reviews recent issues and arguments relating to judicial independence and accountability in the federal court system, as reflected in Commission hearings, scholarly literature, newspaper articles, etc.. Although the Commission's study is focused on judicial independence in the federal system, in Part V the Commission supplements that study with an abbreviated review of independence and accountability issues that have surfaced in the state courts. Finally, in Part VI, the Commission offers its findings, conclusions and recommendations.

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¹⁰² U.S. 137 (1803).

The History and Evolution of Judicial Independence



Any study of judicial independence in the United States courts logically begins with the text of the Constitution and a discussion of the meaning ascribed to that text by its framers. Our focus, however, is on the present, not the past, for which reason a conscious effort has been made to keep the historical discussion in this Report brief. The reporter to the Commission offers a more detailed analysis of the historical background in a paper prepared at the Commission's request; a copy of that paper is included as Appendix A to this Report.

A. THE CONSTITUTIONAL TEXT

Article III, Section 1 of the United States Constitution includes three provisions central to the establishment of federal judicial independence.

- First, the judicial power clause provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Implicitly, at least, to delegate "the" judicial power to the courts is to deny that power to Congress or the President, and thereby establish a sphere of exclusive and inherent judicial authority immune to political branch encroachment.
- the good behavior clause provides that "The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour," which assures federal judges life tenure.
- Third, the compensation clause provides, in self-explanatory terms, that "the judges of the Supreme and inferior courts shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

The independence guaranteed by Article III, Section 1 is offset to an uncertain degree by powers the Constitution grants the political branches to hold the judiciary accountable for its behavior. The Constitution

- delegates to the House and Senate the power to impeach and remove "all civil Officers" for "High Crimes and Misdemeanors";
- gives Congress the power "To constitute Tribunals inferior to the supreme Court";

- subjects the Supreme Court's appellate jurisdiction to "such Exceptions, and under such Regulations as the Congress shall make";
- grants to the President, the "Power, by and with the Advice and Consent of the Senate," to appoint "Judges of the supreme Court, and all other Officers of the United States"; and
- authorizes Congress to "make all Laws which shall be necessary and proper for carrying into execution . . . all . . . Powers vested by this Constitution in the Government of the United States."

B. THE ORIGINAL UNDERSTANDING OF JUDICIAL INDEPENDENCE

The provisions for judicial tenure during good behavior and a compensation that could not be diminished were a part of the proposed Constitution from the very beginning and do not appear to have been seriously threatened during either the convention or ratification debates. The founders thus remained steadfast in their support for judicial independence and assumed that life tenure and irreducible salary were the necessary and sufficient means to preserve the independence of the judiciary as an institution, as well as the decisional independence of individual judges.⁸ At the same time, they did not appear to consider the extent to which judicial independence might be undercut in other ways, such as through political branch manipulation of the judiciary's nonremunerative resources.

The precise language of the judicial power clause was added midway through the convention by the Committee on Detail, although from the outset the delegates sup-

ported the establishment of a third judicial branch with exclusive authority over the judicial function. While this clause obviously contributed to the judiciary's independence as a distinct department of government with powers that no other department could exercise, the framers characterized the clause more in terms of its contribution to separation of powers than independence per se, for which reasons it was not discussed alongside the good behavior and compensation clauses in the convention and ratification debates over judicial independence.

Far more volatile than the good behavior, compensation, or judicial power clauses were provisions enabling the political branches to hold the judiciary accountable for its conduct — particularly those governing impeachment, and those empowering Congress to establish the lower federal courts.

With respect to the scope of impeachable conduct, there appears to have been general agreement in the convention and ratification debates that impeachment ought to reach "political" offenses not recognized as conventional crimes at common law. In the *Federalist Papers*, for example, Hamilton argued that judicial overreaching was not a problem to be feared, because the judges would be unwilling to alienate Congress and risk impeachment:

There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body as possessed of the means of punishing their presumption by degrading them from their stations.⁹

As to Congress' power to constitute the lower federal courts, it needs to be emphasized that the Constitution does not establish

⁸ See generally Appendix A.

⁹ THE FEDERALIST, No. 81 (Alexander Hamilton).

the lower federal courts but merely authorizes Congress to establish them. Congressional authority to regulate the lower federal courts' practice, procedure, and administration, derives from its power to constitute (or not to constitute) the federal courts, which, when taken in combination with the "necessary and proper" clause, is thought to include the power to regulate the operations of whatever lower courts Congress sees fit to create.

The framers' decision to authorize Congress to establish the lower federal courts, rather than to have the Constitution establish them directly, has thus proved critical to the contemporary balance of power between the first and third branches. Even so, this appears not to have been an intended consequence, so much as a side-effect of a decision having more to do with reducing tension in the relationship between state and federal power. As originally proposed, the Constitution would have established the lower federal courts outright. Many delegates were concerned, however, that federal trial courts would ride roughshod over their state counterparts. As a compromise, the proposed Constitution was amended to empower Congress to establish lower federal courts, with no explicit requirement that it do so. The implications of that compromise for Congress' regulatory authority over the courts were unexplored at the convention, were under-explored in the ratification debates, and were thus left to be pursued by a later generation.

C. THE EVOLUTION OF JUDICIAL INDEPENDENCE

Over two hundred years separate the framers' understanding of judicial independence from ours. Intervening history has had an obvious and inevitable impact on the

course of the judiciary's institutional and decisional independence.

1. Decisional Independence

The dual goals of judicial independence — to enable the judiciary to make impartial decisions, and to keep the political branches in check — was put to an early test in the landmark case of *Marbury v. Madison*, decided in 1803.¹⁰ In that case, Secretary of State James Madison, acting on President Jefferson's instructions, refused to award Marbury a commission he had received from outgoing President John Adams to serve as a justice of the peace in the District of Columbia. Marbury challenged Madison and Jefferson's actions in an original mandamus petition to the Supreme Court — a procedure authorized by Congress in the Judiciary Act of 1789.

Chief Justice Marshall's opinion in *Marbury* is sometimes wrongly assumed to be the intellectual genesis of the federal judiciary's power to declare acts of Congress void. That is understandable, given that the opinion cites no outside sources of authority in support of its conclusions. The fact remains, however, that participants in the ratification debates for the most part assumed that the Constitution empowered the judiciary to invalidate unconstitutional laws. What makes *Marbury* a landmark decision, is that it was the first case in which the judiciary's power to review and void the acts of another branch of the federal government was asserted.

A less adroitly crafted opinion could have "established" the power of judicial review only to have it consigned to oblivion by a resentful Congress and President hell-bent on ignoring a presumptuous court order invalidating a statute or executive action. That did not happen in *Marbury*. Rather, the Court avoided a direct confrontation with

¹⁰2 U.S. 137 (1803).

President Jefferson by asserting, without exercising, its authority to declare presidential actions unconstitutional. It could not exercise such authority, the Court explained, because the statute permitting the dispute to come before the Court in an original mandamus petition was itself unconstitutional. By striking down this relatively inconsequential statute, the Court created precedent for its exercise of judicial review over legislative enactments without alienating Congress. The act in question had been passed fourteen years earlier by the Federalists, who were now in the distinct minority in Congress; moreover, the net effect of invalidating the statute was to deprive the Court of jurisdictional power it would otherwise possess, which sapped strength from the argument of detractors that the Court's motive was to accumulate power to itself.

Although *Marbury* set precedent for the proposition that the federal courts could and should serve as a check on the political branches and majoritarian whim without jeopardizing their independence, such a proposition has never implied immunity from criticism. To the contrary, criticism of the judiciary — including countermajoritarian criticism — has come and gone in cycles, beginning with the founding generation. Throughout that time, unpopular decisions have subjected individual judges to personal attacks and occasional calls for impeachment and removal. Never, however, has a judge been removed from office because of an unpopular decision alone.

In 1805, the House went so far as to impeach Justice Samuel Chase for his procedural rulings in an Alien and Sedition Act case, but the Senate refused to convict. In the view of a noted scholar testifying before the Commission, that set a precedent:

[F]rom the conclusion of the proceedings against Justice Chase to the present it has remained the general view, including of most people in the political branches, that invocation of the impeachment process is not an appropriate response to unpopular judicial decisions.¹¹

Apart from criticizing judges or threatening them with impeachment, the political branches have occasionally responded to unpopular judicial decisions by attempting to limit the courts' subject matter jurisdiction or by adjusting the size of the Supreme Court. As with judicial criticism, efforts to strip the courts of jurisdiction have risen and receded in cycles. The same is true of strategic efforts to alter court size, although no serious effort has been made in that direction since President Roosevelt's widely criticized effort to pack the Supreme Court.

2. Institutional Independence

Neither the text of the Constitution nor the convention and ratification debates establishes a firm foundation for the institutional independence of the federal courts. Granted, the framers spoke in sweeping terms of creating three separate and independent branches of government, and of an independent judiciary that could stand up to the political branches and keep them in check. To these ends they vested "the judicial power" in the federal courts, and gave the judges life tenure and a salary that could not be diminished, protections that made decisions like *Marbury v. Madison* possible. But the framers also gave the political branches considerable regulatory authority over the federal courts — the lower federal courts in particular — and elaborated little on the scope of that authority in the convention and ratification debates.

¹¹October 11, 1996 Hearing at 33, 39 (testimony of Stephen Burbank).

Twelve years after Congress first exercised its power to establish lower federal courts in the Judiciary Act of 1789, Federalist and lame duck President John Adams, aided by a Federalist and lame duck Congress, passed the Judiciary Act of 1801. Among other things, the Act established sixteen new circuit judgeships, which the President and Senate promptly filled with Federalist judges.

The next year, the Jeffersonian Republicans passed legislation eliminating the judgeships established the preceding year.

The congressional debate on the repeal of the 1801 Act brought the underlying institutional judicial independence issues into sharp focus. Those legislators opposed to the repeal argued that Congress' power to establish the lower courts could not be construed to empower Congress to repeal the courts it established, without eviscerating judicial independence. Those favoring the repeal argued, in effect, that Congress could exercise its plenary regulatory authority over the judicial office without running afoul of the constitutional protections afforded judicial office-holders.

The constitutionality of the 1802 repeal was never conclusively resolved by the Supreme Court. The episode nevertheless served to further weaken the judiciary's already tenuous claim to independence as an institution or branch. The point was bluntly made in an 1808 speech on the Senate floor:

The theory of three distinct departments in government is, perhaps, not critically correct; and although it is obvious that the framers of our Constitution proceeded upon this theory in its formation, yet in the practical adjustment of the departments to each other it was found impossible to carry this theory completely into effect. . . . With respect

to the word independent, as applicable to the Judiciary, it is not correct, nor justified by the Constitution. This term is borrowed from Great Britain, and by some incorrect apprehension of its meaning there. . . is applied here to the department itself instead of the officers of the department. . . . An independent department of a Government is conceived to be a department furnished with powers to organize itself, and to execute the peculiar functions assigned to it without aid, or in other words, independent of any other department. A moment's attention to the Constitution will show that this is not the Constitutional character of our Judicial department.¹²

In certain significant respects, the issue of whether the judiciary possessed institutional independence remained unripe throughout the eighteenth and nineteenth century. The judiciary had no institutional identity to speak of, being a decentralized confederation of judges whose sense of "independence" was derived as much from geographical isolation as anything else. And interbranch confrontations that might otherwise have arisen out of the tension between the founders' rhetoric of judicial branch independence and the reality of plenary congressional power to regulate the courts were for the most part averted, due to congressional indifference or informal, ad hoc communication and cooperation between judges and legislators.

By the turn of the twentieth century, however, the needs and size of the federal courts had grown to the point where both Congress and the courts perceived the need to bureaucratize and centralize the judiciary's operations. In 1922, Congress established

¹²CHARLES HYNEMAN AND GEORGE CAREY, *A SECOND FEDERALIST* 183-84 (1967) (statement of Senator William Giles).

the Conference of Senior Circuit Judges, later renamed the Judicial Conference of the United States; in 1934, Congress delegated the task of procedural rulemaking to the Supreme Court; and in 1939, Congress established the Administrative Office of the United States Courts. Taken together, these enactments gave rise to the modern federal judiciary as an institution.

Regardless of whether the Constitution required Congress to do so, Congress manifested a high degree of deference to the new, bureaucratized judiciary that it had established. It routinely acted on proposals recommended by the Judicial Conference, and never once interfered with procedural rules promulgated by the Supreme Court from 1934, when the Rules Enabling Act was passed, to 1973. The net effect was to create functional independence for the judiciary as an institution, despite the tenuous foundation for insisting upon it as a constitutional necessity.

Federal Judicial Independence: A Review of Recent Issues and Arguments

IV.

Recent developments have sparked renewed interest in judicial independence and its limits. These developments have raised institutional and decisional independence concerns.

A. DECISIONAL INDEPENDENCE ISSUES

Over the course of the Commission's hearings, a number of issues surfaced concerning perceived threats to the ability of individual judges to render impartial decisions in individual cases without inappropriate outside interference.

1. Judicial Criticism

In recent years, a number of judges have been criticized, sometimes severely, by elected officials, the press and public, for decisions in particular cases. There is, moreover, reason to suspect that this recent cycle of judicial criticism is and will remain on the upswing. A booklet widely circulated on Capitol Hill urges members of Congress to initiate impeachment proceedings against "activist" judges, regardless of whether such efforts are likely to result in removal:

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.¹³

This view has not been ignored in Congress. In March 1997, the Majority Whip of the House of Representatives stated that "[a]s part of our conservative efforts against judicial activism, we are going after judges"; that "Congress has given up its responsibility in [overseeing] judges and their performances on the bench, and we intend to revive that and go after them in a big way."¹⁴

The following episodes of judicial criticism are illustrative of those brought to the Commission's attention.

■ District Judge Harold Baer (S.D.N.Y.): In March 1996, District Judge Harold Baer ruled on a criminal defendant's motion to suppress evidence. Several

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¹³DAVID BARTON, IMPEACHMENT! RESTRAINING AN OVERACTIVE JUDICIARY 53 (1996).

¹⁴Ralph Z. Hallow, *Republicans Out to Impeach "Activist" Jurists*, THE WASHINGTON TIMES, March 12, 1997 at A1.

men had dropped duffel bags into defendant's car and fled upon seeing the police. The police stopped defendant's car and found drugs in the bags. The question was whether those drugs had been seized in an "unreasonable" search, within the meaning of the Fourth Amendment. Judge Baer ruled in favor of defendant. In the neighborhood where the incident occurred, Judge Baer reasoned, people reasonably feared police; hence, running from the police did not furnish the officers with sufficient reason to believe that a crime had occurred to justify the search.¹⁵

The prosecution filed a motion for reconsideration. While the motion was pending, then Senate Majority Leader Robert Dole, and Speaker of the House Newt Gingrich threatened to initiate impeachment proceedings against Judge Baer if he did not change his ruling. The President suggested, through a spokesman, that he might request Judge Baer's resignation if the ruling were not changed. Judge Baer ruled in favor of the government on the motion for reconsideration, concluding that new information presented at the rehearing justified the police search.¹⁶ Notwithstanding the change of ruling, Baer was later identified by House Majority Whip Tom DeLay as an impeachment target.¹⁷

■ Circuit Judge Rosemary Barkett: In April 1992, then Florida Supreme Court Justice Rosemary Barkett concurred in a dissent written by fellow Justice Parker Lee McDonald, in *Dougan v. Florida*.¹⁸ Dougan

had been convicted of a brutal, racially motivated murder, and sentenced to death. The Florida Supreme Court upheld the sentence; the dissent, however, argued that the death penalty was excessive, given the circumstances leading up to the murder, which Justice McDonald described in the following terms:

[Dougan's] impatience for change, for understanding, for reconciliation matured into taking the illogical and drastic action of murder. His frustrations, his anger and his obsession of injustice overcame reason. The victim was a symbolic representative of the class causing the perceived injustices.¹⁹

During confirmation proceedings on her nomination to the United States Court of Appeals for the Eleventh Circuit, Justice Barkett's concurrence in the Dougan dissent was pointed to as evidence that she "subscribes to the blame-society, blame anybody-but-the-criminal philosophy of criminal law," that "epitomizes the kind of judge the American people do not want."²⁰ In the 1996 presidential campaign, the above-quoted passage from Justice McDonald's dissent in Dougan was characterized by members of Congress as "her [Judge Barkett's] famous line,"²¹ and what "Rosemary Barkett, a Clinton judge. . . wrote."²² And presidential candidate Robert Dole pointed to her concurrence in the Dougan dissent as the basis for listing her among four appointees in

¹⁵For a brief description of Judge Baer's preliminary ruling, see Don Van Natta, Jr., *Judges Defend a Colleague From Attacks*, NEW YORK TIMES, March 29, 1996, at B1; Robyn Blumner, *Judges Must Be Free of Political Pressure*, ST. PETERSBURG TIMES, May 26, 1996, at 4D.

¹⁶For a description of events culminating in the changed ruling, see John Goldman, *Judge Bows to Pressure, Changes Ruling on Drug Seizure*, L.A. TIMES, April 2, 1996, at A8.

¹⁷Ralph Hallow, *supra* note 14.

¹⁸595 So.2d 1, 7 (1992) (McDonald dissenting).

¹⁹*Id.*

²⁰140 Cong. Rec. H4292 (April 14, 1994) (statement of Senator Smith).

²¹142 Cong. Rec. H3652 (April 19, 1996) (statement of Representative Baker).

²²142 Cong. Rec. H3652 (April 19, 1996) (statement of Representative Scarborough).

President Clinton's judicial "hall of shame," that together comprised "an all star team of liberal leniency."²³

■ District Judge James Beaty: In December 1995, District Judge James Beaty, sitting by designation on the United States Court of Appeals for the Fourth Circuit, voted with the majority of a three judge panel to overturn the conviction of and grant a new trial for murder defendant Timothy Sherman.²⁴ At the time, Judge Beaty's nomination to the United States Court of Appeals for the Fourth Circuit was pending. In February 1996, the Senate Judiciary Committee Chairman said on the floor of the Senate:

President Clinton is rewarding Judge Beaty by promoting him. While the President cannot force activist, soft-on-crime judges to resign, he can choose to keep them where they are instead of promoting them to the appellate courts where they can do even more damage to the law and to our communities. Maybe he ought to withdraw the nomination.²⁵

■ Judge Fred Biery: In the November 1996 elections, two Democratic candidates for Val Verde, Texas county offices were defeated by Republicans on the strength of 800 absentee ballots cast by military base personnel.²⁶ Plaintiff filed suit in federal district court in December, seeking to enjoin the Republican winners from taking office. A temporary restraining order was issued, and a hearing was held in January, at which plain-

tiff presented evidence showing that none of the military voters currently lived in the county and that a majority had not lived there for six years. On January 24, Judge Fred Biery issued a preliminary injunction (the temporary restraining order had been issued by a different judge) and referred the case to state courts for residency rulings.

In March 1997, it was reported that a Texas congressman was taking the lead in drawing up articles of impeachment against Judge Biery.²⁷ It was further reported that the congressman "would really like to see the results of being able to use articles of impeachment to stop judicial activism," and was "seriously looking into impeachment as an option in this case," but that "this is a very serious move, and we do not want to make it until we are certain we are on firm constitutional footing."²⁸

■ Chief Judge Thelton Henderson: In December 1996, Chief Judge Thelton Henderson preliminarily enjoined implementation of California Proposition 209, a voter-approved ban on race and gender preferences in state hiring and college admissions. Judge Henderson issued the preliminary injunction on the grounds that Proposition 209 would likely be found to violate the Equal Protection clause of the Fourteenth Amendment and the Civil Rights Act of 1964. The House Majority Whip identified Judge Henderson as a target for impeachment because of his decision,²⁹ which was later reversed by the United States Court of Appeals for the Ninth Circuit.

²³Ceci Connolly, *Dole Criticizes Clinton's Choice of Judges*, ST. PETERSBURG TIMES, April 20, 1996, at A1.

²⁴The question before the court was whether a juror who visited the scene of the crime during jury deliberations, and then shared that information with the other jurors, constituted harmless error for the conviction.

²⁵October 11, 1996 Hearing at 94.

²⁶The facts described in the remainder of this paragraph were reported in Ross E. Milloy, *Suit Fights Absentee Vote By Soldiers*, N.Y. TIMES, March 2, 1997 at A22.

²⁷Ralph Hallow, *supra* note 14.

²⁸*Id.*

²⁹*Id.*

■ District Judge Norma L. Shapiro: In 1983, Judge Shapiro dismissed a suit filed by a prisoner in a Philadelphia jail overcrowding case, concluding that the case was appropriate for judicial abstention. The Court of Appeals reversed Judge Shapiro's decision and ordered her to intervene.³⁰ A few months later, the City of Philadelphia presented Judge Shapiro with a consent decree that left it to the court to impose a prison population cap. Judge Shapiro, after inspecting the prisons and after due deliberation, approved the decree.

The Philadelphia District Attorney then petitioned to intervene. Judge Shapiro denied the petition, and the denial was affirmed by the Court of Appeals. The Pennsylvania General Assembly then passed a statute authorizing the District Attorney to intervene. Judge Shapiro, however, held the statute unconstitutional on separation of powers grounds, and was again affirmed on appeal.

Over the course of the litigation, Judge Shapiro was criticized by successive district attorneys. One addressed community groups on a monthly basis condemning the judge's conduct. A local newspaper editor identified her as "public enemy number one" and ran a daily article accompanying Judge Shapiro's photograph, that listed the previous day's arrestees who Judge Shapiro was purportedly responsible for releasing from jail.³¹ The

Wall Street Journal published an article on the case, that was inserted in the Congressional Record by Senator Dole, who, in Judge Shapiro's words, labeled her "the second most activist judge in the country who likes releasing criminals because she doesn't care about law and order."³²

■ Supreme Court Justice Clarence Thomas: A former clerk to Justice Clarence Thomas complained that critics of "judge-bashing" unjustifiably excluded Justice Thomas from their list of victimized judges.³³ He recounted a barrage of criticism Justice Thomas has received since joining the Supreme Court, which included accusations that Justice Thomas "perjured himself during his confirmation hearings," and that he is the "youngest, cruelest Justice."³⁴ One law professor "argued that Justice Thomas' votes on the Court should not be counted"; a journalist "declared that she hoped Justice Thomas' wife fed him a high cholesterol diet so that he would suffer from heart disease"; and various groups have "attempted to prevent him from speaking at public ceremonies and events because of disagreement with his judicial views."³⁵

Witnesses before the Commission who addressed the issue were unanimous in the view that judges are not above criticism.³⁶ Witnesses acknowledged that criticism of judicial decisions — including severe criticism — was a healthy and valuable part

³⁰December 13, 1996 Hearing at 191, 198-199 (testimony of Judge Norma L. Shapiro)("I decided [the case] was appropriate for judicial abstention because the state courts had been involved for 25 years in trying to deal with the conditions and had declared them unconstitutional perhaps 10 or 15 years before. The Court of Appeals felt that the decision of the state courts, the 450 orders or something, did not preclude my getting involved because they hadn't been concerned with awarding damages to prisoners, past, present and future, and it was an improper case for federal judicial abstention.")

³¹December 13, 1996 Hearing at 200, 201 (testimony of Norma Shapiro).

³²*Id.* at 201-202.

³³The witness, Professor John Choon Yoo, was nevertheless of the view that judicial criticism posed no threat to judicial independence. Prepared statement of John Choon Yoo, February 21, 1997.

³⁴*Id.* at 5.

³⁵*Id.*

³⁶See, e.g., December 13, 1996 Hearing at 43, 50 (testimony of Judge John Walker) ("I don't want to suggest that discussion, indeed forceful criticism of particular decisions of particular courts is somehow inappropriate."); October 11, 1996 Hearing at 33, 84-85 ("I think vigorous criticism, Harry Truman-type criticism, is just dandy."); *id.* at 91, 96 (testimony of Nan Aron)("[P]oliticians are free to criticize and should criticize."); *id.* at 101, 107 (testimony of Thomas Jipping) ("Things like analysis, criticism, even by

of the democratic process.³⁷ “[P]rincipled criticism serves as an invaluable corrective of otherwise unrealized error.”³⁸ Moreover, there was no suggestion that the press, public or politicians could or should be subject to formal sanction for non-defamatory criticism of judges.³⁹ There was disagreement, however, as to whether certain forms of criticism, even if constitutionally protected, undermined the judiciary’s decisional independence and were therefore inappropriate.

Some were troubled by inappropriate or excessive criticism, which they variously defined as including “personalized attacks that are focused simply on the result of a judge’s decision without any consideration of its legal reasoning or of the facts of the case”;⁴⁰ threats to impeach, remove or request the resignation of a judge because of

a particular decision;⁴¹ and criticism that seeks to influence the outcome of a pending case.⁴² They viewed inappropriate judicial criticism as undermining judicial independence in two ways.

First, some were concerned that inappropriate criticism may in fact influence judicial decision-making. As one judge testified, “Judges are human, and thus, perhaps depending on the thickness of a particular judge’s skin, are not invulnerable to the influence of political pressure. To rely on constitutional protections alone, I think, is not enough.”⁴³ Another witness cautioned:

[H]ow would you like to try to present a motion to suppress to [Judge Baer] the following week in a high-profile case? And if you think that he could divorce himself from what

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³⁶(...continued)

politicians of what judges do are not threats to judicial independence at all.”); *id.* at 113, 118 (testimony of Andrew Coats) (“[E]verybody knows that there’s going to be constant criticism of all our institutions in government, and certainly the judiciary is not exempt from that.”); prepared statement of John Yoo, February 21, 1997 at 3 (“Although this political attention and criticism of judges has concerned some of those who testified before this Commission, and evidently concerned leaders of the ABA, I find nothing wrong with it.”).

³⁷Daniel Troy, Associate Scholar of Legal Studies at the American Enterprise Institute, put it this way: “[T]he Commission should make clear that scrutiny of and debate about judicial decisions in law reviews, professional journals, and newspapers is natural, legitimate, and in most cases beneficial.” December 13, 1996 Hearing at 5, 14 (testimony of Daniel Troy).

³⁸December 13, 1996 Hearing at 43, 50 (testimony of John Walker).

³⁹*See, e.g.*, December 13, 1996 Hearing at 43, 51 (testimony of John Walker) (“Nor do I suggest that personal or partisan criticism is somehow outside the tradition of our freedom of expression.”); *id.* at 5, 28 (testimony of Daniel Troy) (“[T]o have the bar sanction somebody without requiring a judge to actually sue the lawyer for libel does not trouble me, but anything short of ‘demonstrably false and misleading’ does trouble me.”); October 11, 1996 Hearing at 33, 83-84 (testimony of Stephen Burbank) (“[W]e ought to embrace as applicable as a matter of discipline, obviously, for all public officials . . . that one should not falsely or with reckless disregard for its truth or falsehood impugn the qualifications of the integrity of a federal judge.”).

⁴⁰December 13, 1996 Hearing at 43, 54 (testimony of John Walker). Professor Burbank made a similar point, that politicians who state that “federal judges are making decisions based on their political affiliations or because of loyalty to the appointing power . . . cannot perhaps be disciplined for making such statements, nonetheless public officials and others in similar positions ought fairly to be brought to judgment in the court of public opinion.” October 11, 1996 Hearing at 33, 85 (testimony of Stephen Burbank).

⁴¹October 11 hearing at 199, 201 (testimony of Stephen Wermiel) (“[T]he idea that one might ask a judge to resign or to be impeached because one disagrees substantively with that judge’s decision making is outrageous and, to me, suggests very directly that we ought to be quite concerned about judicial independence.”); *id.* at 113, 122 (testimony of Andrew Coats) (“[T]here is a difference between criticism of a kind of decision or criticism of a range of decisions or criticism of attitudes and threats of removal of judges. And maybe that’s where the line ought to be drawn.”).

⁴²October 11, 1996 Hearing at 113, 139-140 (testimony of Andrew Coats) (“[T]he pending case aspects of [the Baer episode] seems to me to make it somewhat more difficult. . . . I guess that interference in the process seems to me to be more of a danger than just the criticism after the fact.”); *id.* at 101, 141 (testimony of Thomas Jipping) (“I think the line [Andrew Coats] suggested about a pending case is valuable.”).

⁴³December 13, 1996 Hearing, at 43, 51 (testimony of John Walker). Judge Walker also quoted Judge William Hoeverler for a similar proposition: “Even though we have life tenure, we’re human; don’t ever think that we’re not subject to outside pressures.” *Id.* Judge Louis Pollack, when asked whether he sensed any “intimidation impact” on federal judges as a result of “criticism” or “demagogic attacks”, responded that “intimidation is too strong. I think what I would sense is caution. It would be nice to make a decision that

happened to him the previous week and rule fairly and accurately on the motion, I think that's quite a leap of faith and I'm not sure it is so.⁴⁴

Second, some witnesses were concerned that inappropriate judicial criticism undermined public confidence in the judiciary and judicial independence, regardless of whether such criticism would in fact influence judicial decision making:

I do not . . . expect a contemporary politician to echo the extravagant campaign statement of [then Presidential candidate] William Howard Taft . . . when he said: "I love judges, and I love courts. They are my ideals. They typify on earth what we shall meet hereafter in heaven under a just God."

On the other hand, public denunciations and statements of lack of confidence in the judiciary . . . inevitably undermine public confi-

dence that the exercise of judicial power is being applied properly and objectively.

As my colleague Judge Jane Roth observed . . . "Judicial independence is not only important to the judicial system. The independence of the judiciary must be credible to those being judged."⁴⁵

Not all witnesses testifying before the Commission regarded criticism as a threat to judicial independence. Some were reluctant to draw lines between appropriate and inappropriate judicial criticism.⁴⁶ Such lines, they argued, are difficult if not impossible to draw when the speaker is within his constitutional rights to criticize, and any attempt to do so gives rise to the specter of censorship.⁴⁷ Moreover, there is no need to cordon off a zone of "inappropriate" criticism, because federal judges are already adequately insulated from such criticism. As one witness testified:

⁴³(...continued)

doesn't necessarily get closer than about page 23 to anybody's attention who is reading the next day's newspapers." October 11, 1996 Hearing at 15, 79 (testimony of Louis Pollack). Andrew Coats, then incoming President of the American College of Trial Judges, went further than Judge Pollack, observing: "I heard this morning that some backed away from the word 'intimidation' and liked 'caution' better. As a trial lawyer, I do think there is the serious danger of an intimidation factor because I think we're dealing with the situation in a context which is unusual which has not been there before." *Id.* at 113, 117-18 (testimony of Andrew Coats).

⁴⁴October 11, 1996 Hearing at 113, 121 (testimony of Andrew Coats).

⁴⁵February 21, 1997 Hearing at 156, 167-68 (testimony of Joseph Rodriguez). See also, October 11, 1996 Hearing at 33, 85 (testimony of Stephen Burbank) ("It's comments [of public officials] that will cause the public to misunderstand what this process is about that I think should cause [us] to be concerned about judicial independence. If the public believes that federal judges are making decisions based on their political affiliations or because of loyalty to the appointing power, that casts a pall over the whole process."); December 13, 1996 Hearing at 109, 111 (testimony of John Domino) ("[T]he courts have neither the power of the purse nor the sword. That means . . . the power of the courts is rooted in the public's acceptance of legitimacy of judicial authority. If the public loses confidence or withdraws its support, then the integrity of judicial authority becomes threatened."); Gilbert Merritt, *Judge Bashing Only Undermines Public Confidence in the Judiciary*, NASHVILLE BANNER, July 7, 1996 at A11 ("The independence of the judiciary is fragile and rests in large measure upon the continued confidence of the public. If either judicial misbehavior or intemperate judge-bashing undermine that independence, we will have failed to learn the lesson of the farmer and the goose that laid the golden eggs: In our shortsighted need for one good meal, we will have killed the goose that lays the golden eggs of liberty and justice.")

⁴⁶December 13, 1996 Hearing at 5, 20 (testimony of Daniel Troy) ("[O]ne can imagine hypotheticals that would constitute . . . speech that is inappropriate. But I think that any rule that this Commission, that the ABA, or certainly that any state jurisdiction would adopt would not only, in the state context, be of dubious constitutionality, but the [game] would not be worth the candle."); prepared testimony of Thomas Jipping, October 11, 1996 ("I think it is clear that some things popularly called threats to judicial independence are not threats at all. Analyzing, critiquing, or even criticizing what judges do — either by individuals or by politicians — is not a threat to judicial independence at all.")

⁴⁷December 13, 1996 Hearing at 5, 21 (testimony of Daniel Troy) (opposing the suggestion that the Commission develop a procedure for bar organizations to follow in responding to what they conclude is inappropriate criticism, because "it's just too open to abuse. There's a reason why we have a First Amendment and we're opposed to censorship.")

[T]he ultimate protection of an independent judiciary is the one the framers came up with, guaranteeing judges life tenure and protecting their salary So protected, any judge worth his or her salt will be able to withstand some public criticism.⁴⁸

Thus, when judges are criticized for bad decisions, they are free to ignore such criticism.⁴⁹ If they are not strong-willed enough to do so, then, as one scholar put it "[t]he sensitivity of these judges to political events perhaps shows that they were unsuited to the federal bench in the first place."⁵⁰ Moreover, a media representative noted that when inappropriate or excessive criticism is published, it is ordinarily neutralized by counter-reports, so that, in the case of Judge Baer,

[T]he end result [was that] things reached an equilibrium and I think the good sense of the American people penetrated what was happening there and made it unworthy of being carried too far.⁵¹

2. Public Confidence

In the views of some, public confidence in the judiciary was being undermined by far more than isolated episodes of judicial criticism. One witness, representing the Western Regional Counsel to the NAACP Legal Defense and Education Fund, acknowledged what she perceived to be the adverse impact of unjust criticism on judicial independence, but found it impossible to counteract within the "underclass," which she defined as including "poor people of every race."⁵² She attributed underclass cynicism about the judiciary to a lack of understanding of the judicial system, coupled with a series of events that have engendered skepticism: high incarceration rates in poor neighborhoods; disproportionately high sentences for offenses involving drugs prevalent in poor communities, such as crack cocaine, as compared to powder cocaine; and highly publicized trials, such as the Rodney King and O.J. Simpson prosecutions.⁵³

A representative of a local bar association made a related point that when the judicial system is, in most places, "overwhelmingly

Some...were concerned that inappropriate judicial criticism undermined public confidence.

⁴⁸December 13, 1996 Hearing at 5, 14 (testimony of Daniel Troy); see also, prepared statement of John Choon Yoo, February 21, 1997, at 4 ("So long as criticism of the judiciary does not transform itself into attempts to eliminate the Constitution's guarantees for judicial independence or to misuse the impeachment power, there is nothing to worry about. Judges do not need protection from criticism; they are the only officials of our national government that are institutionally insulated from political pressure and popular opinion.").

⁴⁹These witnesses thus did not believe that the criticism of Judges Baer, Shapiro or Beaty was problematic. Daniel Troy reacted to a "hypothetical" situation that tracked the facts of Judge Shapiro's experience, by saying "the judiciary is not a place for people who are concerned about popularity contests." December 13 Hearing at 5, 23 (testimony of Daniel Troy). After testifying before the Commission, Thomas Jipping noted that Judge Beaty's decision, in the case criticized by Senator Hatch, was ultimately reversed by the Fourth Circuit sitting en banc, which "exposes leftist claims that discussion and even criticism of judicial decisions threaten judicial independence. What they really want is for liberal activist judges to be able to run the country in peace." Thomas Jipping, *Poor Judgment*, THE WASHINGTON TIMES, October 29, 1996, at A17. Court television anchor Fred Graham characterized Judge Baer's initial ruling as "foolish and wrong-headed," and noted that Baer agreed after "some reflection and maybe a little jaw-boning from Senator Dole and the White House," which, Graham concluded, was "a good thing for . . . the federal judiciary and all of us." October 11, 1996 Hearing at 192, 193 (testimony of Fred Graham). Professor Yoo added that if Judge Baer's change of ruling made him appear beholden to the political branches, "Judge Baer, not the President and not Senator Dole, is the individual responsible for threatening judicial independence, specifically by showing himself to be so readily influenced by the political winds." Prepared Statement of John Choon Yoo, February 21, 1997 at 4.

⁵⁰Prepared statement of John Choon Yoo, February 21, 1997 at 4.

⁵¹October 11, 1996 Hearing at 192, 197 (testimony of Fred Graham).

⁵²February 21, 1996 Hearing at 245 (testimony of Constance L. Rice).

⁵³*Id.* at 244-46.

white male. . . minorities coming into that system do not believe frequently that they are going to, in fact, be dealt with on a fair basis because they don't feel that the system itself is constituted in a fair fashion."⁵⁴ Her comments were directed to the California state judicial system. Race and gender bias studies conducted in the federal system have reached similar conclusions.⁵⁵

3. Judicial Activism

Some witnesses suggested that judges are not victims of their harsh critics, but of their own activism. Daniel Troy argued that judges are "increasingly involving themselves in political disputes where they have no warrant to do so."⁵⁶ Edwin Meese and Rhett Dehart cite the following examples of such activism in a recent book chapter:

Activist court decisions have had an adverse impact on nearly every aspect of public policy. Among the most recent examples are:

- Imposing racial preferences and quotas;
- Creating a "right" to public welfare assistance;
- Weakening criminal procedures;
- Lowering hiring standards;
- Interfering in state legislative reapportionment;
- "Discovering" a right to an abortion;
- Overturning state referenda.⁵⁷

For Daniel Troy, such decisions help to

explain the recent increase of judicial criticism:

[I]f courts are going to constitutionalize vast areas of our public policy, thereby preventing the people from governing themselves, it's not reasonable to expect that the judiciary will be beyond criticism, even harsh criticism.⁵⁸

Professor Daniel Meador observed that "the judges themselves can be potential threats to judicial independence by what they do."⁵⁹ A former federal judge added that: "The judiciary needs to be extremely sensitive in exercising its power of judicial review — not to overstep and antagonize the legislative branch. These powers should be used with great caution and circumspection."⁶⁰ District Judge Gerald Rosen made the point succinctly in a recent speech:

What those of us in the judiciary must always remember is that if we begin to exceed our limited constitutional role of interpreting the laws and the Constitution and becoming super-legislators, invading the provinces of the policy branches of government by blithely striking down statutes, regulations and popular referenda . . . we will without question engender a response from policy makers and the people. The response may at first be incremental, aimed only at specific judicial action itself. But, if judicial excesses come

⁵⁴February 21, 1997 Hearing at 73, 98, 99 (testimony of Drucilla Ramey).

⁵⁵For a summary of the studies to date, see Judith Resnik, *Activities and Publications of Courts and Organizations of Judges and Bar Associations Concerned About the Effects of Gender, Race and Ethnicity in the Courts and the Legal Profession* (paper presented to the Federalist Society, August 6, 1995).

⁵⁶December 13, 1996 Hearing at 5, 10 (testimony of Daniel Troy).

⁵⁷EDWIN MEESE III AND RHETT DEHART, *Reining in the Federal Judiciary*, MANDATE FOR LEADERSHIP IV: TURNING IDEAS INTO ACTIONS 247(1996).

⁵⁸*Id.* at 12.

⁵⁹December 13, 1996 Hearing at 161, 168 (testimony of Daniel Meador).

⁶⁰February 21, 1997 Hearing at 13, 17 (testimony of Charles Renfrew).

to be viewed as commonplace, I believe the response will be systemic and broad-based, going to the heart of our independent power.⁶¹

For these witnesses, were judges to exercise greater restraint, it would mute the charge of judicial activism and end the threat it poses to the judiciary's legitimacy.⁶²

Others disagreed. The Executive Director and General Counsel of the Bar Association of San Francisco emphasized the importance of a countermajoritarian judiciary that is independent enough to make decisions that sometimes override majority will.

While. . . Mr. Troy spoke of commentators who are justifiably — he said — amazed that a judge is apparently willing to overturn the democratically arrived at decision of the people of California, we, in fact, see it as the very essence of what an independent judiciary is all about.⁶³

"With respect to women," she argued, "we as a class have had to depend on brave and independent judges. . . to measure and, when appropriate, strike down laws including

initiatives . . . here in California against the yardstick. . . of the Constitution."⁶⁴ The President of the Asian Pacific Bar Association of California made a similar point with respect to minority groups: "The experience of Asian-Americans in California shows that an independent judiciary can and must play a role in protecting minorities from legislation that is unconstitutional even if that legislation may be popular at the time."⁶⁵

Professor Erwin Chemerinsky went a step further. "I am unsure of exactly what 'judicial activism' means. . . . My sense is that it is a label that critics use to attack decisions that they do not like."⁶⁶ Thus, Chemerinsky suggested that political conservatives focus their attack on liberal judicial activism.⁶⁷ If, however, judicial activism means "disregard of precedent and overturning the decisions of the elected branches of government," then, in his view, "the conservative attack on judicial activism is particularly ironic because today the activism on the Supreme Court is entirely in a conservative direction."⁶⁸

Chemerinsky questioned the relevance of judicial activism to a discussion of recent developments affecting judicial independence. Quoting from *McCulloch v. Maryland* for the proposition that the Constitution is

"...if we begin to exceed our limited constitutional role... we will engender a response from policy makers and the people."

⁶¹Judge Gerald Rosen, Remarks at Kalamazoo College 13-14 (November 21, 1996) (available at the ABA Governmental Affairs Office).

⁶²December 13, 1996 Hearing at 5, 15 (testimony of Daniel Troy) ("A bit more restraint on the part of the courts will reduce criticism of judges."); id. at 161, 181 (testimony of Daniel Meador) ("[T]he only remedy I know for [criticism arising out of the courts' exercise of judicial review]. . . lies with the judges themselves. They have it within their power to stick closely, I would say, to clear warrants in the Constitution."); October 11, 1996 Hearing 101, 113 (testimony of Thomas Jipping) ("If judges were to observe that substantive independence which keeps them in a more restrained, separate from politics kind of role, there would not be the calls there are today, and they are growing ones, to change the institutional side.").

⁶³February 21, 1997 Hearing at 73, 81 (testimony of Drucilla Ramey).

⁶⁴*Id.* at 77.

⁶⁵*Id.* at 88, 89 (testimony of Kevin Fong).

⁶⁶Prepared statement of Erwin Chemerinsky, February 21, 1997 at 2.

⁶⁷Opponents of judicial activism, however, contend that they oppose conservative as well as liberal activism. See, e.g., *Remarks of Sen. Orrin Hatch Before the Federalist Society's 10th Anniversary Lawyers Convention*, November 15, 1996 at 4 ("[W]hen we commission judicial activists who distort the Constitution to impose their own values, policy preferences, or visions of what is just and right. . . [w]e risk converting our constitutional democracy into a 'Government by Judiciary.' This is as unacceptable when the results are favored by conservatives as when the results are cheered by liberals.").

⁶⁸Prepared Statement of Erwin Chemerinsky, February 21, 1997 at 2. As evidence of the Court's conservative judicial activism, Chemerinsky pointed to the Court decisions dismantling federal, state and local affirmative action programs; striking down statutes on the grounds that they exceeded the scope of the commerce clause or violated the Tenth Amendment; and overturning very recent decisions concerning the Eleventh Amendment, the double jeopardy clause, and victim impact statements. *Id.* at 2-3.

"intended to endure for ages to come, and consequently [is] to be adapted to various crises of human affairs," he concluded that judicial activism — conservative and liberal — is and always has been a necessary and inevitable part of a democracy that depends for its success upon the interpretation of a constitution "written in open-textured language using phrases such as 'due process of law,' 'cruel and unusual punishment,' and 'equal protection of the laws.'"⁶⁹

4. Judicial Appointments

Witnesses were in general agreement that the President and members of the Senate Judiciary Committee have a legitimate interest in questioning candidates for judicial office about a variety of matters.⁷⁰ Professor Daniel Meador, however, pointed out that the judicial selection process can, and perhaps does, impinge on the judiciary's decisional independence at two different points. First, the President may seek assurances from the candidate that he or she will decide certain issues certain ways, as a prerequisite to nomination:

What we have since the early years of the Reagan administration is a process in which prospects for nominations undergo intensive interviews by lawyers in the Justice Department or the White House, and sometimes both. This is perceived by a lot of people as posing a threat to judicial independence, both in reality as well as appearance, by at least appearing to try to extract from the judge a commitment or some indication of positions to be taken

later on issues that will come before the courts.⁷¹

Second, the Senate may seek to extract comparable assurances from nominees, as a prerequisite to confirmation:

[W]e get into the Senatorial confirmation process and whether that poses some potential threat to judicial independence, and I'm inclined to think that it might, at least to the appearance of it and maybe to the reality, depending on how these hearings are conducted. But there are undoubtedly efforts, I think, in some of these hearings to extract positions or commitments about legal issues that will come before the courts. Now, the nominee can attempt to resist that, but a nominee does so at his peril.⁷²

Professor Meador was a member of the Miller Center Commission on the Selection of Federal Judges which issued its report on May 15, 1996. In addition to the concerns he raised, the Commission was likewise concerned by the chronic delays in the nomination and confirmation process and the heightened focus on ideology in the appointment process, which leaves the impression with the public that judges are not independent and impartial, but ideological and partisan:

To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science;

⁶⁹*Id.*

⁷⁰*See, e.g.*, December 13, 1996 Hearing at 121, 124 (testimony of Robert Katzmann) ("If you look at the confirmation process, the Senate must learn enough about nominees to be able to evaluate their fitness."); *id.* at 43, 82 (testimony of John Walker) ("I don't view the judicial confirmation process as a threat to judicial independence. I think that is the appropriate point at which all considerations, including political considerations, can come to bear on the appointment of a particular individual for a lifetime position.")

⁷¹*Id.* at 161, 169 (testimony of Daniel Meador).

⁷²*Id.* at 170-71.

it also serves to weaken public confidence in the courts. Just as candidates put aside their partisan views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging.⁷³

5. Congressional Modification of Judicial Decisions

The Constitution delegates to the federal judiciary the exclusive authority to exercise "the judicial power." The exclusivity of this delegation has been construed to forbid Congress from exercising judicial power by prescribing rules of decision in targeted, pending cases,⁷⁴ or by disturbing or rescinding the final decisions of federal courts.⁷⁵ At the same time, Congress does have the power to amend substantive law and make such law applicable retroactively, which may require appellate courts to apply the new law to pending cases and modify lower court judgments accordingly.⁷⁶

The point at which Congress ceases to exercise legislative power and begins to exercise judicial power — and thereby threatens the judiciary's decisional independence — remains uncertain. In *Plaut v. Spendthrift Farms, Inc.*, the Supreme Court held that Congress could not order courts to reopen final judgments in cases previously dismissed as time-barred by the applicable statute of limitations.⁷⁷ More recently, Congress intervened in pending criminal proceedings against Oklahoma City bombing suspect Timothy McVeigh on two separate occasions. First, Congress provided for closed-

circuit television broadcast of the proceedings to victims and families in Oklahoma City. Later, Congress permitted witnesses who may be asked to furnish victim-impact testimony to view or attend the trial. Although neither congressional action disturbed a final judgment as in *Plaut*, both involved targeted congressional intervention in a specific, pending case, and both raise questions as to whether Congress was intruding upon core judicial functions.

B. INSTITUTIONAL INDEPENDENCE ISSUES

In the introduction to his *1996 Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist distilled the essence of what may be an intractable issue concerning the judiciary's institutional or branch independence:

Once again this year — in my eleventh annual report on the state of the judiciary — I am struck by the paradox of judicial independence in the United States: we have as independent a judiciary as I know of in any democracy, and yet the judges are very much dependent on the Legislative and Executive branches for the enactment of laws to enable the judges to do a better job of administering justice.⁷⁸

Witnesses testifying before the Commission were in general agreement that the judiciary is a separate, coequal branch of government, and that it alone has the constitutional authority to exercise "the judicial

"I am struck by the paradox of judicial independence in the United States..."

⁷³IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES 11-12 (1996).

⁷⁴*United States v. Klein*, 13 Wall. 128 (1872).

⁷⁵*Plaut v. Spendthrift Farms, Inc.*, 115 S. Ct. 1447 (1995).

⁷⁶*Id.*; see also *United States v. Schooner Peggy*, 1 Cranch 103 (1801).

⁷⁷115 S. Ct. 1447 (1995).

⁷⁸C.J. William H. Rehnquist, *1996 Year-End Report on the Federal Judiciary*, January 1, 1997.

power.”⁷⁹ As a logical corollary, the political branches lack the constitutional authority to exercise judicial power, and if they attempt to usurp it, the judiciary has the inherent authority to preserve its independence as an institution and resist such encroachments.⁸⁰

Congress, however, has an important constitutional role to play in regulating the judiciary, given its powers to establish the lower federal courts, to regulate the Supreme Court’s appellate jurisdiction, to impeach and remove judges, and to enact laws necessary and proper for carrying these powers into execution. The pervasiveness of that role was described in the following way:

In Congress, as well as in state legislatures, throughout our history we find a very substantial involvement by the legislative branch in the judicial branch. If you think about everything we have there by way of legislative enactments — times and places of holding courts, number of judges, compensation of judges, provision for all other judicial personnel, jurisdiction, substantive rules of decision and procedure — all of that is there in large quantity and always has been.⁸¹

Theoretically, then, a line separates constitutional legislative oversight of the courts from unconstitutional usurpation of core judicial functions. Some have argued that

Congress has crossed that line in certain instances.⁸² One witness, testifying on behalf of the Judicial Conference, allowed that “Congress, for the most part, does a good job in its oversight of the judiciary,”⁸³ but raised the specter of legislative oversight degenerating into unconstitutional overreaching:

It is safe to say that the happiness, effectiveness, stability and independence of the federal judiciary depends to a large extent on Congress. If the legislative branch is responsive to our needs, we shall remain one of the most durable legacies of the founders of this nation. If it is not, then suspicion, underfunding, minute oversight, and capricious additions to workload may become the equivalent of a constitutional amendment effectively repealing Article III.⁸⁴

Others, however, view the “core” judicial power as more limited in scope. Relative to decisional independence, they regard the judiciary’s institutional independence as having “less claim in history, in practice, and [one which] is indeed a murky area.”⁸⁵ They therefore assert that congressional regulation of the judiciary as an institution will rarely, if ever, rise to the stature of a constitutional violation.⁸⁶ At a minimum, without

⁷⁹October 11, 1996 Hearing at 101, 103 (testimony of Thomas Jipping) (“The judiciary is part of an overall governmental structure that the Framers of the Constitution and the Founders of the country created as a coequal branch of the federal government.”); December 13, 1996 Hearing at 43, 46-47 (testimony of John Walker) (“The judiciary’s place as a third coordinate, coequal, but separate branch of government was anchored, then, in Article III of the Constitution.”).

⁸⁰December 13, 1996 Hearing at 161, 172 (testimony of Daniel Meador) (“[T]here is probably a hard core of inherent judicial authority that is beyond legislative reach.”).

⁸¹December 13, 1996 Hearing at 161, 172 (testimony of Daniel Meador).

⁸²*See, e.g.,* Linda Mullenix, *Unconstitutional Rulemaking: the Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993) (arguing that the Civil Justice Reform Act is unconstitutional).

⁸³February 21, 1997 Hearing at 156, 157 (Testimony of Joseph Rodriguez).

⁸⁴*Id.* at 158-59.

⁸⁵December 13, 1996 Hearing at 171-72 (testimony of Daniel Meador). *See also*, Russell Wheeler, *The Emerging Judicial Branch: Luongo Lecture to the Historical Society of the Eastern District of Pennsylvania*, December 11, 1996.

⁸⁶October 11, 1996 Hearing at 33 (testimony of Stephen Burbank) (rejecting the argument that the Civil Justice Reform Act or congressional intercession in rulemaking violates the separation of powers, concluding that “you need not be concerned that the constitutional zone of independence will very often, if ever, be involved in discussions of the appropriate norms in that area.”).

well-developed case precedent, the constitutional limits of Congress' regulatory authority over the judiciary remain largely speculative.⁸⁷

Some witnesses nevertheless stressed what Professor Burbank characterized as the "need to . . . rationalize the relationship between Congress and the judiciary in making rules for procedure of the federal courts and for judicial administration,"⁸⁸ not as a matter of constitutional law, but as a matter of good government.⁸⁹ In the past several years, the political branches have taken a number of actions that arguably restrict the judiciary's institutional autonomy. Some label such actions ill-considered micromanagement of the third branch by the first; others consider it appropriate oversight of the courts.

The tension between oversight and micromanagement was described in the following terms:

From the judge's perspective . . . the challenge for the Congress is . . . to engage in oversight without micromanagement. From the congressional perspective, the challenge for the judiciary is to understand that not every disagreement is a threat to independence, that inquiry into how the judiciary spends its money is not a hostile act.⁹⁰

A representative of the Federal Judges Association offered the following distinction between legitimate congressional oversight

and micromanagement:

The question, I think, is really who should actually be managing the affairs of the judiciary in terms of making the appropriate decisions about how the judiciary should function, meet its caseload requirements, manage itself. And we think that as a general matter, the governing bodies of the judicial branch are in that position. Now Congress can and should exercise oversight. They should hold hearings. They should make sure that the money is being appropriately spent That's very different . . . I think, from . . . deciding . . . time frames for deciding particular cases, trying to determine . . . how fast a civil docket of a particular judge should move. That simply is . . . bad management to have it come from Washington.⁹¹

The spokesperson for the Judicial Conference suggested that there was no formula for determining when particular congressional actions cross the line separating oversight from micromanagement. Rather, he characterized micromanagement as a matter of "atmosphere that has been created that some judges perceive to be an intrusion on their work." He felt that this atmosphere that Congress has created is attributable less to particular intrusions viewed in isolation, than to their collective impact.⁹²

Congress...has an important constitutional role to play in regulating the judiciary. . . .

⁸⁷December 13, 1996 Hearing at 161, 172-73 (testimony of Daniel Meador) (observing that "I'm not quite sure what is in that core [of inherent judicial authority]" and that "I find it very difficult as a matter of Constitutional law to draw any line.").

⁸⁸October 11, 1996 Hearing at 33, 52 (testimony of Stephen Burbank).

⁸⁹Professor Meador explained the difference between "appropriate and inappropriate" congressional management of the courts, not as a matter of constitutional law, but as "a matter of policy, of wise administration of governmental affairs." December 13, 1996 Hearing at 161, 173 (testimony of Daniel Meador). Professor Katzmman characterized the difference between "proper congressional oversight. . . and micromanagement" as "a matter of common sense." *Id.* at 121, 138 (testimony of Robert Katzmman). Judge Walker, in turn, defined congressional micromanagement as a matter of "bad management" in which Congress does not appreciate when the judiciary is in a better position to make "appropriate decisions about how the judiciary should function." *Id.* at 43, 70-71 (testimony of John Walker).

⁹⁰December 13, 1996 Hearing at 121, 126 (testimony of Robert Katzmman).

⁹¹December 13, 1996 Hearing at 43, 70-71 (testimony of John Walker).

Not all witnesses saw a linkage between the so-called micromanagement problem and judicial independence. One former federal judge, for example, thought that “[m]icromanagement should be avoided and is a nuisance, but is not a serious threat to judicial independence.”⁹³ Another witness was loathe to distinguish between appropriate and inappropriate congressional management of the courts on judicial independence grounds, as long as Congress’ actions are constitutional. “[A]ppropriations or even establishing, creating, abolishing judgeships, reallocation of judicial resources, the kinds of things the Constitution gives Congress the authority to do,” can not legitimately be criticized as threats to judicial independence, he argued, because

[w]hat that would result in is that perfectly legitimate things that coordinate branches of government may legitimately do under the Constitution are then defined to be a threat to what another coordinate branch does, and that creates a kind of internal conflict that I don’t think makes any sense.⁹⁴

Another witness likewise found it “hard to understand exactly what [the micromanagement] problem is,” because Congress possesses the power and right to regulate the judiciary, and “as long as judges receive their constitutionally-required protections of life tenure, irreducible salary, and removal by impeachment, their independence is protected as a constitutional matter.”⁹⁵

1. Political Branch Control Over the Judiciary’s Financial Resources

The Commission received testimony and information from other sources on issues relating to the regulation of the judiciary’s financial resources and operations that have triggered disputes concerning the appropriate reach of political branch management of the courts.

a. Judicial Salaries

Several witnesses testified that Congress’ failure to increase judges’ salaries undercuts the judiciary’s institutional, if not decisional, independence. Federal judges have not received a salary increase since 1993, and Congress has made no provision for automatic cost-of-living adjustments. “There can be no doubt,” one federal judge argued, “that the reduction in purchasing power that results from inflation is a real pay cut.”⁹⁶ Regardless of whether the compensation clause “explicitly applies to cuts in real pay resulting from inflation,” he continued, “the principle of judicial independence that gave rise to the Compensation Clause is equally and forcefully applicable to pay reductions due to inflation.”⁹⁷

Witnesses argued that the impact of Congress’ failure to increase judicial salaries on judicial independence is potentially three-fold. First, and a bit ironically, witnesses made the same argument in support of automatic pay increases that James Madison made at the Constitutional Convention in opposition to any pay increases — namely, that putting the judiciary

⁹²February 21, 1997 Hearing at 156, 169-74 (testimony of Joseph Rodriguez) (attributing perceptions of micromanagement to the Grassley questionnaire, the federalization of state crimes and civil actions, mandatory minimum sentencing, the Speedy Trial Act and the Civil Justice Reform Act).

⁹³Prepared Statement of Charles Renfrew, February 21, 1997 at 4.

⁹⁴October 11, 1996 Hearing at 101, 108-09 (testimony of Thomas Jipping).

⁹⁵Prepared Statement of John Choon Yoo, February 21, 1997 at 6-7.

⁹⁶December 13, 1996 Hearing at 43, 59 (testimony of John Walker).

⁹⁷*Id.* at 56.

in the position of lobbying Congress for raises creates an unhealthy dependence of judges on legislators.⁹⁸ As one federal judge put it:

[I]t leads to the unseemly practice of judges having to implore Congress to restore fair compensation at the very same time that these judges are sitting in review of congressional enactments and interpreting legislation.⁹⁹

Another federal judge made the related point that forcing the judiciary to lobby Congress every time it needs a raise generates unnecessary friction between the branches:

If the problem of judicial pay is not fixed, judges will have to implore Congress to take the politically untenable position of voting for unpopular, huge, catch-up increases, an intolerable situation that inappropriately places a non-political judiciary in the center of a hostile public controversy.¹⁰⁰

Second, in the words of one federal judge, "reductions in real pay resulting from denial of these adjustments . . . affect the ability of the judiciary to attract the most qualified men and women to judicial office and keep them there."¹⁰¹ Another judge illus-

trated this point with reference to his own judicial district:

The pay structure is a problem. The middle level partners of law firms who often came onto the bench years ago are no longer interested. They can't afford it. We have the unprecedented situation in my city of five former federal judges either resigned or retired, practicing in the city of Chicago. That's an entirely new phenomenon in the federal bench.¹⁰²

Third, although the view was not unanimous, the observation was made that unless judicial salaries keep pace with inflation, there is danger that the future federal bench will be limited to the independently wealthy, since ethics requirements severely restrict a judge's outside income.¹⁰³

b. Appropriations

In some state systems, the courts have held it unconstitutional for the legislature to underfund the courts on the grounds that the judiciary's institutional independence is undermined when the legislature provides the courts with fewer resources than they need to function.¹⁰⁴ In the federal system, the issue has yet to arise. Some have argued that Congress' power to establish, and by

⁹⁸See Appendix A.

⁹⁹December 13, 1996 Hearing at 43, 56-57 (testimony of John Walker); see also, October 11, 1996 Hearing at 113, 126 (testimony of Andrew Coats) (discussing the deleterious impact on judicial independence of judges' "having to come to Congress every time and plead for a cost-of-living adjustment").

¹⁰⁰February 21, 1997 Hearing at 156, 162-63 (testimony of Joseph Rodriguez).

¹⁰¹December 13, 1996 Hearing at 43, 56-57 (testimony of John Walker); see also October 11, 1996 Hearing at 113, 115 (testimony of Andrew Coats) (viewing the failure to raise judicial salaries as "dangerous" because "we need to be able to attract and keep the best people we can find to come to the bench."); Henry Weinstein, *U.S. Judges Advised to Lobby Congress for a Boost in Salary*, *LOS ANGELES TIMES*, July 16, 1989, at A3; see also, letter from Judge A. Avant Edenfield to Harold Daniel, September 9, 1996 (stating that Congress' failure to maintain judicial salaries "will be disruptive of judicial independence and the quality of the federal judiciary").

¹⁰²February 21, 1997 Hearing at 25, 29 (testimony of Marvin Aspen).

¹⁰³*Talking Points on Judicial Compensation*, prepared by the Administrative Office of the U.S. Courts, Office of General Counsel, January 27, 1997 at 1 ("[I]t is entirely possible that those who would seek federal judgeships in the future will be independently wealthy, without any children to educate, or unable to find better paying jobs in the legal profession. This is especially likely to be the case in urban areas with high costs of living.").

¹⁰⁴FELIX STUMPF, *INHERENT POWERS OF COURTS* 49-50 (1994).

implication abolish, the lower federal courts deprives the federal judiciary of the argument that its inherent authority entitles it to minimum levels of funding.¹⁰⁵

One witness, however, testified that "[t]he necessary reliance by the judiciary on the political branches of government for its sustenance creates the potential for the weakening of the judiciary as an institution."¹⁰⁶ As Judge Richard Arnold recently wrote:

Essentially, the courts have no substantial money of their "own," barring admission fees from lawyers. We have to get money from somewhere if the judges are to be compensated, if the lights are going to turn on in the courtroom, if the doors are going to open and if the rent is going to be paid. We get money, of course, from Congress.¹⁰⁷

Two recent events illustrate the concerns of some federal judges over the potential threat that political branch control over the judiciary's budget poses to institutional independence.

The 1995-96 impasse between Congress and the President over the federal budget is one example. The political branches shut each other down for want of funds as negotiations stalled, and at one point, closure of the judicial branch likewise seemed imminent. Chief Justice Rehnquist interceded, arguing that the dispute giving rise to the impasse was between the first and second branches alone, and that to hold the third branch hostage pending resolution of that dispute would impair the judiciary's institutional independence. Congress and the President

acquiesced and separately approved the judiciary's appropriation so as to avoid a shut down of the third branch.¹⁰⁸ Testifying on behalf of the Judicial Conference, one federal judge pointed to the political branches' sensitivity to the budgetary needs of the judiciary during the shutdown as an example of the "good job" Congress usually does in its oversight of the courts.¹⁰⁹

Another witness, however, did not regard a budgetary shut-down as implicating judicial independence:

Like any bureaucracy, the federal judiciary may not enjoy having its . . . funding temporarily cut off during a budgetary shut down, but as long as judges receive their constitutionally-required protections of tenure, irreducible salary, and removal by impeachment, their independence is protected as a constitutional matter.¹¹⁰

Line-item veto legislation, which was recently signed in law, is another illustration. A witness testifying on behalf of the Federal Judges Association explained the problem:

[W]e are concerned that the recent line-item veto legislation could upset the delicate balance created by our Constitution. Under the new law, almost all the judiciary's appropriations are subject to line item veto by the President. Now, the Chief Judge. . . Gilbert S. Merritt, has testified before Congress in support of an exemption of the judiciary from the line-item veto. He said "[i]t requires

¹⁰⁵Jeffrey Jackson, *Judicial Independence, Adequate Court Funding and Inherent Judicial Power*, 52 MD .L. REV. 217, 226-27 (1993).

¹⁰⁶December 13, 1996 Hearing, at 43, 55 (testimony of John Walker).

¹⁰⁷Richard Arnold, *Money, or the Relations of the Judicial Branch With the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 19-20 (1996).

¹⁰⁸Frank Moray, *Rehnquist Lobbies for Court Funds*, WASHINGTON TIMES, January 1, 1996 at A1.

¹⁰⁹February 21, 1997 Hearing at 156, 157 (testimony of Joseph Rodriguez).

¹¹⁰Prepared Statement of John Choon Yoo, February 21, 1997 at 7.

little imagination to see how a threat to judicial independence could come from undue financial pressure by the executive branch."¹¹¹

A similar observation was made by another judge:

The Judiciary does not want our appropriation to be subject to the Line Item Veto [sic]. Why not? The answer is that the Executive Branch is the biggest litigant in our courts and we are uneasy about giving the President the power to reject a little piece of our budget.¹¹²

Yet another judge concurred that:

[T]here is something . . . problematic about the executive being in a position to make surgical deletions individualized from an overall budget than from having the Congress, in its aggregate authority, make decisions either to reduce or not augment . . . portions of the judicial budget.¹¹³

Nevertheless, this witness ultimately agreed with Professor Burbank that the line-item veto issue, as it affected the judiciary, was not one of constitutional dimension.¹¹⁴ They were likewise in agreement that if the President were to exercise the line-item veto "in a surgical way" to retaliate against the judiciary, "the President would be exposing himself or herself to very obvious criticism on that ground."¹¹⁵ Professor Burbank

therefore did not "share the bottom-line conclusion of the judiciary" that the line-item veto rendered the judiciary's budget appreciably more dependent upon the President.¹¹⁶

2. Congressional Control Over the Judiciary's Internal Administration

a. Legislative Oversight of Judicial Administration

Congress has become increasingly interested in how efficiently the judiciary utilizes its appropriated funds and assesses its resource needs. The resulting scrutiny has precipitated several episodes in which judicial independence concerns have been raised.

In December, 1995, Senator Charles Grassley, Chairman of the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts, announced that he would circulate a questionnaire to all federal judges, asking them how they spend their time on judicial activities, how they use support staff, and how much time they commit to extrajudicial activities.¹¹⁷ Federal judges, including Chief Justice Rehnquist, criticized the proposed questionnaire. The Chief Justice's 1995 year-end state of the judiciary message warned that "the subject matter of the questions and the detail required for answering them could amount to an unwarranted and ill-considered effort to micro-manage the work of the federal judiciary."¹¹⁸ Senator Grassley responded that "the very same judges who

Congress has become increasingly interested in how efficiently the judiciary utilizes its appropriated funds and assesses its resource needs.

¹¹¹December 13, 1996 Hearing at 43, 64-65 (testimony of John Walker); see also, Leo Rennert, *Clinton Signs Line-Item Veto*, ROCKY MOUNTAIN NEWS, April 10, 1996, at 2A.

¹¹²RICHARD ARNOLD, *supra* note 107.

¹¹³October 11, 1996 Hearing at 15, 65 (testimony of Louis Pollack); see also prepared statement of Erwin Chemerinsky, February 21, 1997, at 6 ("[T]here is need to consider the potential effects of the line item veto on judicial independence. There is the danger that a President could use this new power to threaten funding for the judiciary in response to unpopular rulings.").

¹¹⁴October 11, 1996 Hearing at 64-65 (testimony of Louis Pollack).

¹¹⁵*Id.* at 33, 64 (testimony of Stephen Burbank).

¹¹⁶*Id.*

¹¹⁷Neil Lewis, "Survey to Press U.S. Judges On Caseload and Expenses," N. Y. TIMES, December 17, 1995.

¹¹⁸William Rehnquist, 1995 Year-End Report on the Federal Judiciary 3 (January 1, 1996).

maybe think I shouldn't be questioning them applaud when I find waste in the Pentagon,"¹¹⁹ and distributed the questionnaires as scheduled.¹²⁰

Opinions of the witnesses were divided as to whether the Grassley questionnaire exemplified micromanagement. A representative of the Judicial Conference observed that "certain questions . . . were seeking such detail from the judges . . . that it would appear to be intruding into the [judicial] function and to that extent could be micromanagement."¹²¹ Another witness acknowledged that "some judges would say that there were aspects of the Grassley questionnaire that point to [micromanagement]," but added that the Director of the Administrative Office of the United States Courts "in the end said that the questionnaire was constructive."¹²² In contrast, another witness dismissed the micromanagement concern altogether: "If Congress wants to conduct a survey on judicial workload, that is its right, because Congress must make the ultimate budgetary and resource decisions concerning how large a judiciary the nation can afford."¹²³

In a recent op. ed. column, Judge William W Schwarzer summarized several other recent developments concerning Congress' role in overseeing the judiciary's allocation of resources.¹²⁴ First, he quoted from a congressional committee report

directing the Judicial Conference "to initiate an in-depth review of ways to make the courts more efficient and less costly," which was to be "performed by an independent, nonpartisan, professional organization outside the judiciary, but with the complete cooperation and support of the judiciary."¹²⁵ Second, Judge Schwarzer noted that "the Senate has passed an amendment that would prohibit the circuits from holding their judicial conferences outside their geographical boundaries, make the conferences optional, and limit the amount of funds each circuit can spend on its conference to \$100,000."¹²⁶ Third, he referred to one Senator's proposal that an inspector general be assigned to the Administrative Office.¹²⁷ Finally, he pointed to hearings conducted by another Senator to determine whether there are judgeships that could be eliminated.¹²⁸

Judge Schwarzer wrote that these developments "should energize the judiciary to examine its governance structure" to better enable it to "preserve and [protect] the essential elements of judicial independence, against both congressional intrusion and unwise measures of governance,"¹²⁹ a point that he reiterated before the Commission.¹³⁰

b. Judicial Discipline

In 1980, Congress passed the Judicial Conduct and Disability Act, thereby impos-

¹¹⁹Neil Lewis, *supra* note 117. It should be noted that Senator Grassley's remarks predated Chief Justice Rehnquist's Year-End Report, and were offered in response to other federal judges who raised similar concerns.

¹²⁰Judicial Survey, January, 1996.

¹²¹February 21, 1997 Hearing at 156, 170 (testimony of Joseph Rodriguez).

¹²²December 13, 1996 Hearing at 121, 139 (testimony of Robert Katzmann).

¹²³Prepared statement of Professor John Choon Yoo, February 21, 1997 at 7.

¹²⁴William W Schwarzer, *Court Administration*, THE RECORDER, December 22, 1995, at 6.

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰February 21, 1997 Hearing at 5, (testimony of William Schwarzer) ("I want to suggest to you that the criticism and questioning that we hear ought not to be so readily written off. Instead, I believe we might well view it not as an occasion for circling the wagons but as a challenge that deserves to be taken seriously and calls for a thoughtful response grounded [in] searching self-examination of the institution.").

ing a system of self-discipline on the federal courts.¹³¹ The Act, as passed, embodied several elements to protect judicial independence: a disciplinary action cannot be brought against a judge because of disagreement with the merits of his or her decision; removal from office is excluded as an available sanction, and administration of the procedure is left within the judicial branch, authority for which is grounded in the administrative power of each judicial council to make all necessary orders for the effective administration of justice within the circuit. Nonetheless, at the time, many judges viewed the effort as an unwarranted and possibly unconstitutional encroachment upon the institutional independence of the judiciary.¹³²

The 1980 Act permits any person to file a complaint alleging that a federal judge (including bankruptcy and magistrate judges, but not Supreme Court justices who are exempt from coverage) "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or...is unable to discharge all the duties of office by reason of mental or physical disability." Since 1990, the Act has also let a chief judge of a circuit dispense with a formal complaint and "identify a complaint on the basis of available information."

After considering a complaint, the chief judge may, by written order stating the reasons, dismiss the complaint if it is frivolous, "directly related to the merits of a decision or procedural ruling," not in conformity with the filing requirements of the Act, or corrective action has already been taken.

If a chief judge does not dismiss a complaint, he or she must appoint a special committee to investigate the complaint and file a

written report which contains both the findings and recommendations with the circuit judicial council. The judicial council may conduct an investigation of its own and is required to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts." The Act specifies some of the actions a council may take, prohibiting, however, the removal of a judge from office. Actions include certifying disability of a judge, requesting that the judge retire, ordering that no more cases be assigned to that judge for a temporary time, and censuring or reprimanding such judge privately or publicly. The judicial council may also dismiss a complaint or refer it to the Judicial Conference for resolution. If the council concludes that the aggrieved behavior of a judge may constitute one or more grounds for impeachment, the case is automatically referred to the Judicial Conference for final action.

The Act permits a complainant or judge aggrieved by the order to petition the judicial council for review and also permits a petition for review to the Judicial Conference.

In the interest of public accountability, all council orders implementing action following the report of a special committee are to be made public and generally accompanied by written reasons. Implementation rules regarding confidentiality require that the name of the judge not be disclosed without his or her consent. The Administrative Office of the U.S. Courts is required to gather yearly statistics regarding the number of complaints filed, their general nature and their disposition.

In 1990, Congress created the National Commission on Judicial Discipline and Removal to investigate and study problems

Opinions of the witnesses were divided as to whether the Grassley questionnaire exemplified micro-management.

¹³¹Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §372(c)).

¹³²See, e.g. Irving Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980). A congressionally imposed system of judicial discipline could conceivably affect decisional independence as well, to the extent that judges were subjected to discipline for the decisions they made in particular cases. The discipline statute is quite clear, however, that complaints concerning judicial conduct are to be dismissed if they are "directly related to the merits of a decision or procedural ruling." 28 U.S.C. §372(c)(3)(A)(ii).

and issues related to the discipline and removal from office of life-tenured federal judges and to evaluate current and proposed mechanisms for disciplining and removing federal judges. As part of its mission, the Commission, which was chaired by Robert W. Kastenmeier, who likewise serves on our Commission, undertook a rigorous study of the Act. In August 1993, the National Commission submitted its final report with recommendations to Congress, the Chief Justice and the President.¹³³

In its final report, the National Commission stated that "the primary objection" to the 1980 Act "was that the discipline mechanisms. . . were inconsistent with the principle that federal judges are independent individually as well as collectively."¹³⁴ The National Commission rejected this argument:

[T]he Act is within Congress' authority to make laws that will carry into execution the powers of the other two branches. The fact that individual judges enjoy life tenure and protected compensation does not, in the Commission's view, imply that they must be free from all internal sanctions, provided those sanctions do not threaten tenure and compensation. The Commission believes that a power in the judiciary to deal with certain kinds of misconduct furthers both the smooth functioning of the judicial branch and the broad goal of judicial independence.¹³⁵

Since its enactment, Congress has amended the discipline statute twice. A

House Judiciary subcommittee recently held hearings on court reform legislation which among other things, would amend the discipline statute to require that a complaint against a judge in one circuit be referred to the chief judge of a different circuit for investigation and resolution."¹³⁶

3. Congressional Control Over Court Practice and Procedure

In recent years, Congress has taken an increasing interest in court practice and procedure. On several occasions, congressional forays into such matters have led to debates over the impact of congressional intercession on judicial independence.

a. Procedural Rulemaking

From 1934, when the Rules Enabling Act was passed, to 1973, the Supreme Court promulgated procedural rules with literally no congressional intervention. Since then, Congress has become involved in procedural rulemaking on an increasingly regular basis, prompting the charge that Congress is interfering with the judiciary's independence.¹³⁷

b. The Civil Justice Reform Act of 1990

The Civil Justice Reform Act, as originally introduced in the Senate, would have required all district court judges to implement a model, multi-component case management plan in all civil actions. The Judicial Conference opposed the Act, on the grounds that it would micromanage the courts and threaten the judiciary's institutional independence.¹³⁸ As ultimately enacted, the district courts were directed to develop their own case management plans but were not

¹³³REPORT OF THE NATIONAL COMMISSION ON JUDICIAL INDEPENDENCE AND REMOVAL (1993).

¹³⁴*Id.* at 14.

¹³⁵*Id.*

¹³⁶H.R. 1252, 104th Cong., 1st Sess. § 4 (1997).

¹³⁷Linda Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER LAW REVIEW 733 (1995).

¹³⁸*The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings Before the Comm. on the Judiciary of the United States Senate*, 101st Cong., 2d Sess. 221 (statement of Judge Aubrey Robinson).

required to adopt the model plan, which, one witness concluded, "came out much better than some of the judges had feared."¹³⁹ Even so, one judge alluded to the Civil Justice Reform Act as an example of congressional micromanagement. He argued that the judicial branch, not Congress, "should actually be managing the affairs of the judiciary in terms of how the judiciary should function, meet its caseload requirements, manage itself," and that it exemplifies "bad management" for Congress to set "time frames for deciding particular cases, trying to determine. . . how fast a civil docket of a particular judge should move."¹⁴⁰ Another judge added that the problems were compounded by the apparent collision between the Civil Justice Reform Act and the Speedy Trial Act, "as you impose deadlines on civil case management and yet you impose deadlines on criminal speedy trial."¹⁴¹ Other judges likewise remain troubled that the Civil Justice Reform Act, as passed, compromised the judiciary's institutional independence."¹⁴²

*"...that
individual
judges enjoy life
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imply that they
must be free
from all
internal
sanctions...."*

¹³⁹December 13, 1996 Hearing at 121, 140 (testimony of Robert Katzmman).

¹⁴⁰December 13, 1996 Hearing at 43, 70- 71 (testimony of John Walker).

¹⁴¹February 21, 1997 Hearing at 156, 174 (testimony of Joseph Rodriguez).

¹⁴²Letter from Judge B. Avant Edenfield to Harold Daniel, September 9, 1996 (identifying the CJRA as an example of congressional micromanagement that impinges on judicial independence).

State Judicial Independence: A Review of Recent Issues and Arguments

V.

The focus of this study is on judicial independence in the federal courts; limited time and resources have not allowed a detailed examination of the intrusions, both real and apparent, on the independence of the state courts. Nevertheless, since 97% of all litigation occurs in the state courts, the Commission felt it was essential to survey the major issues affecting state judicial independence, if only briefly.

A. ISSUES SHARED BETWEEN THE STATE AND FEDERAL SYSTEMS

Witnesses testifying before the Commission on matters of state judicial independence raised some of the same concerns as observers of federal judicial independence:¹⁴³

■ *Judicial criticism and its relationship to decisional independence.*

Much of the harshest recent criticism of judges has been directed at state jurists for issuing opinions at odds with the majority will in a variety of contexts. A California trial judge reported on the prevalence of public criticism of California judges, and discussed a program initiated by the California Judges Association to respond to such criticism.¹⁴⁴

■ *Legislative control over the judiciary's financial resources and its relationship to institutional and decisional independence.*

A representative of the Conference of Chief Justices characterized "the ability of legislatures to . . . determine our budgets" as "one of the greatest threats to judicial independence. . . at the state level."¹⁴⁵ Whereas witnesses suggested the possibility that the federal legislature could punish the judiciary for unpopular decisions by withholding salary increases or cutting the judiciary's budget,¹⁴⁶ this witness

¹⁴³To the extent that the recommendations of witnesses testifying on state judicial independence apply with equal force to the federal system, such recommendations are cross-referenced in the Commission's discussion of federal judicial independence.

¹⁴⁴February 21, 1997 Hearing at 128, 130-32 (testimony of Albert Dover).

¹⁴⁵October 11, 1996 Hearing at 146, 161 (testimony of Thomas Moyer). *See also*, December 13, 1996 Hearing at 88, 95-96 (testimony of Chief Justice Shirley Abrahamson) ("In more recent years, doctrines of separation of powers and inherent powers have focused on the issue of funding for the courts. And the bottom line, of course, is that the courts are to operate effectively for the people and they must be adequately funded.").

¹⁴⁶December 13, 1996 Hearing at 78-79 (testimony of John Walker) (responding to the question "Can you cite any case in which Congress has been concerned about the results of judicial decisions and that has affected its budgetary responsibilities?" by saying "No, I can't, fortunately, and I hope never to be able to cite one [but] one doesn't have to necessarily wait for a crisis or a problem in order to come forward with thoughts and statements designed to hopefully never have one occur.").

testified that some state legislatures had in fact done so.¹⁴⁷

B. JUDICIAL ELECTIONS GENERALLY

In addition to areas of overlap, there were a number of issues unique to state judicial independence that witnesses identified relating to judicial selection and retention. Unlike federal judges, the vast majority of state systems provide for the selection or retention of judges through some form of popular election.¹⁴⁸ Eight states select judges through partisan elections.¹⁴⁹ Thirteen do so through nonpartisan elections.¹⁵⁰ Of the remaining twenty-nine states, initial appointments are made by the governor or legislature in six states,¹⁵¹ and by some form of merit selection commission in twenty-three states,¹⁵² but in seventeen of those twenty-nine, the judges stand for reelection or retention election.¹⁵³ In total, then, state judges are subject to election, reelection or retention election in thirty-eight states.

Some remain confident that the elective process is not an inherent threat to independence. Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court, for example, testified that

decisional independence . . . arises out of the judge's training, oath of office, and social and cultural conditioning In sum, I believe that judicial independence is a matter of the character of the individual judge. . . and that the quality of the individual, not necessarily the selection process, determines the independence.¹⁵⁴

A participant at a recent conference on judicial independence made a similar observation:

A judge elected under the most outrageous electoral system can still be truly independent if he or she can make a decision that he or she thinks is right and be willing to say, "if I get defeated for it, so be it because I became a judge with an oath of office to do precisely that."¹⁵⁵

¹⁴⁷October 11, 1996 Hearing at 146, 161 (testimony of Thomas Moyer) ("[A] legislature decides that it is not popular to provide increased compensation for judges [it] does not like — as we saw in California. . . a very difficult decision of the supreme court, and the supreme court and the whole system suffered fairly dramatically from that decision. That is a real threat to the independence of the judiciary, in my view.").

¹⁴⁸JUDICIAL SELECTION IN THE UNITED STATES (1996 supp.) The data that follows are derived from this document.

¹⁴⁹Alabama, Arkansas, Illinois, Louisiana, North Carolina, Pennsylvania, Texas, and West Virginia.

¹⁵⁰Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

¹⁵¹California, Maine, New Hampshire, New Jersey, South Carolina, and Virginia.

¹⁵²Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming.

¹⁵³Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah and Wyoming. In the remaining twelve states, judges are either appointed for life (Rhode Island), until the age of 70 (Massachusetts and New Hampshire), or are reappointed periodically by one or both political branches (Maine, New Jersey, South Carolina, Vermont and Virginia) or by a merit selection commission, sometimes in combination with one or both political branches (Connecticut, Delaware, Hawaii, and New York). New York is a hybrid, in which trial judges are selected in partisan elections and reelections, while appellate judges are selected by a merit selection commission and reappointed by the governor following merit selection commission review.

¹⁵⁴December 13, 1996 Hearing at 88, 101 (testimony of Shirley Abrahamson).

¹⁵⁵*What is Judicial Independence? Views From the Public, the Press, the Profession, and the Politicians*, 80 JUDICATURE 73, 81 (September-October 1996); see also, February 21, 1997 Hearing at 128, 135 (testimony of Albert Dover) ("[L]ife tenure may instill confidence in judges but . . . it is the character and integrity of the judge that instills confidence in the people. . . [T]he people believe that irrespective of their lack of job security, a judge who took an oath to follow the law will do so no matter the prevailing popular opinion.").

Others, however, are of the view that an elected, independent judge is on some level a contradiction in terms.¹⁵⁶ Judge V. Robert Payant, President of the National Judicial College, noted that judges from other countries attending National Judicial College programs on judicial independence are "shock[ed] when they get to the United States and are talking . . . to state judges, because their image . . . has been primarily based on the federal system."¹⁵⁷ Judge Payant reported that "our foreign visitors are convinced with their lifetime tenure they have in Russia . . ., for example . . ., they have a much better chance at judicial independence than the poor American judges who are facing [an elective] system."¹⁵⁸ Such concerns have been fueled by recent reports of state judges losing reelection bids on the basis of isolated, unpopular decisions.¹⁵⁹

As one witness explained:

The system of electing judges poses other threats to judicial independence as judges are voted out of office for controversial rulings. A key issue is whether judges can be independent if their rulings can be the basis of a . . . negative vote at the polls.¹⁶⁰

C. CAMPAIGN FINANCE

A number of witnesses were concerned that raising money to finance judicial elections posed an apparent, if not a real threat to judicial independence. Chief Justice Thomas

Moyer of the Ohio Supreme Court explained the problem:

One of the defects in the state systems . . . is that for those of us who live in states where the judges are still elected in regular elections, there is the perception — no matter how . . . earnestly we assure the people that funds coming into our campaign don't influence our decisions, we're talking against human nature. I mean, if you can identify an interest group . . . that has contributed "x" number of dollars to a judicial candidate, the presumption by most people is that has some influence on the judge's conduct.¹⁶¹

The Chief Justice shared the view of the American Judicature Society that when judges are selected by a commission on the basis of merit, rather than in contested elections, the problems associated with campaign finance are lessened.¹⁶² The American Judicature Society's witness testified that most merit selection systems subject judges to retention elections, but in such elections the judge runs against his record and is otherwise unopposed, thereby reducing the need to raise campaign funds.¹⁶³ On the other hand, a Florida legislator participating in an American Judicature Society panel on judicial independence observed that in Florida, the merit selection retention election "has been as costly, more costly in defending incumbents than an actual challenge. My

A number of witnesses were concerned that raising money to finance judicial elections posed . . . a threat to independence.

¹⁵⁶Prepared statement of V. Robert Payant, February 21, 1997, at 3 (summarizing the conclusions of judges attending symposia on judicial selection, who "are not convinced that the judges from Texas who are elected for a four year term in partisan elections can be as independent as the Massachusetts or New Hampshire or federal district judges who are appointed for life," and recommending that states "amend their method of judicial selection and move to either a system comparable to the federal system or some modification of the Missouri merit plan.").

¹⁵⁷February 21, 1997 Hearing at 116, 120 (testimony of V. Robert Payant).

¹⁵⁸*Id.* at 121.

¹⁵⁹John Gibeaut, *Taking Aim*, 82 A.B.A.J. 50, November, 1996.

¹⁶⁰Prepared Statement of Erwin Chemerinsky, February 21, 1997.

¹⁶¹October 11, 1996 Hearing at 146, 163 (testimony of Thomas Moyer).

¹⁶²*Id.* at 163 (advocating merit selection as an appropriate remedy for campaign finance problems associated with elections).

¹⁶³December 13, 1996 Hearing at 109, 119 (testimony of John Domino).

law firm has probably contributed more to retain the justices that have been challenged by abortion opponents and other groups than anything else."¹⁶⁴

D. REACTIONS FROM BAR LEADERS

In an effort to gather more information concerning state judicial independence, the Commission circulated a list of six questions to state and local bar presidents and executive directors in all states and territories. A total of 245 bar leaders were contacted. Ninety three responded and supplied the following information:

- Over two-thirds of those responding perceived a major or a minor threat to decision-making independence in their state.
- Those who perceived such a threat thought that four factors, in descending order of importance, contributed to that threat: 1) judicial criticism is being eroded by excessive criticism of judges; 2) judicial reelection is too politicized; 3) judicial selection is too politicized; and 4) judges are too dependent on campaign contributions.
- Almost two-thirds perceived a major or a minor threat to institutional independence in their state. For those perceiving such a threat, the primary contributing factor was that the judiciary has insufficient control over the size of its budget.
- A majority of those responding to our inquiry believed that judges were sufficiently accountable in their state, although a significant minority

thought the judiciary was not accountable enough. The two most important factors contributing to the assessment of those who thought the judiciary was insufficiently accountable were 1) the available means of judicial discipline are ineffective; and 2) there is no effective means to hold judges accountable for decision-making delay.¹⁶⁵

A review of the reactions from bar leaders on a state by state basis revealed that

- All respondents from twenty-four states perceived a major or minor threat to decisional independence; all respondents from eleven states perceived no such threat; respondents in an additional nine states were divided in their views; and no response was received from the remaining states.
- All respondents from seventeen states perceived a major or a minor threat to institutional independence; all respondents from twelve states perceived no threat; respondents in fifteen states were divided; and no responses were received from the remaining states.
- All respondents in thirteen states agreed that the judiciary was either effectively unaccountable or not accountable enough; all respondents in eighteen states reported that the judiciary was sufficiently accountable; respondents in thirteen states were divided; and no responses were received from the remainder.

It is important to appreciate the extreme limitations of the information gathered from bar leaders. Although bar leaders are

¹⁶⁴What is Judicial Independence? *supra* note 155 (statement of Kenneth C. Jenne II).

¹⁶⁵Other important factors contributing to a perception of lack of accountability, although not focused on by these respondents, are reported instances of perceived or actual judicial bias on the grounds of race, gender or ethnicity. *See infra* note 196.

uniquely positioned to report on the state of judicial independence in their respective jurisdictions, their opinions may not be shared by rank-and-file members of the bar, let alone by judges. Indeed, given that fewer than a majority of those contacted responded to our inquiries, the results may not accurately reflect the views of a significant number of bar leaders. The results nevertheless provide valuable information that suggests the presence of issues warranting further exploration.

Findings, Conclusions and Recommendations

VI.

A. THE GENERAL STATE OF FEDERAL JUDICIAL INDEPENDENCE

1. Maintaining the Appropriate Balance Between Independence and Accountability is of Critical Importance to Our Democracy. Current Mechanisms for Promoting Accountability and Preserving Independence are Essentially Sound; and Efforts to Modify Them are Subjects of Concern.

The preceding sections of this Report, which summarize issues brought to the Commission's attention, raise a number of concerns about the current state of judicial independence and accountability. Some of these concerns are legitimate, serious, and deserving of prompt attention. Notwithstanding these concerns, which are addressed below, the Commission finds that the state of judicial independence and accountability is essentially sound.

Judicial independence has been characterized as "perhaps the most essential characteristic of a free society"¹⁶⁶ for good reason. A federal judge must first be independent enough to protect the freedoms of the people from the excesses of the executive branch. As one commentator has observed,

Arbitrariness is held back when independent judges stand between the executive and the application of legal sanctions such as seizure of property, fines, or imprisonment.¹⁶⁷

A judge can be counted upon to curb the executive branch in this way, however, only if he is not beholden to that branch for his livelihood.

Second, a federal judge must be independent enough to protect the people from the excesses of the legislative branch. A judge must be able to say what the law is, and, when necessary, "to declare all acts contrary to the manifest tenor of the constitution void."¹⁶⁸ Once again, however, the power of judicial review — like the power to rein in the president — would be meaningless if judges were so dependent on the legislature as to deprive courts of the capacity to exercise independent judgment.

¹⁶⁶Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 121 (1970).

¹⁶⁷Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. OF DAYTON L. REV. 566, 567-68 (1996).

¹⁶⁸THE FEDERALIST, No. 78 (Alexander Hamilton).

Third, a federal judge must be independent enough to protect the people from the temporary whims of the majority when they are at odds with the Constitution. Since a judge is under an obligation to decide cases according to the law as written, even when the consequences do not sit well with the public, he or she must be prepared to invalidate laws that run afoul of the Constitution, regardless of how popular those laws may be. As one of the great constitutional historians and a former Supreme Court Justice observed:

It is in vain, that we insert bills of rights in our constitutions as checks upon legislative power unless there be firmness in the courts, in the hour of trial, to resist fashionable opinions of the day.¹⁶⁹

In a larger sense, however, a federal judge is not independent of the people he serves. The Constitution is the charter of "We the People." In that charter, we have preserved certain fundamental rights for all Americans, and have delegated to the federal courts the responsibility to protect those rights against attacks from temporary majorities that may — by statute or otherwise — seek short-term gain at the expense of the long-term good. If the majority view embodied in laws declared unconstitutional by the courts is sustained over time, a constitutional amendment will provide the remedy.

After undertaking a wide-ranging review of federal judicial independence in operation, the Commission concludes that judicial independence continues to serve the important ends that our forefathers envisioned. Without denying its faults, our federal judges administer impartial justice of unparalleled quality and remain ready, willing and able to

exercise an independent check on the excesses of the political branches.

In focusing attention on the difficulties that we face in the administration of our justice system, it is important to keep our problems in perspective. In a recent paper presented on the administration of justice in the Americas, the author found that "[j]udicial independence remains threatened by acts against or the censure or removal of judges for political reasons," which "have been reported in many member countries over several years," and cited examples from Argentina, Chile, El Salvador, Colombia, Nicaragua, Haiti and Panama.¹⁷⁰ The cases of two Chilean judges are illustrative. In one case, a criminal court judge was suspended at half salary for publicizing torture practices of the state security police; in another, an appellate judge was suspended and later dismissed after refusing to close a case against military officers implicated in kidnappings and disappearances.¹⁷¹

Our founders took steps to guarantee the independence of the federal judiciary to prevent events like these from occurring in the United States. The longevity and continuing vitality of our Constitution is attributable in significant measure to an independent judiciary preserved by two simple clauses, providing for judicial tenure during good behavior and a compensation that may not be diminished.

**Recommendation:
Efforts to amend the
Constitution to interfere with
the protections for judicial
independence, as set forth in
Article III, Section 1, should be
opposed.**

Judicial independence is not an end in itself but is a means to promote impartial

¹⁶⁹JOSEPH STORY, MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 229 (William W. Story ed. 1852).

¹⁷⁰Jonathan T. Fried, *Improving the Administration of Justice in the Americas: Report on Protection and Guarantees for Judges and Lawyers in the Exercise of Their Functions*, Address before the Inter-American Juridical Committee (February 13, 1995) at 32.

¹⁷¹*Id.*

decision-making and to preserve the supreme law of the land, as embodied in our Constitution, against encroachments from Congress, the President and majority whim. Once judicial independence is understood as a means to these ends, it becomes clear that independence requires accountability — otherwise, an unaccountable judge would be free to disregard the ends that independence is supposed to serve.

It is thus consistent with judicial independence that the Constitution includes a number of provisions to promote judicial accountability. It delegates to the political branches the powers to nominate and confirm judges; to determine the judiciary's budget; to regulate the courts' jurisdiction; to establish the lower courts, and by implication, to regulate their practice, procedure, and administration; and to impeach and remove judges for treason, bribery and other high crimes and misdemeanors. In addition, the Constitution empowers the Supreme Court to correct judicial error through the exercise of appellate jurisdiction.

These mechanisms for promoting judicial accountability, like the mechanisms for preserving judicial independence, remain essentially sound and are able to serve their purpose without constitutional modification.

Recommendation:

Judicial accountability is an indispensable counterbalance to judicial independence. The present mechanisms to provide accountability are essentially sound. Efforts to amend the Constitution to alter these mechanisms should be opposed.

Despite the theoretical compatibility of judicial independence and judicial accountability, there is a tension between the two that Chief Justice Rehnquist rightly calls a paradox. We have a judiciary that is, on one

level, independent of the political branches; yet we also have a judiciary that is dependent on the political branches for survival, since the political branches authorize court appropriations, appoint judges, and decide when judges have committed impeachable offenses. This inevitable tension between the branches, generated by the imperfect compatibility of independence and accountability, gives rise to an issue at the forefront of the contemporary debate: not whether judges should be independent, but rather, what the nature and extent of that independence should be. That the issue may be intractable, and interbranch friction inevitable, is not surprising. To the contrary, the uneasy balance between independence and accountability is typical of the tensions generated by the system of checks and balances that define our constitutional structure. Such tensions — if maintained within manageable limits — are not so much a cause for concern as a sign that the Constitution, as contemplated by the framers, is functioning as intended.

The fact that some interbranch friction is inevitable does not mean that unnecessary friction is healthy. The Constitution empowers Congress and the judiciary to keep each other in check, by extreme means if necessary: the courts may declare congressional action unconstitutional, and Congress may impeach and remove judicial officers or slash the courts' budget. While the departments of government are thus equipped with the weapons needed to wage a full-scale, interbranch war, excessive resort to such weapons is symptomatic not of a government in good repair, but of one in a perpetual state of crisis.

The key to managing interbranch tension, and maintaining the essentially sound state of judicial independence and accountability in a system of separated powers, is mutual restraint. We concur in the sound observation of Dean Peter Shane of the University of Pittsburgh School of Law that "the ultimate truth of the separation of

Without denying its faults, our federal judges administer impartial justice of unparalleled quality.

powers" is that "its implementation requires statecraft, a spirit of restraint and common purpose." He elaborated by stating:

The success of any government under a separation of powers system depends upon each branch refraining from pressing its powers to the utmost. That's why... despite a great many proposals to do so, Congress has virtually never tinkered with federal court jurisdiction to limit the courts' capacity to decide delicate constitutional issues. It is why the New Deal Congress refrained from court-packing and why federal courts themselves have developed prudential rules of justiciability. It is why the federal courts have never issued an injunction directly against the President, and why President Eisenhower sent troops to enforce a desegregation order, even though he may have disagreed with it.¹⁷²

2. Several Recent Events Pose a Potential Threat to Federal Judicial Independence

In the recent past, there have been a number of departures from the "spirit of restraint" that should dominate the interbranch relationship. These departures have given rise to three potentially serious problems.

First, individual judges have been subjected to demagogic attacks and threats of impeachment from representatives of both political branches in both political parties. In the course of such criticism, accusations of "judicial activism" and "soft on crime" have been wielded as political weapons against judges who have overturned statutes and initiatives, or made rulings in favor of crimi-

nal defendants on constitutional grounds. These developments have a potentially deleterious effect on the courts' decision-making independence.

Second, the cooperative, mutually deferential relationship between the federal courts and Congress on matters of statutory reform affecting the judiciary has become increasingly strained. Congress has shown the judiciary less deference than in the past, in the course of overseeing and reforming the courts' jurisdiction, practice, procedure, administration, and budget. Judges, on the other hand, have not always responded constructively to such initiatives, sometimes accusing Congress of "micromanaging" the courts or of threatening judicial independence. That, in turn, has served only to deepen Congress' resolve to look at the courts even more closely, which may ultimately inure to the detriment of the courts' institutional independence.

The third problem is related to the first two: if Congress and the courts do not cooperate in a constructive and restrained manner, public confidence in the judiciary will be adversely affected. When judges are publicly accused of committing impeachable offenses or engaging in illegitimate criminal coddling or "activist" decision-making, it diminishes public faith in the judicial system as a whole. Although targeted, rational criticism can result in improvements, the increasingly contentious relationship between courts and Congress and the atmosphere of skepticism that has begun to work its way into congressional oversight of the judiciary, manifests shrinking confidence in the judiciary's capacity or willingness to regulate itself, and further fuels public disenchantment with the courts.

¹⁷²Peter Shane, unpublished, undated, untitled paper presented to the Pennsylvania Bar Association (on file with the ABA). See also, ROBERT KATZMANN, *COURTS AND CONGRESS 1* (1997) (describing the "constructive tension" among the branches as envisioned by the founders, in which "[n]o branch was to encroach upon the prerogatives of the others, yet in some sense each was dependent upon the others for its sustenance and vitality." Good governance, he concluded, "is premised on each institution's respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity.").

Public support for the judicial system is currently at its lowest point in recent memory. If confidence in the courts is not restored, real threats to judicial independence are sure to follow. In a representative democracy, the judiciary will remain independent only as long as the people trust it to be so. When the public loses faith in its judges, threats to judicial independence, in the form of amendments to Article III of the Constitution, are a logical next step.

B. FINDINGS, CONCLUSIONS AND RECOMMENDATIONS ADDRESSING FEDERAL JUDICIAL INDEPENDENCE PROBLEMS

In light of the three major concerns identified in the preceding section, the Commission makes a number of specific findings, conclusions and recommendations to address these and related issues.

1. Issues Affecting the Courts' Decision-Making Independence

a. Judicial Criticism

Robust criticism of judicial decisions is fully protected by the First Amendment to the United States Constitution and is indispensable to the well-being of a democracy.

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the

bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.¹⁷³

Throughout our history, judges have been criticized — often-times savagely — for decisions they have made in individual cases, and the same is true today. As long as the courts continue to serve as the stage for contentious battles over such emotionally charged issues as religion, abortion, drugs and crime, judges must expect to be criticized and criticized harshly for the decisions they make. Moreover, such criticism will inevitably be pervasive in a society such as ours, in which the electronic media disseminate critical commentary instantaneously to a world wide audience, via a staggering number of network, cable and satellite stations.

Tenure during good behavior, a compensation that can not be diminished, and a thick skin are ordinarily all that federal judges require to weather most criticism. As Judge Guido Calabresi is reported to have said, the proper response of a federal judge subjected to criticism is "absolutely nothing; silence is the price of life tenure."¹⁷⁴ There are, however, situations in which additional concerns arise.

1) Threats of Impeachment and Removal

There is a difference between intemperate criticism of a judge for making a wrong-headed decision, and a threat by a member of Congress or the President to seek the judge's removal for that decision. The latter is a political threat that the judge's job will be endangered if the case is not decided "favorably." The message is even more pointed when delivered while the case in question is pending, before the judge has made a final ruling. Such a message is calculated to

...there have been a number of departures from the "spirit of restraint" that should dominate the interbranch relationship.

¹⁷³Bridges v. State of California, 314 U.S. 190, 197. Opinion by Justice Hugo Black. (1941).

¹⁷⁴Michael Daly Hawkins, *Dining With the Dogs: Reflections on the Criticism of Judges*, 57 OHIO ST. L. J. 1353, 1354 (1996).

interfere with the decision-making independence of the judge in question and is objectionable on that basis. Neither the text of the Constitution, nor the intent of the framers, nor two hundred years of precedent, support the view that it is appropriate to impeach and remove judges solely on the basis of their constructions or misconstructions of the law in isolated cases.

This point was vigorously affirmed by the House Judiciary Committee a decade ago. A three-judge panel of the United States Court of Appeals for the Eleventh Circuit had ordered a new trial for three defendants in a multiple murder case, on the grounds that pretrial publicity deprived defendants of their right to a fair trial.¹⁷⁵ The decision sparked public outrage and culminated in a grassroots petition of over 100,000 signatures calling for the impeachment of the three judges.¹⁷⁶ The House Judiciary Committee's Subcommittee on Courts investigated the incident and issued a report in September, 1986, which concluded that

[a] judicial decision (right or wrong), standing alone, cannot rise to the level of a 'high crime or misdemeanor.' If this was otherwise, the impeachment remedy would become merely another avenue for judicial review: a sort of legislative referendum on the quality of judicial decision-making. To the contrary, impeachment is a constitutional last step and an extraordinary response to that.¹⁷⁷

The interbranch friction that these episodes generate is unnecessary, and undermines public confidence in the judiciary. It is unnecessary because there is a more routine, more efficient, and considerably less confrontational way to remedy misconstructions of the law, that has no impact on judicial independence — judicial review through the appellate process. There is no need to begin loading what James Bryce called the "one-hundred ton gun" of impeachment in anticipation of a multi-year battle to remove a district judge for enjoining California Proposition 209, for example, when in a matter of months — as happened in that case — the court of appeals reversed the district court and lifted the injunction.¹⁷⁸ Appellate review is the best remedy for claimed judicial error.

Apart from being unnecessary, responding to unwelcome decisions with threats of impeachment undermines public confidence in judicial integrity and independence. After a judge is threatened with impeachment for making a particular ruling, subsequent reconsideration or reversal of the ruling may lead the public to suspect that the judge was influenced by public pressure and not exercising impartial, independent judgment.

Recommendation:

Disagreement with a particular decision of a federal judge is not a proper basis for initiating impeachment proceedings. Public officials should refrain from threatening to initiate

¹⁷⁵*New Trial In Multiple Murder Decried*, THE RECORD, Dec. 15, 1985 at A52 ("The ruling said that despite 'overwhelming evidence' against Carl Isaacs, Wayne Coleman, and George Dungee, their murder convictions and death sentences had to be overturned because pretrial publicity made it impossible for an unbiased jury to be seated in Seminole County.").

¹⁷⁶Regional News, UPI, Mar. 19, 1986 ("Rep. Charles Hatcher, D-Ga., said he was happy to give his constituents 'a vehicle ... to show their frustration' over the decision. Asked whether he agreed the judges should be impeached, Hatcher said he had not fully reviewed the case but that he shared 'the concern and frustration of the people.'").

¹⁷⁷*Ouster of Judges For Rulings Denied*, N.Y. TIMES, Oct. 26, 1986, at A31. See also October 11, 1996 Hearing 59, 60 (testimony of Congressman Kastenmeier) ("As Chairman of the Courts Subcommittee, I received petitions from north Georgia ... 80,000 initially, supplemented by 20,000 other petitions-consisting of 100,000 signatures demanding the impeachment of three federal appellate judges from the Eleventh Circuit for ordering a new trial for three murder defendants in a notorious case.").

¹⁷⁸See *supra* text accompanying note 29 for a discussion of this case.

impeachment proceedings on the basis of judges' interpretation or misinterpretation of the law in particular decisions.

The two-hundred-year precedent in which no judge has been impeached and removed solely on the basis of an isolated, unpopular judicial decision, should be instructive not only to Congress but to federal judges as well. Despite occasional calls in Congress for the impeachment of judges on account of their decisions, no judge has ever been removed on that basis alone. Article III, Section 1 independence has shielded judges from such attacks. As inappropriate as it may be for a member of Congress to threaten a judge with impeachment and removal for making an unpopular ruling, the judge is equipped with the independence needed to withstand the ordeal.

Recommendation:

Judges threatened with impeachment proceedings on account of unpopular rulings should not be deterred from exercising their independent judgment and rendering decisions according to law.

(2) "Judicial Activism"

"Judicial activism," has become a pejorative terms suggesting that a judge, through his or her decisions, is not deciding cases "according to law," but rather has imposed his or her own value preferences without regard to legal precedent or proper constitutional interpretation. The term "judicial imperialist" is sometimes used interchangeably. The debate as to whether a decision is the product of political rather than legal reasoning has existed since the formation of our judicial system. A generation ago, the Warren Court came under heavy criticism for a series of

landmark decisions which had profound political and social implications for the country. The criticism then was leveled at the Supreme Court, the court of last resort. "Impeach Earl Warren" became a political slogan and some threatened to impeach Justice William O. Douglas. Today's "activism" charges are different; they center in large part on lower court judges whose single decisions may have found popular or political disfavor.

It should be emphasized again that a judicial decision perceived to be erroneous as a matter of law will be reviewed on appeal and, if erroneous, reversed. The implication, however, that a judge who makes an erroneous decision is guilty of wrongdoing and should be impeached is unwarranted and evidences a disrespect for the judicial branch, which serves only to undermine public confidence in the judiciary and ultimately in judicial independence.

The Commission takes no position as to whether particular judges have exceeded their constitutional authority in particular cases. Article VI of the Constitution requires all public officials, including judges, to take an oath to support the Constitution. In the case of judges, that has meant respecting the limited role that the Constitution has assigned them and deciding cases and controversies according to law.

We have no quarrel with principled criticism of particular decisions on the grounds that they are inadequately tied to the law; if such criticism is correct, the decision will probably be reversed in the appellate process. We share the view of Archibald Cox, that "[a] judge whose decisions are influenced by politics is putting the independence of the judiciary at risk."¹⁷⁹ We do, however, object to those who resort to pejorative terms merely because of political or ideological disagreement with the outcome of a decision.

"We...object to those who resort to pejorative terms merely because of political or ideological disagreement with...a decision."

¹⁷⁹See Archibald Cox, *supra* note 167.

Recommendation:

The constitutional oath of office sworn to or affirmed by all public officials in the executive, legislative and judicial branches alike, embraces a commitment to the "spirit of restraint" that should dominate all interbranch relationships in fulfillment of their varied obligations to "support the Constitution."

(3) Misleading Criticism

One assumption underlying the First Amendment freedom to criticize institutions of government is that, through an open exchange of ideas and information, the truth may prevail, to the ultimate benefit of the governmental institutions criticized. When a judicial decision is criticized, however, the author of that decision is often prohibited by the rules of judicial ethics from entering the debate. As a consequence, the exchange of ideas and information on the case in question is less than open, which increases the risk that misinformation, rather than the truth, will emerge, to the ultimate detriment of public confidence in the judiciary.

As one commentator observed, it is not a "fair fight" to leave the judges to respond to unfair and inaccurate criticism without allies.¹⁸⁰ The answer lies not in censorship or silence, but in prompt responses to inform the public. Several state and local bar associations have initiated mechanisms to respond to what they perceive as misleading criticism of state judges. Many of these follow a model developed in 1988 by a subcommittee of the the Judicial Administration Division Lawyers Conference of the American Bar Association, which is included as Appendix B to this Report. Unfortunately, most of these response mechanisms were not devel-

oped for, and have not been used for, situations involving federal judges.

It is important to respond to misleading judicial criticism regardless of whether the judge in question is in the state or federal system. Indeed, for the moment at least, harsh and often misleading criticism of federal judges appears to be on the upswing. When federal judges are victimized by false or misleading criticism, they — like state judges — need help in correcting a factually inaccurate record so that the public is not led to believe that the targeted judge committed an injustice. Judges also need help in deflecting misleading criticism lest it adversely affect the performance of their judicial duties.

Recommendation:

State and local bar associations should develop effective mechanisms for evaluating and, when appropriate, promptly responding to misleading criticism of federal judges and judicial decisions in each federal judicial district.

b. Judicial Appointments

The nomination and confirmation process is the one point at which the political branches may exercise a check on the composition and quality of the federal bench. To these ends, it is appropriate and desirable for members of the Senate and the President to explore the qualifications, character and judicial philosophy of would-be judges.

Problems arise, however, when legitimate inquiries into a nominee's judicial philosophy degenerate into thinly veiled efforts to preordain how the nominee will rule on specific issues in the future. Such "litmus test" questions cut to the quick of would-be judges' decisional independence and are properly resisted by the nominees.

¹⁸⁰Robert H. Henry, Address at the Meeting of the American College of Trial Lawyers, Boca Raton, FL (March 21, 1997).

A strong and independent judiciary likewise turns on the orderly filling of judicial vacancies. Protracted delays in the nomination and confirmation process, whether by design or as a result of inefficiency, weaken the federal judiciary and should be avoided.

The Miller Center Commission on the Selection of Federal Judges was established in 1994 by the University of Virginia's Miller Center of Public Affairs to respond to the perceived growing crisis in the federal court system caused by lengthy delays in filling judgeships. The Miller Commission issued its report on May 15, 1996 which contained a number of significant recommendations, including the following:¹⁸¹

- Senators, in their "advice and consent" role, should identify good judgeship candidates before a vacancy occurs and the candidates should be thoroughly appraised and "vetted" either before the vacancy occurs or within 30 days after it;
- Senators should recommend two or more names to the President, in order of priority, for each vacancy to avoid delays in case a potential nominee becomes unavailable. In no case should a senator's recommendation go to the executive branch later than 90 days after a vacancy occurs.
- If a senator doesn't respond to the request for more than one name, the Administration should notify the senator of additional names the Administration would like to consider. The executive branch too should maintain lists of prospective judicial nominees.
- If senators haven't made recommendations within 90 days of a district court vacancy, the President should proceed with the administration's own nominee, and if confirmation is delayed, make a temporary, or "recess" appointment.
- The White House, Department of Justice, FBI and American Bar Association all should complete their investigations of candidates within 90 days of a vacancy.
- The ABA should have more than one representative from each circuit court on its Standing Committee on Federal Judiciary and should provide a brief explanation for its rating, to avoid charges that it sometimes takes political considerations into account.
- The White House and Justice Department should review current procedures to simplify them and avoid duplication and should consider eliminating personal interviews with candidates, to avoid the appearance of trying to influence candidates' judicial views.
- The Senate Judiciary Committee should increase the number of its staff attorneys investigating judicial nominees.
- If a nominee is noncontroversial, the Senate Judiciary Committee should forgo holding confirmation hearings.
- The committee should clear nominees for full Senate confirmation within two months of receipt of a President's nomination.

*Protracted
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nomination
and
confirmation
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federal
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¹⁸¹THE MILLER CENTER OF PUBLIC AFFAIRS, IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996). The following summary of the Miller Center Commission's recommendations is taken verbatim from an executive summary, written in the form of a press release, that accompanied the report itself.

- Prospective nominees should be required to complete only a single questionnaire that supplies all the information sought by the Department of Justice, White House, ABA and Senate Judiciary Committee.
- Those agencies should explore whether it is really necessary or appropriate to obtain all the information presently sought.
- Congress should enact a statute providing that an additional judgeship is created on the date an incumbent becomes eligible for senior status (semi-retirement) even if the incumbent doesn't take senior status on that date. The number of authorized judgeships would be reduced by one when the incumbent takes senior status, fully retires or dies.

Recommendation:

The Commission urges that judicial vacancies be filled without delay and further urges that the procedures recommended by the 1996 Report of the Miller Center Commission on the Selection of Federal Judges set forth above, should be fully considered.

2. Issues Affecting the Courts' Institutional Independence

a. Political Branch Control Over the Judiciary's Administration, Practice and Procedure

Nowhere is the "spirit of restraint" more important than in the context of regulating third branch operations. The Constitution may or may not forbid Congress from imposing retaliatory budget cuts, eliminating

judgeships occupied by disfavored jurists, stripping the courts of original and appellate jurisdiction over all manner of cases, or dictating, in torturous detail, every aspect of courtroom practice and procedure. Such issues thankfully remain theoretical, because Congress has, throughout our history, resisted the temptation to test the logical extremes of its power over the judiciary. Rather, Congress has for the most part limited its regulatory reach over the courts to exercising periodic oversight, and delegating to the judiciary the means necessary for the courts to regulate themselves. As a consequence, constitutional crises have been averted, and the interbranch relationship has usually been cooperative and constructive.

Restraint must likewise be a watchword for the judiciary. Judicial independence is not a talismanic slogan to be invoked every time that Congress performs its constitutional duty to oversee and regulate the lower courts. Members of Congress oversee the federal judiciary with an eye toward issues of concern to their constituents. When Congress raises these concerns with representatives of the courts, it should ordinarily be seen not as a threat, but as an opportunity to respond jointly and constructively to public dissatisfaction. We share the view of Judge Schwarzer on this point, who said of judges and the judiciary that

the criticism that we hear ought not to be so readily written off. Instead, I believe we might well view it not as an occasion for circling the wagons but as a challenge that deserves to be taken seriously and calls for a thoughtful response grounded on searching self-examination of the institution.¹⁸²

The success of any cooperative and constructive relationship ultimately depends

¹⁸²February 21, 1997 Hearing at 5, 7 (testimony of William W Schwarzer).

upon meaningful communication. The need for effective interbranch communication has become especially acute in recent years, as the workload of the federal courts has expanded to meet the needs of national campaigns against drugs and violence at the same time that Congress has struggled to limit government spending. If the courts are to make the most of limited resources, it is critically important that the historically amicable relationship between the first and third branches be maintained. The judiciary is usually in a better position than Congress to determine the most efficient, expeditious and effective means to administer the courts; hence it behooves Congress to remain attentive to the judiciary's needs and concerns. By the same token, Congress is in a better position than the courts to structure the nation's policy preferences and fiscal priorities; hence it behooves the judiciary to be sensitive to those priorities when communicating its own needs and concerns.

The courts and Congress continue to communicate actively: representatives of the Administrative Office, the Judicial Conference, the Federal Judicial Center and the Federal Judges Association, as well as numerous individual federal judges, testify at congressional hearings and meet with or write to members of Congress on a wide variety of matters. Even so, the interbranch relationship has taken a turn for the worse, as evidenced by the proliferation of interbranch confrontations discussed in Part IV of this Report.

Testimony at our hearings supports the conclusion that both branches have contributed to the recent erosion of relations. Some members of Congress may have engendered the judiciary's resentment by viewing it as another administrative agency to be managed as Congress sees fit, rather than as an independent, co-equal branch of government. Some judges, on the other hand, may have engendered congressional resentment by raising judicial independence

objections in response to legitimate congressional inquiries into court administration, practice and procedure, rather than by responding constructively to the sources of dissatisfaction giving rise to congressional concern.

Congress is the source of appropriations, and as such, has a responsibility to see that the taxpayers' money is wisely and effectively spent. Congress' oversight duties include determining what constitutes an adequate number of judges and whether the judicial system is operating efficiently and effectively. The judiciary must work cooperatively with Congress to anticipate and provide the information needed to satisfy appropriate congressional inquiry and thereby justify increased congressional deference to judicial budget requests.

The existing problem may lie not with the volume but with the nature and context of interbranch communications. Throughout the 1980s, the Brookings Institution hosted conferences for members of Congress, their staffs, federal judges and court administrators to gather and discuss issues of mutual interest in informal, non-confrontational settings in Williamsburg, Virginia and elsewhere outside of Washington, D.C.. In the early years, these conferences were quite successful, and other organizations, such as Aetna Insurance and Yale University, hosted comparable events. Over time, however, members of Congress ceased to attend the Brookings-sponsored conferences, and the program was ultimately discontinued.

Ad hoc, interbranch commissions have served a comparable role. The Commission on Revision of the Federal Court Appellate System, the Federal Courts Study Committee, and the National Commission on Judicial Discipline and Removal each brought representatives of the courts and Congress together for a limited period of time in the 1970s, 1980s, and 1990s,

*Congress has...
resisted the
temptation to
test the logical
extremes of its
power over the
judiciary.*

respectively, to analyze specific issues affecting the courts in informal, small group meetings. Because of their ad hoc nature, however, these commissions provided sporadic rather than continuous and ongoing interaction between the branches.

The continued health and well-being of judicial independence depends on the preservation and enhancement of productive and cooperative communications between the branches. Existing channels of communication have proved inadequate to the task. Individual judges, legislators, academicians, and recently the Judicial Conference, have proposed the creation of a permanent, interbranch entity, to study court operations and recommend reforms to Congress.¹⁸³ A primary virtue of such an entity is that it would facilitate non-confrontational communication among the branches in an ongoing project dedicated to sensitive and sensible regulation of the third branch, to the end of preserving the independence of the judiciary. Consistent with the view that judicial independence serves to protect the public, the entity in question should also logically include representatives of court users.

Recommendation:
Congress should promptly consider establishing a permanent National Commission on the Federal Courts, to be comprised of representatives from all three branches of government, as well

as representatives of litigants and other groups with an interest in the federal courts. The Commission would develop, on an ongoing basis, recommendations for Congress concerning court practice, procedure, administration, and the like, and evaluate legislative proposals affecting the courts introduced by members of Congress.

In addition to formal mechanisms for interbranch communication, such as the National Commission on the Federal Courts, proposed here, federal judges should be encouraged to develop informal ties with legislators in their respective judicial districts. In Chicago, for example, the chief judge in the Northern District of Illinois hosts periodic luncheons at the courthouse with individual senators and representatives from the district.¹⁸⁴ The point of such meetings is not to discuss an agenda of issues, but simply to promote better communication and mutual understanding through periodic contact. Events like these, if commonplace across the country, would help to enhance the cordial interbranch relationship essential to good governance.

Recommendation:
The Commission encourages federal judges to meet informally with their congressional

¹⁸³Proposals for creation of an Office charged with reviewing laws and/or court decisions and recommending revisions, include: COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 126-27 (1995) (proposing the creation of a National Commission on Federal Courts); December 13, 1996 hearing at 161, 175-77 (testimony of Daniel Meador) (proposing the creation of "an ongoing body with a very modest staff that would survey the problems of the courts and develop measures to meet those problems"); Charles Gardner Geyh, PARADISE LOST, PARADIGM FOUND: REDEFINING THE JUDICIARY'S IMPERILED ROLE IN CONGRESS, 71 N.Y.U. L. REV. 1165 (1996) (proposing the creation of a permanent, interbranch commission to study the federal court.); William E. Cooper, *A Proposal for a Congressional Council of Revision*, 12 SETON HALL LEGIS. J. 233 (1989) (proposing a council of revision comprised of former judges and legislators); Henry J. Friendly, *The Gap in Law-Making—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963) (proposing the creation of a council on a Ministry of Justice, Council of Law Revision, or its equivalent); Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921) (proposing the creation of a ministry of justice to review and recommend revisions to laws passed).

¹⁸⁴February 21, 1997 Hearing at 25, 48.

representatives on a periodic basis, for the purpose of improving interbranch communication and understanding.

b. Political Branch Control Over the Judiciary's Appropriations: the Line-Item Veto

As paradoxical as it may be for an independent judiciary to be dependent on Congress for its financial survival, the committee process in Congress assures that the judiciary's fiscal needs will not be given short shrift. To the contrary, there is ample opportunity for the judiciary to communicate its needs and concerns to Congress, and for those needs and concerns to be thoroughly evaluated over the course of annual deliberations on the federal budget. According to the immediate past Chair of the Budget Committee of the Judicial Conference:

The system of separation and interdependence among the three branches of government works extremely well in the case of the federal judiciary budget. It works primarily because of Congress. . . . They have a great deal of knowledge about our budget. They handle it in a very responsible fashion and they do so with a high level of sophistication.¹⁸⁵

This respectful and responsive budget-setting process potentially could suffer disruption as a result of the recently enacted Presidential line-item veto. The Commission believes that the presidential line-item veto — be it a statute or a constitutional amendment — should exclude appropriations for the judiciary from its scope.

First, there is no public, deliberative process that precedes the President's decision to strike specific items from spending bills.

The judiciary does not have the same opportunity to justify its budget request to the President as it does to Congress. Moreover, line items relating to the judiciary's appropriations may be more vulnerable to a veto than other line items inserted at the behest of legislators, who are better positioned than judges to defend the line items they support.

Second, the executive branch is the most frequent litigant in the federal courts. By giving a litigant the power to manipulate the judiciary's budget, the appearance — if not the reality — of making the courts beholden to that litigant raises decision-making independence concerns. It is unlikely that the President would ever use or threaten to use the line-item veto in an explicitly retaliatory or extortionate way against the judiciary, if for no other reason than that doing so would be politically imprudent. Subtler forms of manipulation, however, might still be possible; moreover, any veto of a line item from the judiciary's budget — even if innocently motivated — could appear retaliatory and create the appearance of dependence.

Recommendation:

Legislation should be enacted to exclude budgetary items involving the federal judiciary's appropriations from the scope of the Presidential line-item veto.

c. Congressional Limits on or Curtailment of Jurisdiction

Since the 1950s, members of Congress have frequently attempted to limit the jurisdiction of the federal courts, both the Supreme Court's appellate jurisdiction and the original and appellate jurisdiction over the lower federal courts. The declared aim of these legislative proposals is to give the state

"The continued health and well-being of judicial independence depends on productive and cooperative communications between the branches."

¹⁸⁵Richard Arnold, *Money, or the Relations of the Judicial Branch With the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L. REV. 17, 28 (1996).

courts exclusive jurisdiction of suits involving issues such as abortion, school busing, school prayer, or flag burning, and in earlier years, subversive activities laws and legislative apportionment.¹⁸⁶ The assumption is that state judges, most of whom are subject to election, will be more sympathetic to the majority will when interpreting the laws in question and deciding whether such laws violate the Constitution. Many of these bills would deny the Supreme Court appellate jurisdiction over state court decisions, so that state court departures from established precedents could not be overturned. Even when Supreme Court appellate jurisdiction is retained, however, the sponsors of such "court-stripping" proposals assume that the High Court could not police the many anticipated departures from unpopular federal court precedents.

The Commission opposes court-stripping proposals, as does the ABA.¹⁸⁷ The framers deliberately created a cumbersome process for amending the Constitution. To ensure that federal courts would be strong enough to resist attempts by simple majorities to bypass the amendment process and change the Constitution by statute or other political branch action, the framers guaranteed judicial independence. It is inconsistent with the spirit of this constitutional structure to permit a simple majority in Congress to effect constitutional change in the guise of jurisdictional reform, by replacing the Constitution's interpreter with one perceived to be more beholden to a transient majority's view.

We recognize that the Constitution authorizes Congress to make "exceptions" to and "regulations" of the appellate jurisdiction

of the Supreme Court. We also recognize that Congress' power to create and ordain the lower federal courts includes the power to give and deny jurisdiction. But we conceive of the congressional power as encompassing issue-neutral rules designed to foster an effective and efficient federal judicial system. We do not think that Congress' power to regulate federal court jurisdiction was intended to vest in transient majorities the power to alter judicial decisions by depriving the federal courts of the power to interpret the Constitution in issue-specific situations.

Apart from the impact of court-stripping proposals on the federal courts, successful enactment of such bills could also imperil state judges. With court-stripping legislation in place, state judges would often be the exclusive interpreters of the laws in question. As such, they could be faced with a "Catch-22" when asked to rule on unconstitutional but popular governmental action: they could honor their oaths to uphold the Constitution by invalidating the governmental action in question, only to be defeated in the next election; or they could preserve their tenure in office at the expense of their oaths, by upholding the popular governmental action, in disregard of the Constitution and interpretive precedent of the High Court. In the Commission's view, neither alternative is acceptable.

Recommendation:

The Commission urges Congress to resist any proposal that would strip the federal courts of their jurisdiction to hear and decide any particular constitutional issue for the purpose of effecting changes in constitutional law.

¹⁸⁶A brief history of these efforts and the historical context of other periods of jurisdiction stripping may be found in ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 663-69 (2d ed. 1990).

¹⁸⁷Two separate policies were adopted by the ABA on this subject: AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 15 (August 1991); and AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 31 (August 1992). Appendix D reproduces these and other ABA policies which pertain to the recommendations proposed in the Report.

Congress has great power to structure judicial review of executive and administrative action, even to the point of denying review altogether. Some challenges raise constitutional questions, and denial of judicial review in those cases may well be invalid. However, even if Congress can deny review, the Commission respectfully suggests that under the rule of law it is bad policy to refuse to permit a claimant access to the courts to pose properly presented constitutional issues. Even in the absence of a constitutional question, we do not believe that, ordinarily, Congress should bar judicial review of enforcement and coercive governmental actions, in light of historical examples of executive and administrative misapplication of law. The revisions in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act,¹⁸⁸ which bar review of many actions having potentially devastating impact on both legal and illegal aliens, represent the kinds of governmental actions that should not be free from judicial review.

Recommendation:

The Commission urges Congress to provide for judicial review of constitutional questions in cases involving administrative and regulatory actions and ordinarily to provide for judicial review of enforcement and coercive actions of the government in administrative and regulatory actions.

Congress also has broad powers to structure and regulate the remedies available in federal courts. From the beginning, Congress has restricted the use of injunctions and other remedial devices. But just as it is or should be

impermissible for Congress to strip jurisdiction from the courts to hear cases of constitutional violations, so too it is or should be impermissible for Congress to deny to the federal courts the power to correct constitutional violations that they find. The American Bar Association has plainly equated the two policies and has opposed both. Nonetheless, several restrictions recently enacted by Congress in the Prison Litigation Reform Act¹⁸⁹ and in habeas corpus amendments¹⁹⁰ do impose severe limits on the authority of the federal courts. If these laws are successful, we assume more will follow as a way of preventing disfavored claimants from obtaining remedies to which they may be entitled.

Recommendation:

The Commission urges Congress to resist efforts to intrude into the remedial processes of the federal courts for the purposes of restricting the ability of litigants to obtain their constitutional rights and of preventing the federal courts from fairly adjudicating constitutional claims. The Commission does not oppose all legislative regulation of processes, but it does urge Congress to carefully evaluate the purposes and results of all such proposals before it.

d. Judicial Compensation

The framers of the Constitution appreciated the relationship between compensation and independence. They never second-guessed the wisdom of insulating federal judges from retaliatory pay cuts. They

¹⁸⁸110 Stat. 3009-546 et seq., §§ 304-306, 381, 604.

¹⁸⁹110 Stat. 1321-66.

¹⁹⁰110 Stat. 1219, §104(2), adding 28 U.S.C. §2254(d).

realized, moreover, that the health and well-being of the judiciary depended on furnishing judges with adequate compensation, and that inflation could render a once satisfactory compensation inadequate. Accordingly, they amended an early proposal foreclosing upward as well as downward adjustments of judicial pay, to permit the former. They did so, however, over the objection of James Madison, who was concerned that making judges beholden to Congress for periodic salary increases could create an undesirable dependence.

History has vindicated both sides in this debate. Without periodic, upward adjustments in judicial salaries to account for increases in the cost of living, it is difficult to imagine how the nation could have retained its ablest judges during periods of severe inflation. At the same time, the periodic spectacle of judges appearing, hat in hand, to request raises from Congress — which enacts the laws that judges are to interpret, and if necessary, invalidate — is at best unseemly, and at worst, destructive of the independence the framers sought to preserve.

The ease with which periodic cost-of-living adjustments might otherwise be approved is further hampered by the longstanding practice in Congress of tying proposals to increase judicial pay to more controversial proposals to increase congressional pay. The Commission is aware of and supports legislation introduced in Congress that would address these problems by furnishing judges with periodic and automatic cost-of-living adjustments.

Recommendation: The Commission recommends that Congress de-link proposals to increase congressional pay

from proposals to increase judicial pay, and make judicial salaries subject to periodic and automatic cost-of-living adjustments.

e. Judicial Discipline

In 1980, Congress passed the Judicial Conduct and Disability Act, 28 U.S.C. § 372(c), to provide a formal supplement to the impeachment process for resolving complaints of misconduct or disability against federal judges. The 1980 Act was the culmination of years of discussion and compromise over the scope, design, and constitutionality of establishing a statutory disciplinary mechanism for the federal judiciary. Despite preliminary uneasiness among some judges that the Act threatened the judiciary's institutional independence, it is now generally agreed that the Act does no such thing.

The American Bar Association, which had established a special task force to monitor and evaluate the work of the National Commission on Judicial Discipline and Removal,¹⁹¹ concurred with the Commission's overall views regarding the efficacy of the Act, and adopted policy reaffirming its support for the Act, while recommending some procedural modifications.¹⁹²

Recognizing both the salutary effects of the Act in resolving meritorious complaints and providing a vehicle for informal resolution of a number of performance problems within the judiciary, and the general lack of knowledge among practitioners about the Act, the ABA also adopted policy urging that more vigorous efforts be made within the ABA and by state and local bars to increase awareness and understanding of the Act.¹⁹³ Unfortunately, these efforts have not been forthcoming.

¹⁹¹ See *supra* notes, 133-135 and accompanying text.

¹⁹² AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 5 (Midyear Meeting, 1993).

¹⁹³ AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 9 (Midyear Meeting, 1994).

The Judicial Conduct and Disability Act provides a powerful mechanism for holding judges accountable for misconduct, particularly that which does not rise to the level of an impeachable offense. We believe that if more people knew about the Act and how to invoke it in appropriate circumstances, allegations that federal judges are not held accountable for their actions except in the most egregious situations would diminish.

Recommendation:

The American Bar Association, in conjunction with state and local bars, should take appropriate steps to inform the bar and the public of the procedures for handling complaints against and disciplining federal judicial officers under the Judicial Conduct and Disability Act of 1980.

During recent congressional hearings on legislation which would amend the Act by requiring that a complaint against a judge be handled by the chief judge of a different circuit, some House Judiciary subcommittee members acknowledged that they were not aware of the Report of the National Commission on Judicial Discipline and Removal or its recommendations regarding the 1980 Act¹⁹⁴. This is cause for concern, especially since many of the issues addressed by current legislative proposals involving the federal judiciary were examined in depth by the National Commission. For example, the National Commission concluded, among other things, that changes to the constitutional provisions for impeachment and removal were neither necessary nor desirable. After a careful, empirical study, it also

concluded that the system of formal and informal discipline under the 1980 Judicial Conduct and Disability Act was working reasonably well and that perhaps one of the most important benefits of the Act was the impetus it has given to informal resolutions of problems of judicial misconduct and disability — a benefit that might be compromised if the proposed legislative amendment to the Act is enacted.

To our knowledge, Congress has not given serious attention to the National Commission's Report, including the recommendations addressed to the legislative branch. In that respect, this careful work, funded by the taxpayers, has been largely ignored, even though it bears directly on issues of current debate and controversy.

Recommendation:

Congress should hold hearings on and consider appropriate responses to the 1993 Report of the National Commission on Judicial Discipline and Removal. That process should be completed before Congress considers any proposals for additional legislation or constitutional amendments in the area of judicial discipline and removal.

3. Issues Affecting Public Confidence in the Judiciary

Public confidence in the judiciary — at both the federal and state level — is perceived by many to be in a dangerous state of decline. The Corporate Counsel for the District of Columbia, for example, recently told a task force of the D.C. Circuit that “[c]onfidence in our judicial system has probably never been shakier.”¹⁹⁵

The Judicial Conduct and Disability Act provides a powerful mechanism for holding judges accountable.

¹⁹⁴The hearing in question was held on May 14, 1997 before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, and concerned H.R. 1252, 105th Cong., 1st Sess.. A transcript of the hearing has not yet been published.

¹⁹⁵Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias, 64 GEO. WASH. L. REV. 189, 252 (1996).

The problem has no defined racial, ethnic or socioeconomic boundaries and it is present in urban areas as well as rural areas. The Western Regional Counsel to the NAACP Legal Defense and Educational Fund told the Commission:

[T]here are sectors of the public I cannot discuss the judicial system and the judiciary with anymore and convince them that they should have faith with it, they should view it as impartial. . . . [W]e have lost poor people, at least in the area that I work. . . . It is beyond the reach because what they see is anything but impartial and anything but fair.¹⁹⁶

Others have told the Commission that similar sentiments are expressed by participants in the "militia movement" who claim that state and federal courts lack legitimacy and have no jurisdiction over the militias' membership.¹⁹⁷

This perceived decline of public confidence in federal and state courts is supported by persuasive evidence:

- Gallup polls conducted between 1986 and 1994 reveal that the percentage of respondents expressing "quite a lot" or "a great deal" of confidence in the Supreme Court declined from 54% to 42% in that time.¹⁹⁸

- A poll sponsored by the National Center for State Courts showed that in 1977, 29 percent of respondents were very confident in the federal courts, 41 percent were somewhat confident, and 28 percent were not at all confident.¹⁹⁹ In 1991, a survey conducted by the National Opinion Research Center yielded comparable results: twenty-five percent of respondents had a great deal of confidence in the courts and the legal system, 46 percent had some confidence, and 27 percent said they had little or no confidence. By 1995, however, a survey sponsored by U.S. News and World Report found that only 8 percent of respondents now had a great deal of confidence in the judicial system, 46 percent said they had some confidence, and 45 percent indicated that they had not very much confidence or none at all.

- In a similar vein, a 1994 Gallup poll reported that only 15 percent of respondents had "a great deal of confidence" in the criminal justice system, as compared to 49 percent who had very little or no confidence.²⁰⁰

- A 1996 poll of New York residents found that only 2 percent of respondents thought the criminal court system was "excellent," while 64 percent

¹⁹⁶February 21, 1997 Hearing at 239, 248-49. See also FINAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS 39 (1997) ("Many speakers at the public hearings expressed their belief that minorities do not receive justice in the California courts."); Bob MacPherson, *Survey: Bias Felt in Courts*, STATE NEWS, October 12, 1996 at 1 ("Many minority groups lack confidence in the Delaware court system and believe they receive harsher sentences than whites, a recent survey found."); Jonathan Rabinowitz, *Panel Finds Bias in Connecticut Courts*, N.Y. TIMES, April 24, 1996 (reporting that a study's "findings highlighted startling differences between minority and white lawyers' and court employees' views of how members of minority groups are treated" by the Connecticut courts).

¹⁹⁷See, e.g., T.C. Brown, *Justice for the Common Man? Alternative 'Court' Stirs officials' Fears Violence Will Rule*, CLEVELAND PLAIN DEALER 1A, December 11, 1995.

¹⁹⁸*The Military Earns the Highest Public Confidence Rating*, RESEARCH ALERT, June 17, 1994.

¹⁹⁹Poll data provided in this paragraph was obtained from the Roper Center for Public Opinion Research and is available on the Westlaw poll database.

²⁰⁰*O.J., the People and the System*, THE BALTIMORE SUN, 18A, September 26, 1994.

gave it a negative rating, and 55 percent thought that judges should be easier to remove.²⁰¹

- And in a 1996 Gallup poll of Republican voters, 73 percent thought that term limits for federal judges ought to be in the Republican Party platform.²⁰²

The recent proliferation of criticism directed at individual federal judges, as chronicled in this report, both manifests and exacerbates declining public confidence in the courts. Recent congressional efforts to monitor and regulate the federal judiciary more closely than in the past may likewise be a reflection of the public's shrinking confidence in our courts. While there was disagreement among the witnesses as to whether any of the recent criticism or congressional initiatives directed at federal judges and the courts in fact constituted "threats" to judicial independence, there is little doubt that these events are symptomatic of declining public support for the courts.

If judicial independence is to be preserved, public confidence in the judiciary must be maintained. A public that does not trust its judges to exercise sound, even-handed, independent judgment, will look upon judicial independence — guaranteed by life tenure and an undiminished compensation — as a problem to be eradicated, rather than a virtue to be preserved. The Judicial Conference of the United States understands the critical nexus between judicial independence and public confidence:

Preserving the power of the courts to do what is right while sustaining their legitimacy in the eyes of the

public is one of the most delicate balancing acts of our constitutional system. If the federal courts alienate the public and lose its support and participation, they cannot carry out their appropriate role.²⁰³

Revitalizing public confidence in the judiciary depends upon Congress and the courts manifesting the "spirit of restraint and common purpose" characteristic of a separation of powers system that is in good repair and deserving of public support; and it depends upon the success of efforts to expand the public's knowledge of our judicial systems and the fundamental importance of the principle of judicial independence in a healthy democratic republic.

There is evidence that the public does not fully understand why judicial independence is so essential and how it is constitutionally protected. A survey conducted in the 1980s revealed that only 44 percent of respondents answered "true" to the statement that "federal judges are appointed for life," while 40 percent answered false and the remaining 16 percent answered that they did not know. Interestingly, although polls indicate public support for an independent judiciary, they also suggest public support for judicial term limits and making judicial removal easier.²⁰⁴ If the public does not understand that judicial independence exists for the protection of the people and not for the benefit of judges, then how can they be expected to view life tenure as anything other than a frivolous perquisite of judicial office? If the public does not understand that judges are given independence to enable them to make impartial decisions based on the rule of

The recent proliferation of criticism... both manifests and exacerbates declining public confidence in the courts.

²⁰¹Wendell Jamieson, *Judges Losers, Cops Winners in Poll*, N.Y. DAILY NEWS, 33, April 28, 1996.

²⁰²CNN/USA TODAY/Gallup Poll, March 15-17, 1996. Based on a poll of 474 Republicans. Margin of error is +/-5 percentage points.

²⁰³JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN OF THE FEDERAL COURTS (1995).

²⁰⁴See *supra* text accompanying notes 201-202.

law rather than on the passing popular will of the political branches or the people, they will not comprehend how a system that permits judges to invalidate popular laws, or "release criminals on technicalities," ultimately protects *their* rights, and they will not long tolerate judges who take such actions.

Judges and the federal judiciary need to be involved in efforts to explain their role to the public. Aloofness begets an appearance of elitism that only contributes further to public misperception of the judiciary as an inscrutable, dangerously distant institution. The Commission shares the view of the American Judicature Society:

It is the obligation of judges to educate the public about important concepts of the rule of law and the independence of the judiciary. The media will not do so, and the public schools and colleges are apparently failing to do so. Therefore, judges are encouraged to reach out and educate the public. This does not mean giving speeches to attorney audiences, but to civic organizations, schools and colleges, and religious institutions."²⁰⁵

Research to identify the reasons for the erosion of public confidence has been undertaken by several organizations, including the ABA, the National Center for State Courts, the State Justice Institute and the American Judicature Society. These research efforts should be expanded to include other organizations concerned with our justice and judicial systems; and the federal judiciary should join in this effort.

As the underlying causes of the discontent are identified, they must be addressed by the courts and the political branches as well as through educational programs. Long-term

educational programs with defined goals and strategies should be developed, with an emphasis on three principle venues:

- **Schools and Colleges:** Strong civics programs should be developed in conjunction with both state education and law-related education coordinators.
- **Communities:** Lawyers and judges should participate in community activities that provide opportunities for dialogue about the role of law and the courts in our lives. Opportunities for such exchanges of information may exist in activities conducted by neighborhood organizations, professional and social service group meetings, book clubs, and other associations.
- **Electronic Media:** An understanding of the communication mechanism by which children and adults learn about the justice and judicial systems is crucial to the success of any educational program. The Internet and television are important communication vehicles and should be used creatively to convey essential information about our judicial system. For example, a public education home page could be created which includes a virtual courtroom, in which the actions of the justice system are viewed in the context of real cases in the news.

Recommendation:
The American Bar Association, through its Division on Public Education, should take the lead in the formation of a consortium of organizations dedicated to

²⁰⁵December 13, 1996 Hearing 109, 113 (testimony of John Domino).

educating the public about the importance of an independent judiciary and an impartial system of equal justice. The consortium should (a) continue research into the causes of eroding confidence in the judicial and justice systems throughout the country and (b) develop and implement long-term educational programs, both in the schools and for the public generally, with defined goals and strategies, focused on improving public understanding of our system of justice and of an independent judiciary.

C. FINDINGS, CONCLUSIONS AND RECOMMENDATIONS ADDRESSING STATE JUDICIAL INDEPENDENCE PROBLEMS

The importance of an independent judiciary applies equally to the state courts which handle ninety-seven percent of the nation's litigation. Threats to judicial independence and its goals are greater in many state court systems than in the federal judiciary. Crises of underfunding, which the federal judiciary has largely avoided, are common in many state court systems.²⁰⁶ The election process for judicial selection and retention in many states gives rise to concerns about the impact of campaign financing on the impartiality of judges.²⁰⁷ Even those states opting for a merit selection process ordinarily require their judges to stand for retention elections. Retention elections (in which judges run unopposed) and reelections (in which opponents are permitted) have resulted in judges

being challenged and, in some cases turned out of office, for unpopular decisions in individual cases.²⁰⁸

The increasing amount of money required to finance a judicial campaign over the last several years has given rise to increasing concerns among members of the bar that, "although permissible from a legal standpoint, the fund-raising that accompanies judicial campaigns frequently gives rise to conflicts of interest that may reflect adversely upon the impartiality of the judiciary."²⁰⁹ As a result, amendments to the Commentary to Section 5C(2) of the 1990 ABA Model Code of Judicial Conduct recently have been proposed by the ABA Standing Committee on Ethics and Professional Responsibility which would state the ABA's preference for merit selection and suggest that campaign contributions made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about the judge's impartiality and be cause for disqualification.²¹⁰

The Commission believes that greater consideration needs to be given to the serious ethical problems presented by judicial campaign fund-raising and, to that end, supports the Standing Committee's proposed amendments.

Recommendation:

States which rely on elections in their judicial selection or retention processes should consider adopting the ABA Standing Committee on Ethics and Professional Responsibility's proposed amendments to the Commentary to Canon 5C(2) of the Model Code of Judicial Conduct, dated April 1997.

²⁰⁶ See *supra* text accompanying notes 145-147.

²⁰⁷ See *supra* text accompanying notes 158-64.

²⁰⁸ See *supra* text accompanying notes 159-60.

²⁰⁹ ABA Standing Comm. On Ethics and Professional Responsibility, *Draft Report with Recommendations to the House of Delegates* 2 (April, 1997) (included in this Report as Appendix C).

²¹⁰ *Id.* at 1.

Misleading criticism is not confined to federal judges. To the contrary, the problem currently afflicts state judges to an even greater extent. A good illustration of the problem was provided by a California state trial judge in his testimony before the Commission.²¹¹ A California judge who sentenced a defendant convicted of raping and maiming his victim to the maximum sentence permitted by California law at that time—fourteen years, reduced to eight years for good behavior—was attacked for sentencing the defendant too leniently. The judge could not properly respond to such criticism himself, but if the criticism went unanswered, the public perception would be that an injustice had been done by a judge run amok, rather than by a sentencing statute that was at odds with the majority will. After repeated attacks comparable to the one described above, the California Judges Association developed a protocol for responding to unfair, inaccurate criticism. Pursuant to that protocol, selected judges stand ready to assist in offering a rapid response to such criticism when it occurs, for publication or broadcast. There is some understandable concern as to the propriety and desirability of judges defending decisions of their brethren in the media. Effective response mechanisms must be developed that involve not only the bench, but also the bar and public, in a coordinated effort. As previously noted, some state and local bar associations have developed their own protocols for responding to false, misleading, or what they otherwise perceive to be excessive or unwarranted criticism. The use of such protocols should be encouraged and expanded.

Recommendation:
State and local bar associations should develop and expand effective mechanisms for evaluating criticism of state judges and judicial decisions and, when appropriate, promptly responding to it.

Despite potentially serious problems — some more serious than those affecting the federal courts — the Commission's focus was, of necessity, limited to federal judicial independence. Our life-span and resources were insufficient to permit adequate investigation into the many and varied issues affecting judicial independence in the state courts. No two state systems are identical. Their constitutions, statutes, traditions and legal cultures differ in ways that affect judicial independence and make generalizations difficult.

The distinction between the federal and state judiciaries may not be clear to the public²¹² and, to the extent that judges or the judicial systems are lumped together, public dissatisfaction with one system spills over into the other. By the same token, confidence in state judicial systems is linked to the federal system as well. Hence, additional studies of state judicial independence, and adoption of the reforms on the basis of those studies, may help to restore confidence in both the affected state court system and its federal counterpart. We therefore encourage state bars to conduct their own, individual judicial independence studies, as some have already done.²¹³

²¹¹February 21, 1997 Hearing at 128 (testimony of Albert Dover).

²¹²One witness, for example, who has devoted her career to educating the public on the subject of the legal system, admonished the Commission to "remember that in the broader public's eye there is no distinction between the federal judiciary and the state judiciary." February 21, 1997 Hearing at 239, 242 (testimony of Constance Rice).

²¹³See, e.g., the State Bar of Wisconsin Commission on the Judiciary as a Co-Equal Branch of Government, FINAL REPORT AND RECOMMENDATIONS (1997); the Tennessee Bar Association has appointed a Task Force on the Tennessee Judiciary which is currently drafting a report on judicial merit selection and other issues relating to judicial independence.

Conclusion

VIII.

In 1908, American Bar Association President Jacob M. Dickinson opined to the Association that

[f]or a long time . . . judgments of courts . . . were received with the greatest of respect. . . . If decisions were publicly criticized, the criticism was generally temperate, addressed to particular questions, and was not of such a character as to break down in the minds of the people respect for the judiciary.²¹⁴

In Dickinson's view, however, times had changed for the worse. "Judicial judgments are not accorded the same respect as formerly," he observed. "Not a court, but the courts, are frequently and fiercely attacked," and "[p]olitical parties of all creeds have bowed their heads in recognition of a discontent." The consequence, he warned, was "to destroy confidence in the courts and to make a subservient judiciary. The people have been led away from the principle that the independence of the judiciary is one of the mainstays of civil liberty under self-government, which is based on mutual self-restraint" His warning has equal force today.

Many have made comparable observations in the late twentieth century: that unlike times past, when judicial criticism was civil and Congress' oversight of the judiciary was deferential, the courts are now besieged by unprecedented assaults from all sides. Jacob Dickinson's characterization of the difficulties confronting the courts in 1908 belies the notion that contemporary problems are without precedent, just as Dickinson's perception that the courts of his day faced uniquely troubling attacks is undercut by comparable attacks in generations preceding his. Against this backdrop, the current problems do not warrant an alarmist response, but neither do they counsel complacency. While the current state of federal judicial independence remains essentially sound, a number of potentially serious problems exist that, if left unremedied, could degenerate into real threats to judicial independence. Those who value judicial independence must stand ready to protect it. It is incumbent on lawyers to step up and assume a leadership role in this regard. The time has come for judges, legislators, lawyers and the general public to work together actively and aggressively to address the causes of popular dissatisfaction with the courts, to restore public confidence in our judicial system, and thereby to preserve judicial independence as a value for all to cherish.

²¹⁴American Bar Ass'n, *Address of the President*, 33 REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 341 (1908).

THE ORIGINS AND HISTORY OF FEDERAL JUDICIAL INDEPENDENCE¹

Charles Gardner Geyh

A. Constitutional Text

Article III, Section 1 of the United States Constitution includes three provisions central to the establishment of federal judicial independence: 1) the judicial power clause, which provides that “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”; 2) the good behavior clause, which provides that “The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour,” and 3) the compensation clause, which provides that the judges of the Supreme and inferior courts “shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”

Although the constitutional text is a logical starting point in the Commission’s inquiry, it is far from self-explanatory. First, the extent of the judiciary’s Article III, Section 1 independence turns on the malleable meaning of such phrases as “judicial power,” “good behavior” and “compensation.” Second, the independence guaranteed by Article III, Section 1 is offset to an uncertain degree by powers the Constitution grants the political branches to hold the judiciary accountable for its behavior, by 1) delegating to the House and Senate the power to impeach and remove “all civil Officers” for “High Crimes and Misdemeanors;”² 2) giving Congress the power “To constitute Tribunals inferior to the supreme Court;”³ 3) subjecting the Supreme Court’s appellate jurisdiction to “such Exceptions, and under such Regulations as the Congress shall make;”⁴ 4) granting to the President, the “Power, by and with the Advice and Consent of the Senate,” to appoint “Judges of the supreme Court, and all other Officers of the United States;”⁵ and 5) authorizing Congress to “make all

¹The following report on the history of federal judicial independence was prepared by Charles Gardner Geyh, reporter and counsel to the Commission. It was prepared for the Commission’s review and use, but is not intended to be a part of the Commission Report.

²The relevant clauses provide that “The House of Representatives shall . . . have the sole Power of impeachment,” U.S. CONST. Art. I, Sec. 2, Cl. 2; “The Senate shall have the sole Power to try all Impeachments,” U.S. CONST. Art. I, Sec. 3, Cl. 6; and “all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. Art. II, Sec. 4.

³U.S. CONST. Art. I, Sec. 8, Cl. 9.

⁴U.S. CONST., Art. III, Sec. 2, Cl. 2.

⁵U.S. CONST. Art. II, Sec. 2, Cl. 2.

Laws which shall be necessary and proper for carrying into execution . . . all . . . Powers vested by this Constitution in the Government of the United States."⁶ Accordingly, a search for the meaning of Article III, Section 1, requires exploration beyond the text.

B. The "Original Understanding"

But, my dear Sir, what can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument. That instrument was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove, and to the best of my recollection, this was the only part which passed without cavil.

Gouverneur Morris⁷

The traditional means of parsing less than clear constitutional text, is through recourse to explanatory materials reflecting the "original intent" of the Constitution's founders.

Such an undertaking can be problematic when dealing with even the least controver-

sial or ambiguous segments of Constitutional text, but is particularly so with regard to the original understanding of Article III, as the above quoted passage from the correspondence of Gouverneur Morris suggests.

1. Judicial Independence in the Years Preceding the Constitutional Convention

Attitudes toward judicial independence in the years prior to the constitutional convention were mixed. By virtue of the 1700 Act of Settlement, English judges were granted tenure during "good behavior," as a means to protect against chronic encroachments on judicial independence by the monarch, through at-will discharge.⁸ Colonial judges, in contrast, served at the pleasure of the crown, which became a source of friction between the colonies and Britain, giving rise to a grievance set out in the Declaration of Independence, that the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."⁹

Proponents of judicial independence in the constitutional era argued that an independent judiciary was desirable for two distinct reasons. First, making the judiciary independent of legislature and executive would enable the judiciary to check over-concentrations of power in the political branches. As John Adams put it in a 1776 pamphlet concerning the Virginia Constitution, "the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both"—hence the need for *institutional* judicial independence.¹⁰

Second, as Montesquieu observed, rendering judges independent of outside

⁶U.S. CONST., Art. I, Sec. 8, cl. 18.

⁷Letter from Gouverneur Morris to Timothy Pickering, December 22, 1814, in 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 419-20 (1937).

⁸Peter Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 216 (1993).

⁹DECLARATION OF INDEPENDENCE, para. 10 (U.S. 1776).

¹⁰JOHN ADAMS, ON GOVERNMENT, in C. ADAMS, ED., 4 THE WORKS OF JOHN ADAMS 181, 19888 (1851-56).

influence, would allow them to “follow the letter of the law” in the course of “trying the causes of individuals.”¹¹ Adams made the same point: judges should not “be distracted with jarring interests; they should not be dependent upon any man, or body of men”—hence the need for *decisional* judicial independence.¹²

There was, however, a competing strain of thought. For many, the solution to judicial dependence on the British monarch, was judicial dependence on American legislatures or the American people. Historian Gordon Wood observed, “Despite John Adams’s warnings . . . most of the early constitution makers had little sense that judicial independence meant independence from the people.”¹³ Many of the early state constitutions thus imposed judicial term limits or made judges stand for reelection, while those that established tenure during “good behavior” often gave the assembly control over judicial salaries or subjected judges to removal upon a simple address of the legislature.¹⁴ Concluded Wood:

These constitutional provisions giving control of the courts and judicial tenure to the legislatures actually represented the culmination of what the colonial assemblies had been struggling for in their eighteenth century contests with the Crown. The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it. As Jefferson said to Pendleton in 1776, in relation

to the legislature the judge must “be a mere machine.”¹⁵

Between 1776 and 1787, the political winds shifted in favor of Adams, Montesquieu and judicial independence. State legislatures were accused of usurping power from the judiciary, and the state constitutions were blamed for delegating too much power to the legislature, prompting calls for clearer separation of powers.¹⁶ By 1784, Jefferson — who seven years earlier had said the judiciary should “be a mere machine” for the legislature — now lobbied for judicial independence:

[Under the Virginia Constitution, t]he judiciary . . . members were left dependent on the legislature, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes . . . judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy.¹⁷

Wood concludes that the renaissance of separation of powers occasioned by the this rising fear of legislative despotism, shared by Jefferson and others, was ultimately responsible for the subsequent triumph of judicial independence at the constitutional convention.¹⁸

¹¹C. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, trans. T. Nugent, Book X, Sec. 6, 152 (1949).

¹²ADAMS, *supra* note 10.

¹³GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 161 (1969).

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* at 451.

¹⁷*Id.* (quoting Jefferson).

¹⁸*Id.* at 453-54.

2. Judicial Independence at the Constitutional Convention

The Ninth resolution of the Virginia delegation to the Constitutional Convention sought to ensure judicial independence by providing that "a national judiciary be established;" that the judges would "hold their offices during good behavior," and would receive a "compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time."¹⁹

a. The Good Behavior Clause

The "good behavior" clause remained essentially intact throughout the convention and was challenged only once. On August 27, 1787, Delegate Dickinson moved to follow the good behavior clause with a proviso that judges "may be removed by the Executive on the application [by] the Senate and House of Representatives."²⁰ The motion met with overwhelming opposition despite the prevalence of comparable restrictions on judicial tenure in many state constitutions established just a decade earlier.²¹ James Madison reported Gouverneur Morris as arguing that it was "a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removable without a trial," and concluded that it would be "fundamentally wrong to subject Judges to so arbitrary an authority." Delegate James Wilson agreed, saying that

"[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Gov[ernment];" and John Randolph likewise objected on the grounds that the amendment would "weaken[] too much the independence of the Judges." Dickinson's motion was overwhelmingly defeated by a vote of seven delegations to one.

Any discussion of the "good behavior" clause must necessarily encompass the impeachment clauses, insofar as impeachment followed by removal is the remedy the Constitution provides for less than good behavior that rises to the level of "high crimes and misdemeanors."²² At the Constitutional Convention, four issues arose with respect to the impeachments clauses: 1) which branch of government should have the impeachment power—Congress or the judiciary?; 2) should the President be subject to impeachment?; 3) should a super-majority vote be necessary for conviction in the Senate?; and 4) what conduct should be subject to impeachment?²³

Of these four issues, the latter two are relevant to the study of judicial independence and its limits.²⁴ The delegates inserted the requirement that two-thirds of the Senate concur in a decision to convict in impeachment proceedings, as a means to ensure that the removal process would be insulated from public opinion and legislative whim.²⁵ The point was to preserve impeachment as a check on the judicial and executive branches,

¹⁹WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION* 234-35 (1900).

²⁰MAX FARRAND, 2 *supra* note 7, at 428.

²¹See note 14 *supra*, and accompanying text.

²²Peter Shane, *supra* note 8.

²³Michael Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 11-17 (1989) (discussing the "four major areas of controversy regarding impeachment [that] arose at the Constitutional Convention").

²⁴Whether the power of impeachment should lie with the Supreme Court or the Congress may likewise have at least marginal relevance to judicial independence, insofar as objections to delegating the impeachment function to the Court concerned the Court's susceptibility to manipulation, because of its small size, and its residual dependence upon the President, given his role in judicial nominations. MAX FARRAND, 2 *supra* note 7 at 550-51.

²⁵PETER HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805* at 106 (1984).

and yet to make the impeachment process sufficiently difficult and cumbersome that it would not be used so often as to create an unhealthy dependence of the second and third branches on the first.²⁶

With respect to the scope of impeachable conduct, there appears to have been general agreement that impeachment ought to reach "political" offenses not recognized as conventional crimes at common law.²⁷ Consistent with this view, an August 20, 1787 version of the impeachment clause subjected federal officers to impeachment for "neglect of duty, malversation, or corruption."²⁸ On September 4, however, a modification was proposed that would limit impeachable offenses to treason and bribery.²⁹ On September 8, George Mason moved to add "maladministration" to the list of impeachable offenses, arguing that "[a]ttempts to subvert the Constitution may not be Treason," yet should be impeachable.³⁰ James Madison opposed Mason's motion, arguing that so vague a standard for impeachment "would be equivalent to tenure during pleasure of the Senate."³¹ As a compromise, Mason amended his motion, substituting language that subjected civil officers to impeachment for "other high crimes and misdemeanors."³²

Dean Michael Gerhardt concludes from this compromise that Mason "apparently understood" high crimes and misdemeanors to include maladministration.³³ One would likewise have to assume, however, that Madison did not share this understanding, given his stated objections to so broad an impeachment standard. Perhaps the most that can be said, in light of the subsequent

explanation of the clause offered by Hamilton in the Federalist Papers, is that it was generally agreed that impeachment should reach "attempts to subvert the Constitution."

In sum, the Convention never wavered from its commitment to protect judicial independence through tenure "during good behavior." It also appears, however, that the delegates intended for judges to be subject to impeachment and removal for "political" offenses involving attempts to subvert the constitution. What the convention notes do not indicate, however, are the kinds of behaviors that, in the delegates' minds, would qualify as an attempt to subvert the constitution and subject a judge to impeachment.

b. The Compensation Clause

The compensation clause, as proposed by the Virginia delegation, was modified at the Convention to permit periodic increases in judicial salaries (the original resolution forbade upward as well as downward adjustments). The debate on the modification underscored the tension between two competing aims: to insulate judicial salary from legislative manipulation; and to permit the legislature to increase judicial pay to ensure that judges receive salaries commensurate with their status as members of an independent branch of government.

On July 18, 1787, Gouverneur Morris moved to permit periodic increases in judicial salaries, on the grounds that "the value of money" may change during a judge's tenure, as may "the style of living" and the volume of judicial business, all of which could make

²⁶Warren Grimes, *Hundred-Ton Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209 (1991).

²⁷MAX FARRAND, 2 *supra* note 7 at 64-69; *see also*, Gerhardt, *supra* note 23 at 14.

²⁸FARRAND, 2 *supra* note 7 at 337.

²⁹FARRAND, 2 *supra* note 7 at 493.

³⁰*Id.* at 545.

³¹*Id.*

³²*Id.*

³³MICHAEL GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 9 (1996).

upward adjustment of judicial salaries necessary.³⁴ Madison opposed the amendment on the grounds that “[w]henver an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt toward the latter,” and that “it will be improper even so far to permit a dependence.”³⁵ Madison was unmoved by the concern that judicial salaries would need to be adjusted for inflation, suggesting that a simple solution would be to establish compensation “by taking for a standard wheat or some other thing of permanent value.”³⁶

Morris’s motion carried, but on August 27, Madison moved to have the bar on increases in judicial salaries reinstated. Pinckney opposed Madison’s motion, arguing that “[t]he importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U.S. can allow in the first instance.”³⁷ Granted, incoming judges could be appointed at higher salaries; nevertheless, Pinckney “did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.”³⁸ Madison’s motion was defeated.

Concern over the judiciary’s financial dependence on Congress was confined exclusively to salaries. The framers apparently gave no thought to the judiciary’s dependence on Congress for nonremunerative resources, such as building, clerical, and circuit-riding expenses, which Congress could manipulate to the same effect as salaries. The oversight is, to some extent, understandable. Manipulation of judicial salaries by kings and legislatures was a con-

crete, widely acknowledged problem; the same could not be said for manipulation of nonremunerative judicial resources. Moreover, resources dedicated to the lower courts, over and above judicial salaries, were relatively meager in the early years of the federal judiciary, and the possibility that such limited resources would or could be manipulated, may not have occurred to the delegates.³⁹

c. The Judicial Power Clause

The judicial power clause, as ultimately approved, did not establish the lower federal courts, but merely authorized Congress to establish them. Congress’s authority to regulate the lower federal courts’ practice, procedure, and administration, derives from its power to constitute (or not to constitute) the federal courts, which, when taken in combination with the necessary and proper clause, is thought to include the power to regulate the operations of whatever lower courts Congress sees fit to create.⁴⁰

The framers’ decision to authorize Congress to establish the lower federal courts, rather than to have the Constitution establish them directly, has thus proved critical to the contemporary balance of power between the first and third branches. Even so, this appears not to have been an intended consequence, so much as a side-effect of a decision having more to do with reducing tension in the relationship between state and federal power.

As introduced, the Virginia delegation’s ninth resolution provided “that a national judiciary be established,” without any mention of the Supreme or lower courts.⁴¹ On

³⁴MAX FARRAND 2 *supra* note 7 at 44-45.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.* at 429.

³⁸*Id.* at 430.

³⁹For instance, in the early years of the republic, there were no federal jails; the federal government paid jail fees to local jails. Court was not held in federal buildings, but in rented facilities such as taverns, or local officials’ homes.

⁴⁰*Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1080 (1992).

⁴¹WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION* 234-35 (1900).

June 4, 1787, when the resolution was initially considered, the first clause was amended to state: "Resolved that a National judiciary be established, to consist of one supreme tribunal and of one or more inferior tribunals," and was approved as amended.⁴² Early in the proceedings on June 5, the phrase "one or more" was deleted,⁴³ so that the resolution, as it stood, provided for the establishment of a supreme court and an unspecified number of inferior courts.⁴⁴ Later that day, Delegate Rutledge moved for reconsideration of the clause establishing inferior tribunals. According to Madison's notes, Rutledge argued that "the State Tribunals might and ought to be left in all cases to decide in the first instance," and that establishing lower federal courts would make "an unnecessary encroachment on the jurisdiction [of the states]."⁴⁵ Madison objected, arguing that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential,"⁴⁶ but Rutledge prevailed on a close vote, and the phrase was deleted.

Wilson and Madison then moved to add a clause to the resolution, providing "that the National Legislature be empowered to institute inferior tribunals." According to Madison's notes, "[t]hey observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them," and "repeated the necessity of some

such provision." Butler protested that "[t]he people will not bear such innovations," and that "[t]he states will revolt at such encroachments," but the motion carried by an overwhelming margin.

The issue of whether to grant Congress the power to establish inferior tribunals was revisited on July 18. Steadfast opponents argued that federal trial courts were unnecessary and would interfere with the operation of state courts.⁴⁷ Steadfast proponents argued that federal trial courts posed no threat to state courts and were essential to the administration of national laws.⁴⁸ It was only the ambivalent delegate Sherman who alluded to the provision as a delegation of power to Congress, and then for the limited purpose of expressing his "wish[] [that Congress] make use of the State Tribunals whenever it could be done."⁴⁹

In short, the decision to make the creation of the lower federal courts a matter of Congressional prerogative, rather than constitutional mandate, was the product of a political compromise, designed to deflect the antifederalist fear that a national judiciary would usurp the role of the state courts. Little, if any attention appears to have been given to the consequences of that decision for the relationship between Congress and the federal courts, and the limits of Congress' regulatory authority over the judiciary. To delegates such as Butler, these concerns were beside the point: "We must follow the

⁴²MAX FARRAND, *supra* note 7 at 104-05 (Madison Notes).

⁴³*Id.* at 119 (Madison notes) ("The words, 'one or more' were struck out before 'inferior tribunals'" as an amendment to the last clause of Resoln 9th").

⁴⁴*Id.* at 126 (Yates Notes).

⁴⁵*Id.* at 125 (Madison Notes).

⁴⁶*Id.*

⁴⁷Among the opponents, Butler "could see no necessity for such tribunals. The State Tribunals might do the business," and Martin agreed, arguing that the federal courts "will create jealousies & oppositions in the jurisdiction of which they will interfere." 2 *Id.* at 45-46.

⁴⁸Proponents such as Ghorum, on the other hand, argued that "Inferior tribunals are essential to render the authority of the Natl. Legislature effectual," while Randolph "observed that the Courts of the States can not be trusted with the administration of the National laws." *Id.* at 46.

⁴⁹*Id.* at 46.

example of Solon," Madison reported Butler as saying, "who gave the Athenians not the best Gov[ernmen]t he could devise; but the best they w[oul]d receive."⁵⁰

To the extent that the delegates nevertheless operated on the unstated assumption that the clause empowered Congress not only to establish the federal courts but also to regulate their administration, they do not appear to have thought that such a power would undermine the judiciary as a coequal branch of government. To the contrary, the convention was rife with discussion of the delegates' intention to establish three independent departments of government.⁵¹ The point was underscored when the Committee on Detail revised the first clause of Article III to vest "the judicial power" in the Supreme Court and whatever lower courts Congress established.⁵² By conforming Article III to parallel language in Article II, vesting "the executive power" in the President, and Article I, vesting "all legislative powers" in Congress, the delegates underscored the parity they sought to establish among the branches.

3. Judicial Independence in the Ratification Debates

The ratification debates reinforce, amplify, and in some cases qualify the "original understanding" of Article III. The Federalist Papers underscore the influence of Montesquieu, Adams and other like-minded theorists on the framers of the judiciary article. In Numbers 78 and 79, Alexander Hamilton, like Montesquieu and Adams,

isolated two operational goals of judicial independence, and explained how the good behavior and compensation clauses effectuated those goals. First, he referred to the independence of the judiciary as an *institution*, that enabled it to resist encroachments by Congress and the president, and thereby preserve its role as an institutional check on the political branches. He made the point in defense of life tenure for judges:

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit of judges, which must be essential to the faithful performance of so arduous a duty.⁵³

And again, in defense of the compensation clause:

Next to the permanency in office nothing can contribute more to the independence of judges than a fixed provision for their support. . . . [A] power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter.⁵⁴

⁵⁰*Id.* at 125.

⁵¹*See, e.g.*, JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 at 56, 61, 79-80 (1966) (reporting Delegate Dickinson's observation that "the Legislative, Executive & Judiciary departments ought to be made as independent as possible; Delegate Wilson's statement that "the Legislative Exe[cutive] and Judiciary ought to be distinct & independent"; and Madison's statement that "the Judiciary Departm[en]t ought to be separate and distinct from the other great Departments").

⁵²WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787 239-40 (1900).

⁵³THE FEDERALIST, No. 78.

⁵⁴THE FEDERALIST, No. 79.

Second, Hamilton at other times referred to “judicial independence” as a buffer against majoritarian or other external influence in *individual* decisions. Used in this way, judicial independence has less to do with maintaining institutional separation than preserving the judiciary’s impartiality.

That inflexible and uniform coherence to the rights of the Constitution and of individuals, which we perceive to be indispensable to the course of justice, can certainly not be expected from judges who hold their offices by temporary commission. Periodical appointments, however regulated, or by whomever made, would in some way or other be fatal to their independence.⁵⁵

With respect to the good behavior clause, prominent anti-federalists agreed that life tenure was a necessary and appropriate means to ensure judicial independence.⁵⁶ The compensation clause likewise drew only occasional fire. Of greater concern to the anti-federalists, was that the Constitution did not counterbalance judicial independence with a more powerful institutional check to ensure judicial accountability:

[J]udges under this system will be *independent* in the strict sense of the word. . . . [T]here is no power above them that can control their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of

capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.⁵⁷

In the minds of some antifederalists, the establishment of an insufficiently accountable federal judiciary ensured that federal judges would usurp the role of state judges. Benjamin Gale made the point at a Killingworth, Connecticut town meeting on November 12, 1787:

[T]hey tell us of a Supreme Court to be erected somewhere, but they don’t tell us where—and they shall have a compensation for their services, but they don’t tell us how much—and that they shall hold their seats during good behavior, by that I understand as long as they live or, at most, until some fitter tool to serve their purposes shall appear to oust them—and that their salaries shall not be diminished—and that Congress shall have the power to erect *inferior tribunals* under the Supreme Court of their appointment. Now, gentlemen, the designs of these paragraphs is that the courts appointed by this new-fangled Congress shall eat up our courts, of which our representatives now have the right of appointing the judges annually.⁵⁸

Federalist John Marshall defended the proposed Constitution against a similar attack in the Virginia ratification debates:

⁵⁵THE FEDERALIST, No. 78.

⁵⁶Federalist Alexander Hamilton argued in favor of tenure during good behavior in THE FEDERALIST, No. 78. Brutus and other anti-federalists likewise professed to support tenure during good behavior. See, e.g., *id.* at 223 (“I do not object to judges holding their commissions during good behavior. I suppose it is a proper provision provided they were made properly responsible”); The Federal Farmer; *The Judiciary*, January 18, 1788, in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 99 (Walter Hartwell Bennett, ed. 1977) (“it is well provided, that the judges shall hold their offices during good behaviour”).

⁵⁷Brutus, *The Power of the Judiciary (Part I)*, March 20, 1788, in THE ANTIFEDERALIST PAPERS 222, 223-24 (1965) (Morton Borden, ed.).

⁵⁸*Speech by Benjamin Gale*, III DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 420, 428 (November 12, 1787).

Are there any words in the Constitution which exclude the Courts of the States from those cases which they now possess? Are not controversies respecting lands claimed under grants of different States, the only controversies between citizens of the same State, which the Federal Judiciary can take cognizance of? . . . The State Courts will not lose the jurisdiction of the causes they now decide.⁵⁹

In the minds of other antifederalists, an insufficiently accountable federal judiciary would, through the exercise of judicial review, usurp the role of Congress. The best known of the antifederalists, writing under the pen name "Brutus," argued that "If . . . the legislature pass any laws inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature."⁶⁰ Moreover, Brutus concluded, impeachment is unavailable to remedy such judicial excesses because judges are "removable only for crimes," and "errors in judgment" are not crimes, in the absence of "wicked and corrupt motives."⁶¹

Alexander Hamilton responded to this charge in the *Federalist*. First, in *Federalist* 78, Hamilton explicitly acknowledged that the federal courts would possess the power to void unconstitutional acts of Congress:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to legislative authority. . . .

Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.

Second, Hamilton argued that this power posed no real threat to Congress. "[T]he supposed danger of judiciary encroachments on the legislative authority. . . is in reality a phantom," he declared. Conceding that "[p]articuliar misconstructions and contraventions of the legislature may now and then happen," Hamilton was nevertheless confident that "they can never be so extensive as to amount to an inconvenience," given the "comparative weakness" of the judicial branch (meaning its lack of control over sword or purse) and the availability of impeachment:

There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.⁶²

At first blush, Brutus and Hamilton appear to disagree as to whether impeachment and removal would be available to remedy bad judicial decision-making. A closer look, however, reveals that their interpretations are in accord. Hamilton and Brutus agreed that judicial "errors in judgment," (Brutus's phrase) or "misconstructions and contraventions of the legislature,"

⁵⁹X THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1430, 1431-32 (June 20, 1788).

⁶⁰Brutus, *supra* note 57 at 223-24.

⁶¹*Id.*

⁶²THE FEDERALIST, No. 81.

(Hamilton's phrase) are not high crimes and misdemeanors, subject to impeachment—although Brutus wished it were otherwise. They were likewise in accord, that a “series of deliberate usurpations on the authority of the legislature,” (Hamilton's phrase), which would clearly imply the presence of “wicked or corrupt motives,” (Brutus's phrase) would subject judges to impeachment. In short, the *Federalist Papers* and the *Anti-Federalist Papers* reinforce the view, apparently shared at the Convention, that impeachment and removal were available to remedy crimes *politically* defined, but would not reach errors in judgment in isolated cases.⁶³

The ratification debates reflect an appreciation for the tension and balance the constitution created between accountability and independence. Like the Convention debates, they focus on impeachment and removal as the primary counterbalance to life tenure, non-reducible salaries and judicial review. The extent to which Congress might hold the judiciary accountable by means of its power to establish—and hence regulate—the lower federal courts, remained largely, though not entirely, unexplored in the ratification process.

Most explications of the clause authorizing Congress to establish the lower courts characterized it not as a means to regulate court operations, but as a means to adjust the size of the lower court system in response to changing circumstances the framers could not anticipate. There was, however, some sporadic recognition that Congress's power to establish the courts subsumed a power to regulate them. One prominent antifederal-

ist, writing as “The Federal Farmer,” saw “some good things” in Article III, one being that “[t]he inferior federal courts are left by the constitution to be instituted and regulated altogether as the legislature shall judge best.”⁶⁴ As The Federal Farmer elaborated:

[T]he legislature does not appear to be limited to improper rules or principles in instituting judicial courts: indeed the legislature will have full power to form and arrange judicial courts in the federal cases enumerated, at pleasure, with these eight exceptions only. 1. There can be but one supreme federal judicial court. 2. This must have jurisdiction as to law and fact in the appellate causes. 3. Original jurisdiction, when foreign ministers and the states are concerned. 4. The judges of the judicial courts must continue in office during good behaviour—and 5. Their salaries cannot be diminished while in office. 6. There must be a jury trial in criminal causes. 7. The trial of crimes must be in the state where committed—and, 8. There must be two witnesses to convict of treason.

In all other respects Congress may organize the judicial department according to its discretion.⁶⁵

James Monroe made a similar point in the course of the Virginia ratification debates:

It will therefore be the duty of Congress to organize this branch, by the establishment of such subordinate courts . . . in such man-

⁶³See, e.g., WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

⁷JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RAN*⁶³In *FEDERALIST* No. 65, Hamilton reiterates the point: “A well-constituted court for the trial of impeachments” would have as “the subjects of its jurisdiction [] those offenses which proceed from the conduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”

⁶⁴Bennett, *supra* note 56 at 99.

⁶⁵*Id.* at 99-100.

ner as shall be found necessary to support the authority of the government What mode may best be calculated to accomplish this end, belongs to that body to determine.”⁶⁶

In the end, a study of the convention and ratification debates tells us that the framers intended for the judiciary to be one of three, coequal branches of government. It tells us that the founders gave federal judges life tenure and a salary that could not be diminished, to guarantee that the judiciary would have decisional and institutional independence. It tells us that the framers prized decisional and institutional independence, respectively, as means to insure impartial judicial decision-making and to avoid over-concentrations of power in a single branch of government. Finally, it tells us that impeachment and removal was the primary check on judicial independence, and was thought to be an appropriate remedy for judicial usurpations of power and other political crimes.

A study of the convention and ratification debates is important not only for what it tells us about what was on the minds of the framers, but also for what it tells us about what was not on their minds. They sought to preserve decisional independence by establishing a cumbersome impeachment and removal procedure and by insulating judicial salaries from Congressional manipulation, but do not appear to have considered the extent to which decisional independence could still be compromised by Congressional manipulation of the judiciary's nonremunerative resources. Similarly, they sought to preserve institutional independence by establishing the judiciary as a separate branch of government with the judicial power, but did not explore the extent to which such an aspiration was undercut by delegating to Congress the powers to establish, and by

implication, to regulate and destroy the lower federal courts.

C. Post-Ratification Evolution of Judicial Independence

Over two hundred years separate the framers' understanding of judicial independence from ours. Intervening history has had an obvious and inevitable impact on the course of the judiciary's institutional and decisional independence. It is beyond the scope of this report to detail the progress of judicial independence over time; moreover, space limitations preclude an exhaustive analysis. For purposes here, I will merely highlight some of the events occurring after the founding that inform contemporary conceptions of judicial independence and its limits.

1. Decisional Independence

The dual goals of judicial independence—to enable the judiciary to make impartial decisions, and to keep the political branches in check—was put to an early test in the landmark case of *Marbury v. Madison*, decided in 1803.⁶⁷ In that case, Secretary of State James Madison, acting on President Jefferson's instructions, refused to award Marbury a commission he had received from outgoing President John Adams, to serve as a justice of the peace in the District of Columbia. Marbury challenged Madison and Jefferson's actions in an original mandamus petition to the Supreme Court—a procedure authorized by Congress in the Judiciary Act of 1789.

Chief Justice Marshall's opinion in *Marbury* is sometimes wrongly assumed to be the intellectual genesis of the federal judiciary's power to declare acts of Congress void. That is understandable, given that the opinion cites no outside sources of authority

⁶⁶See, e.g. James Monroe, *Some Observations on the Constitution* May 25, 1788, in IX THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 844, 872 (John Kaminski and Gaspare Saladino, eds. 1990)

⁶⁷2 U.S. 137 (1803).

in support of its conclusions. The fact remains, however, that participants in the ratification debates for the most part assumed that the Constitution empowered the judiciary to invalidate unconstitutional laws. What makes *Marbury* a landmark decision, is that it was the first case in which the judiciary's power to review and void the acts of another branch of the federal government was exercised.

A less adroitly crafted opinion could have "established" the power of judicial review only to have it consigned to oblivion by a resentful Congress and President hell-bent on ignoring a presumptuous Court order invalidating a statute or executive action. That did not happen in *Marbury*. Rather, the Court avoided a direct confrontation with President Jefferson by asserting, without exercising, its authority to declare Presidential action unconstitutional. It could not exercise such authority, the Court explained, because the statute permitting the dispute to come before the Court in an original mandamus petition was itself unconstitutional. And by striking down this relatively inconsequential statute, the Court created precedent for its exercise of judicial review over legislative enactments without alienating Congress: the act in question had been passed fourteen years earlier by the federalists, who were now in the distinct minority in Congress; moreover, the net effect of invalidating the statute was to deprive the Court of jurisdictional power it would otherwise possess, which sapped strength from the argument of detractors that the Court's motive was to accumulate power to itself.

Although *Marbury* set precedent for the proposition that the federal courts could and should serve as a check on the political

branches and majoritarian whim without jeopardizing their independence, such a proposition has never implied immunity from criticism. Two examples from the post-founding generation are illustrative. Impeachment proceedings were initiated against Justice Samuel Chase in 1804, in part for his allegedly partisan procedural rulings in the trial of defendant James Callender, an antifederalist publisher charged with violating the Alien and Sedition Acts.⁶⁸ As Professor Barry Friedman observes in a forthcoming article, antifederalists were outraged, not only because they disapproved of the outcome, but because they objected to the countermajoritarian nature of the federal courts, that enabled unelected judges to pursue private political agendas at odds with the majority will.⁶⁹ Senator William Giles, for example, complained that "[w]e have seen Judges who ought to be independent pronouncing political harangues,"⁷⁰ and a newspaper editorial echoed that "[i]t will one day be the subject for inquiry, why judges and justices of the peace should be more independent of the control of a free people, than those who have the formation and execution of the laws entrusted to them."⁷¹

In the end, the effort to impeach and remove Justice Chase failed, as did a proposed constitutional amendment subjecting judges to removal upon joint address of the House and Senate.⁷² As previously noted, the convention and ratification debates suggested that federal judges would be subject to impeachment and removal for "political" crimes, including usurpations of power.⁷³ The Chase impeachment clarified if not qualified the original understanding, by underscoring that unpopular, wrongheaded judicial decision-making in isolated cases

⁶⁸October 11, 1996 Hearing at 15, 61 (testimony of Louis Pollak).

⁶⁹Barry Friedman, *A History of the Countermajoritarian Difficulty*, March 28, 1996 Draft, at 24.

⁷⁰2 ANNALS OF CONGRESS at 583, cited in Friedman, *supra* note 69 at 19.

⁷¹AURORA, March 31, 1803, cited in Friedman, *supra* note 69 at 21.

⁷²Friedman, *supra* note 69 at 21.

⁷³See *supra* notes 27-33, and accompanying text.

does not constitute high crimes or misdemeanors that should subject judges to impeachment and removal. Professor Burbank explained:

[F]rom the conclusion of the proceedings against Justice Chase to the present it has remained the general view, including of most people in the political branches, that invocation of the impeachment process is not an appropriate response to unpopular judicial decisions.⁷⁴

The 1807 trial of Aaron Burr provides a second example. Following Aaron Burr's acquittal on conspiracy and treason charges, newspapers savaged Judge John Marshall, who presided over the trial, for refusing to admit certain evidence against Burr. In stories with headlines such as "Burr Acquitted, Though Guilty,"⁷⁵ the trial was characterized as a "farce,"⁷⁶ and Marshall was accused of relegating jurors to the role of "eunuchs in the court of a Persian Starap."⁷⁷ Countermajoritarian criticism was once again in evidence, with one paper reacting to the Burr trial with the observation that "the

people now have to consider whether the existing judiciary system and the English common law are exactly calculated for a free and virtuous people."⁷⁸

In the years since, judicial criticism has come and gone in cycles. In his forthcoming article, Professor Friedman chronicles the ebbs and flows of judicial criticism—particularly countermajoritarian criticism⁷⁹—during the Jackson administration in the 1830s;⁸⁰ in the aftermath of the Dred Scott case in the 1850s;⁸¹ during reconstruction in the 1860s and 1870s; in the populist-progressive era from the 1890s to the 1920s;⁸² during the new deal in the 1930s;⁸³ and through and after World War II in the 1940s and 1950s.

Apart from criticizing judges or threatening them with impeachment, the political branches have occasionally responded to unpopular judicial decisions by attempting to limit the courts' subject matter jurisdiction or by adjusting the size of the Supreme Court. Efforts to strip the courts of jurisdiction have risen and receded in tandem with cycles of judicial criticism.⁸⁴ The same is true of strategic efforts to alter court size, although

⁷⁴October 11, 1996 Hearing at 33, 39 (testimony of Stephen Burbank).

⁷⁵AURORA, September 23, 1807, quoted in Barry Friedman, *A History of the Countermajoritarian Difficulty* (Draft), at 22.

⁷⁶AURORA, October 1, 1807, quoted in Friedman, *supra* note 69 at 22.

⁷⁷AURORA, Sept. 25, 1807, cited in Friedman, *supra* note 69 at 22.

⁷⁸AURORA, Sept. 11, 1807, cited in Friedman, *supra* note 69 at 23.

⁷⁹Barry Friedman, *supra* note —. The examples of judicial criticism cited in the remainder of this paragraph are drawn from Friedman's article.

⁸⁰For example, in *Worcester v. Georgia*, 31 U.S. (Pet.) 515 (1832), the Supreme Court held unconstitutional a Georgia statute that the state had relied upon to imprison two missionaries working on Cherokee lands. A Georgia newspaper railed against the decision: "Has it come to this that a sovereign and independent state is to be insulted, by being asked to become a party before the Supreme court, with a few savages residing on her own territory!!!! Unparalleled impudence!" 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 732 (2d ed. 1926).

⁸¹Senator Hale, for example, made the following statement on the Senate floor: "So much for the Supreme Court. If it were not so late, I might say more. I hope I may be excused if I have not denounced them sufficiently for the enormity of their decision; I will make up for it on some other occasion." CONG. GLOBE, 35th Cong., 2d Sess. 1265 (1859).

⁸²In *Chicago etc. Ry. Co. v. Minnesota*, 134 U.S. 418 (1889), the Supreme Court held that rates set by a state commission were subject to the Court's substantive due process scrutiny, causing the Minnesota State Farmers' Alliance to complain that their "liberties (had been) wheedled away from them, on technicalities, by a squad of lawyers, sitting as a supreme authority high above Congress, president and people," and to call for the justices' impeachment. MINNESOTA STATE FARMERS' ALLIANCE, *CONSTITUTION AND BY-LAWS ETC.* 20 (1890).

⁸³For example, after the Court declared the Agricultural Adjustment Act unconstitutional in *United States v. Butler*, 297 U.S. 1 (1935), six members of the Court were hung in effigy in Iowa. *Six Supreme Court Justices Hanged in Effigy in Iowa*, N.Y. TIMES, Jan. 8, 1936, at 15.

⁸⁴See generally, LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 45-50 (1988).

Professor Burbank suggests that such efforts may have ended with President Roosevelt's widely criticized effort to pack the Supreme Court:

President Roosevelt's Court-packing plan thus was not the first word on the subject, but I think it probably was the last, and therefore shares with the impeachment trial of Justice Chase status as a defining moment in our constitutional history as it concerns federal judicial independence.⁸⁵

2. Institutional Independence

Neither the text of the Constitution nor the convention and ratification debates establish a firm foundation for the institutional independence of the federal courts.⁸⁶ Granted, the framers spoke in sweeping terms of creating three separate and independent branches of government, and of an independent judiciary that could stand up to the political branches and keep them in check. To these ends they vested "the judicial power" in the federal courts, and gave the judges life tenure and a salary that could not be diminished, protections that did make decisions like *Marbury v. Madison* possible. But the framers also gave the political branches considerable regulatory authority over the federal courts—the lower federal courts in particular—and elaborated little on the scope of that authority in the convention and ratification debates.⁸⁷ The limits of Congress's regulatory authority, and hence the scope of the judiciary's institutional autonomy and independence thus remained unexplored and uncertain.

In 1789, Congress exercised its power to establish lower federal courts. Twelve years later, federalist and lame duck President John Adams, aided by a federalist and lame duck Congress, passed the Judiciary Act of 1801.⁸⁸ Among other things, the Act ended circuit riding responsibilities for Supreme Court justices, and established sixteen new circuit judgeships, which the President and Senate promptly filled with federalist judges.⁸⁹

The next year, the Jeffersonian republicans passed legislation reinstating circuit riding and eliminating the judgeships established the preceding year.⁹⁰ The Congressional debate on the repeal of the 1801 Act brought the underlying institutional judicial independence issues into sharp focus. Those legislators opposed to the repeal argued that Congress's power to establish the lower courts could not be construed to empower Congress to repeal the courts it established, without eviscerating judicial independence:

What will be the effect of the desired repeal? Will it not be a declaration to the remaining judges that they hold their offices subject to your will and pleasure? And what will be the result of this? It will be, that the check established by the Constitution. . . is destroyed. . . The Constitution provides perfectly for the inviolability of [a judge's] tenure. . . It is admitted that no power derived from the Constitution can deprive him of the office, and yet it is contended by repeal of the law that office may be destroyed. Is not this absurd?⁹¹

⁸⁵October 11, 1996 Hearing at 33, 43 (testimony of Stephen Burbank).

⁸⁶Russell Wheeler, *The Emerging Judicial Branch: Alfred Luongo Lecture to the Historical Society of the Eastern District of Pennsylvania*, December 11, 1996.

⁸⁷See *supra*, notes 42-53 and accompanying text.

⁸⁸October 11, 1996 Hearing at 15, 20-21 (testimony of Louis Pollak).

⁸⁹*Id.*

⁹⁰*Id.* at 21.

⁹¹CHARLES S. HYNEMAN AND GEORGE W. CAREY, *A SECOND FEDERALIST* 195-97 (1967) (quoting Senator Gouverneur Morris).

Those favoring the repeal argued, in effect, that Congress could exercise its plenary regulatory authority over the judicial office without running afoul of the constitutional protections afforded judicial office-holders:

We say that we have the same right to repeal the law establishing inferior courts that we have to repeal the law establishing post offices and post roads, laying taxes, or raising armies. . . . The arguments of gentlemen, generally, have been directed against a position that we never meant to contend for: against the right to remove the judges in any other manner than by impeachment. This right we have never insisted upon. . . . But we do contend that we have an absolute, uncontrolled right to abolish all offices which have been created by Congress, when in our judgment those offices are unnecessary and are productive of a useless expense.⁹²

The constitutionality of the 1802 repeal was never conclusively resolved. In the 1803 decision of *Stuart v. Laird*,⁹³ the Supreme Court rejected the argument that the 1802 Act's reinstatement of circuit-riding was unconstitutional, concluding that because of the Court's customary acquiescence in Congressional imposition of circuit riding responsibilities prior to 1801, subsequent objections to reinstatement of such responsibilities were effectively estopped. It further acknowledged Congress's power to "transfer a cause from one . . . tribunal to another," with respect to which "there are no words in the constitution to prohibit or restrain the exercise of legislative power." The *Laird* Court

did not, however, address the 1802 Act's repeal of circuit court judgeships, or the general limits of Congress's regulatory authority over the lower courts. The episode nevertheless served to further weaken the judiciary's already tenuous claim to independence as an institution or branch. Senator William Giles made the point bluntly in an 1808 speech on the Senate floor:

The theory of three distinct departments in government is, perhaps, not critically correct; and although it is obvious that the framers of our constitution proceeded upon this theory in its formation, yet in the practical adjustment of the departments to each other it was found impossible to carry this theory completely into effect. . . . With respect to the word independent, as applicable to the Judiciary, it is not correct, nor justified by the Constitution. This term is borrowed from Great Britain, and by some incorrect apprehension of its meaning there. . . is applied here to the department itself instead of the officers of the department. . . . An independent department of a Government is conceived to be a department furnished with powers to organize itself, and to execute the peculiar functions assigned to it without aid, or in other words, independent of any other department. A moment's attention to the Constitution will show that this is not the Constitutional character of our Judicial department.⁹⁴

In certain significant respects, the issue of whether the judiciary possessed institu-

⁹²*Id.* at 199 (quoting Representative Joseph Nicholson).

⁹³5 U.S. 299 (1803).

⁹⁴CHARLES HYNEMAN AND GEORGE CAREY, *supra* note 91 at 183-84 (quoting Senator William Giles).

tional independence remained unripe throughout the eighteenth and nineteenth century. The judiciary had no institutional identity to speak of, being a decentralized confederation of judges whose sense of "independence" was derived as much from geographical isolation as anything else.⁹⁵ And interbranch confrontations that might otherwise have arisen out of the tension between the founders' rhetoric of judicial branch independence and the reality of plenary Congressional power to regulate the courts were for the most part averted, due to Congressional indifference or informal, ad hoc communication and cooperation between judges and legislators.⁹⁶

By the turn of the twentieth century, however, the needs and size of the federal courts had grown to the point where Congress and courts perceived the need to bureaucratize and centralize the judiciary's operations. In 1922, Congress established the Conference of Senior Circuit Judges, later renamed the Judicial Conference of the United States.⁹⁷ In 1934, Congress delegated the task of procedural rulemaking to the Supreme Court.⁹⁸ And in 1939, Congress established the Administrative Office of the United States Courts.⁹⁹ Taken together, these enactments gave rise to the modern federal judiciary as an institution.¹⁰⁰

Regardless of whether the Constitution required Congress to do so, Congress manifested a high degree of deference to the new, bureaucratized judiciary that it had estab-

lished. It routinely acted on proposals recommended by the Judicial Conference, and never once interfered with procedural rules promulgated by the Supreme Court from 1934, when the Rules Enabling Act was passed, to 1973.¹⁰¹ The net effect was to create functional independence for the judiciary as an institution, despite the tenuous foundation for insisting upon it as a Constitutional necessity.

⁹⁵PETER FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 13-14 (1973).

⁹⁶See generally, FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) (discussing the difficulties of attracting Congressional attention to the problems of the federal courts); Maeva Marcus and Emily Field Van Tassel, *Judges and Legislators in the New Federal System*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 31 (Robert A. Katzmann, ed. 1988) (discussing informal interbranch communication between justices and legislators in the first decade after ratification).

⁹⁷Act of Sept. 14, 1922, ch. 306, §2, 42 Stat. 837, 838.

⁹⁸Pub. L. No. 73-415, 48 Stat. 1064.

⁹⁹Pub. L. No. 76-299, 53 Stat. 1223.

¹⁰⁰Russell Wheeler, Luongo Lecture, *supra* note 86 at 7-8.

¹⁰¹Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018 (1982).

UNJUST CRITICISM OF JUDGES:

A Model Program Outline for State and Local Bar Associations developed by the Judicial Division Lawyers Conference of the American Bar Association¹

I. Policy Statement

A. Why a Plan Is Needed

The effectiveness of the administration of justice depends in a large measure on public confidence. The reporting of inaccurate or unjust criticism of judges, courts, or our system of justice by the news media erodes public confidence and weakens the administration of justice. It is vital that non-litigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial.

Generally, it is undesirable for a judge to answer criticism of her or his own actions appearing in the news media. This policy has developed to insure the dignity of the administration of justice, to prevent interference with pending litigation, and to reaffirm the commitment to an independent judiciary, a judiciary dedicated to decisionmaking based on the facts and law as presented.

The risk is apparent that a response by a judge to criticism of her or his own actions may be perceived by the community as Self-serving and/or as a "defensive" position which fails for lack of credibility. Also, since there invariably is more at stake than an individual judge's ego or feelings, the bar should recognize the negative reflection on the dignity of the administration of justice if a judge should make an intemperate or emotional response to such criticism.

¹This model program, developed by the Judicial Division Lawyers Conference in 1986, was published in booklet titled *Unjust Criticism of Judges*. It is reproduced here except for introductory material. This model program was never presented to the House of Delegates or the Board of Governors of the ABA and, accordingly, does not represent ABA policy. (The ABA *does* have policy, adopted in 1994, urging state and local bars to consider developing response mechanisms for responding to unfair judicial criticism.) As we go to press, the Lawyers Conference is completing its revision of this model program for responding to unjust criticism, and tentative plans have been made to present the revised model program to the ABA House of Delegates in February 1998 for approval as ABA policy.

Further, a judge's comment contains the potential of reflecting on pending litigation and may have an undesirable effect on litigants.

In addition, an inappropriate response may give encouragement to those who would control the judiciary by intimidation and thus weaken the independence of the judiciary.

Therefore, cooperation of lawyers and bar associations is necessary to successfully meet inaccurate or unjust criticism of judges and courts. This model plan implements the American Bar Association Model Code of Professional Responsibility (EC 84) and the Model Rules of Professional Conduct comment, Model Rule 8.2, which entitle adjudicatory officials to the support of the bar in the case of unjust criticism of their actions.

B. When Action in Response to Inaccurate or Unfair Criticism Should Be Taken by the Bar

Implementation of this plan is selective. To avoid infringing on the freedom of the press, this plan is designed to effect a response to criticism of the judiciary and courts that is serious as well as inaccurate or unjustified criticism.

There should be no attempt to prevent just criticism, but inaccurate or unjust criticism should be answered and prevented through an organized public information program. Such criticism typically results from a lack of understanding of the system—the reason for a decision, a sentence or a courtroom action.

The bar should respond publicly to attacks upon a judge only in the following two instances:

1. a public utterance that is unwarranted or an unjust attack on a judge in a pending case, regardless of the source of the attack, or;

2. any "unwarranted" or "unjust" attack or series of attacks on a judge or court which may adversely affect the administration of justice.

Guidelines to determine when a response to criticism is appropriate in a particular case are provided in Section II.C. of the State Bar Association Model Program and Section III.C. of the Local Bar Association Model Program, below.

C. Implementation of the Policy and Plan

Because of the restraints placed on judges both by tradition and by the Code of Judicial Conduct, and the ethical obligations imposed by the Code of Professional Responsibility for lawyers, it is recommended that our state and local bar associations adopt a policy and program to provide appropriate responses to inaccurate or unjust criticism of judges and courts. The following are suggestions for implementation of such a policy and program:

1. Adopt a policy statement that supports the position that judges should generally not respond to criticism and that the bar, both state and local, should respond to inaccurate or unjust criticism of judges and courts.
2. Adopt a structure and process for receiving, screening and evaluating criticisms of judges and/or courts. (See Sections II.A. and B. and III.A. and B. for suggested program.)
3. Develop guidelines to determine when the bar association should respond. (See Section II.C. and III.C. for suggested guidelines.)
4. Since timing is a key to responding, provide a method whereby the bar can respond quickly, accurately, and with authority. (See Sections II.D. and III.D.)

5. Coordinate state and local bar association programs to broaden the base of the response. In some cases, it may be appropriate for both the state bar and the local bar to respond. In other cases, only one or the other should respond.
6. Coordinate the program with the appropriate state or local judiciary and recommend to other local bar associations the implementation of a comparable policy and program.

II. Model Program for State Bar Associations

A. Purposes and Functions of Program

The primary purposes and functions of the program are:

- (a) To deal with errors in reporting and with inaccurate or unjust criticism of judges, courts, and/or the administration of justice, as further provided in this policy statement;
- (b) To be available to the news media as a resource for obtaining information concerning judicial activities, court process, or other technical or legal information about the administration of justice;
- (c) To encourage broad dissemination of information to the public about noteworthy achievements and improvements within the justice system;
- (d) To suggest means by which judges and lawyers can improve the public image of the legal system; and
- (e) To generally seek a better understanding within the community of the legal system and the role of lawyers and judges.

B. Referral Procedure

1. Assign task of administering the program to an appropriate designee, committee and/or staff person.
2. All referrals of criticism of judges and courts should be forwarded to the appropriate staff person at the state bar association headquarters. The referral may be oral or written, but in all cases the referring person must be available to assist in gathering background and factual information and must present written material when requested. All referrals should be undertaken with the specific permission of the judge or court criticized with the understanding that the judge or court also will assist in gathering necessary information for the bar association to evaluate.
3. The staff person assigned should immediately begin to gather all pertinent background and factual information including a copy of the text. Whether in live or print media of the criticism.
4. The staff person then should immediately notify the president of the state bar association and the designee or chairperson of the committee assigned the overall responsibility.
5. The designee or committee chairperson should promptly investigate the underlying facts, discussing them to the extent possible with other committee members and the judge involved, and then promptly prepare and release the response.

Upon securing approval of the president of the state bar association, the designee or committee chairperson may speak in the name of the association.

C. Guidelines to Determine When the Bar Should Respond

1. The following are the kinds of cases in which responding to criticism is appropriate, except in unusual circumstances:
 - (a) When the criticism is serious and will most likely have more than a passing or de minimis negative effect in the community;
 - (b) When the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding; and,
 - (c) When the criticism is materially inaccurate; the inaccuracy should be a substantial part of the criticism so that the response does not appear to be "nitpicking";
2. The following factors should be considered in determining whether a response should be made in a close case, and considered in every case in determining the type of response:
 - (a) Whether a response would serve a public information purpose and not appear to be "nitpicking";
 - (b) Whether the criticism adequately will be met by a response from some other appropriate source;
 - (c) Whether the criticism substantially and negatively affects the judiciary or other parts of the legal system;
 - (d) Whether the criticism is directed at a particular judge but unjustly reflects on the judiciary generally, the court, or another element of the judicial system (e.g., grand jury, lawyers, probation, bail, etc.);
 - (e) Whether a response provides the opportunity to inform the public about an important aspect of the administration of justice (e.g., sentencing, bail, evidence rules, fundamental rights, etc.);
 - (f) Whether a response would appear defensive or self-serving;
 - (g) Whether the critic is so obviously uninformed about the judicial system that a response can be made on a factual basis;
 - (h) Whether the criticism or report, although generally accurate, does not contain all or enough of the facts of the event or procedure reported to be fair to the judge or matter being criticized;
 - (I) Whether overall the criticism is not justified or fair;
 - (j) Whether the criticism, while not appearing in the local press, pertains to a local judge or a local matter;
 - (k) Whether the timing of the response is especially important and can be best met by the Committee.
3. The following are the kinds of cases in which response to criticism IS NOT appropriate, except in unusual circumstances:
 - (a) When the criticism is a fair comment or opinion;
 - (b) When the feud is between the critic and the judge on a personal level;
 - (c) When the criticism is vague or the product of innuendo, except when the innuendo is clear;

- (d) When there is a likelihood that a complaint against the judge will be presented to the appropriate Judicial Inquiry or disciplinary body;
- (e) When a lengthy investigation to develop the true facts is necessary;
- (f) When the response would prejudice a matter at issue in a pending proceeding;
- (g) When the controversy is insignificant.
- (c) The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
- (d) The statement should be written in lay terms suitable for inclusion in a newspaper story;
- (e) Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., derision required by state law);

D. The Response

1. Timing. To be effective, the response must be prompt, but accurate. If at all possible, the response should be made within 24-48 hours of publication of the criticism or report, especially keeping in mind the deadline(s) of the news media that reported the original criticism.
2. Form of Response. A letter to the editor is generally the best form of response, because it is the most likely to be printed fully and accurately. Press releases are usually more subject to editing and are frequently viewed as less credible, and pamphlets are too elaborate. Television or radio talk shows are more likely to inflame rather than resolve controversy, and should be used with caution and only in the rare cases which would appear to justify such a response.
3. Drafting Considerations.
 - (a) The response should be a concise, accurate, "to the point" statement, devoid of emotional, inflammatory or subjective language;
 - (b) The statement should be informative and not argumentative or condescending;
4. Content of the Response. The following points may be included in a typical response:
 - (f) Where appropriate, the statement should include an explanation of the process involved {e.g., sentencing, bail, temporary restraining order};
 - (g) The statement should not attempt to discredit the critic, that is, attack the competence, good faith, motives, or associates of the critic;
 - (h) The statement should not provide evidence that the critic has hit a nerve, causing overreaction;
 - (I) The statement should not defend the indefensible;
 - (j) The committee should consider the cause of the criticism or controversy, which might not be immediately apparent.
- (a) Identify the criticism and its source.
- (b) We may frequently disagree with the decisions and actions of public officials, including judges, and the federal and state constitutions protect our right to express that disagreement.

(c) We must remember that judges have no control over what cases come before them, but they must decide each and all of those cases. Judges must follow the law as established by higher courts. One side always loses in every lawsuit.

(d) Because of their position, judges are not wholly free to defend themselves and it is ordinarily not appropriate for them to personally answer charges made against them or their decisions (EC 8-6; M.R. 8.2).

(e) Lawyers, under the Code of Professional Responsibility and the Model Rules of Professional Conduct, have a duty to defend judges against unjust criticism (EC 8-6; M.R. 8.2).

(f) The particular criticism or attack is unjust because [give reasons].

Note: Avoid taking a position on the merits of the controversy, since to do so will probably eliminate any educational benefit the balance of the points might have for those who agree with the criticism. Accordingly, it may be best to omit discussion of why the particular criticism is unjust. This should be decided on a case-by-case basis.

(g) The need for independent judges, who will not be influenced by unjustified criticism of them or their decisions, requires that the organized bar remind both lawyers and the public of these facts.

(h) The law has established appellate courts so that decisions of judges may be reviewed and corrected. Our present judicial system provides for change in the law

through legislative action or by constitutional revision.

III. Model Program for Local Bar Associations

A. Purposes and Functions of Program

The primary purposes and functions of the program are:

- (a) To deal with errors in reporting and with inaccurate or unjust criticism of judges, courts and/or the administration of justice, as further provided in this policy statement;
- (b) To be available to the news media as a resource for obtaining information concerning judicial activities, court process, or other technical or legal information about the administration of justice;
- (c) to encourage broad dissemination of information to the public about noteworthy achievements and improvements within the justice system;
- (d) To suggest means by which judges and lawyers can improve the public image of the legal system; and
- (e) To generally seek a better understanding within the community of the legal system and the role of lawyers and judges.

B. Referral Procedure

1. Assign task of administering the program to an appropriate designee, committee and/or staff person.
2. All referrals of criticism of judges and courts should be forwarded to the appropriate staff person at the local bar association headquarters. The referral may be oral or written, but in

all cases the referring person must be available to assist in gathering background and factual information and must present written material when requested. All referrals should be undertaken with the specific permission of the judge or court criticized with the understanding that the judge or court also will assist in gathering necessary information for the bar association to evaluate.

3. The staff person assigned should immediately begin to gather all pertinent background and factual information including a copy of the text (whether in live or print media) of the criticism.
4. The staff person then should immediately notify the president of the local bar association and the designee or chairperson of the committee assigned the overall responsibility.
5. The designee or committee chairperson should promptly investigate the underlying facts, discussing them to the extent possible with other committee members and the judge involved, and then promptly prepare the release of the response.

Upon securing approval of the president of the local bar association, the designee or committee chairperson may speak in the name of the association.

C. Guidelines to Determine When the Bar Should Respond

1. The following are the kinds of cases in which responding to criticism is appropriate, except in unusual circumstances:
 - (a) When the criticism is serious and will most likely have more than a passing or de minimis negative effect in the community;
 - (b) When the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding; and
 - (c) When the criticism is materially inaccurate; the inaccuracy should be a substantial part of the criticism so that the response does not appear to be "nitpicking";
2. The following factors should be considered in determining whether a response should be made in a close case, and considered in every case in determining the type of response:
 - (a) Whether a response would serve a public information purpose and not appear to be "nitpicking";
 - (b) Whether the criticism adequately will be met by a response from some other appropriate source;
 - (c) Whether the criticism substantially and negatively affects the judiciary or other parts of the legal system;
 - (d) Whether the criticism is directed at a particular judge but unjustly reflects on the judiciary generally, the court, or another element of the judicial system (e.g., grand jury, lawyers, probation, bail, etc.);
 - (e) Whether a response provides the opportunity to inform the public about an important aspect of the administration of justice {e.g., sentencing, bail, evidence rules, fundamental rights, etc.);
 - (f) Whether a response would appear defensive or self-serving;
 - (g) Whether the critic is so obviously

uninformed about the judicial system that a response can be made on a factual basis;

- (h) Whether the criticism or report, although generally accurate, does not contain all or enough of the facts of the event or procedure reported to be fair to the judge or matter being criticized;
 - (I) Whether overall the criticism is not justified or fair;
 - (j) Whether the criticism, while not appearing in the local press, pertains to a local judge or a local matter;
 - (k) Whether the timing of the response is especially important and can be best met by the Committee.
3. The following are the kinds of cases in which response to criticism IS NOT appropriate, except in unusual circumstances:
- (a) When the criticism is a fair comment or opinion;
 - (b) When the feud is between the critic and the judge on a personal level;
 - (c) When the criticism is vague or the product of innuendo, except when the innuendo is clear,
 - (d) When there is a likelihood that a complaint against the judge will be presented to the appropriate Judicial Inquiry or Disciplinary body;
 - (e) When a lengthy investigation to develop the true facts is necessary;
 - (f) When the response would pre-

dice a matter at issue in a pending proceeding;

- (g) When the controversy is insignificant.

D. The Response

1. Timing. To be effective, the response must be prompt, but accurate. If at all possible, the response should be made within 24-48 hours of publication of the criticism or report, especially keeping in mind the deadlines) of the news media that reported the original criticism.
2. Form of Response. A letter to the editor is generally the best form of response, because it is the most likely to be printed fully and accurately. Press releases are usually mere subject to editing and are frequently viewed as less credible, and pamphlets are too elaborate. Television or radio talk shows are more likely to inflame rather than resolve controversy, and should be used with caution and only in the rare cases which would appear to justify such a response.
3. Drafting Considerations.
 - (a) The response should be a concise, accurate, "to the point" statement, devoid of emotional, inflammatory or subjective language;
 - (b) The statement should be informative and not argumentative or condescending;
 - (c) The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
 - (d) The statement should be written in lay terms suitable for inclusion in a newspaper story;

- (e) Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., decision required by state law);
 - (f) Where appropriate, the statement should include an explanation of the process involved (e.g., sentencing, bail, temporary restraining order),
 - (g) The statement should not attempt to discredit the critic, that is, attack the competence, good faith, motives, or associates of the critic;
 - (h) The statement should not provide evidence that the critic has hit a nerve, causing overreaction;
 - (i) The statement should not defend the indefensible;
 - (j) The committee should consider the cause of the criticism or controversy, which might not be immediately apparent.
4. Content of the Response. The following points may be included in a typical response:
- (a) Identify the criticism and its source.
 - (b) We may frequently disagree with the decisions and actions of public officials, including judges, and the federal and state constitutions protect our right to express that disagreement.
 - (c) We must remember that judges have no control over what cases come before them, but they must decide each and all of those cases. Judges must follow the law as established by higher courts. One side always loses in every lawsuit.
 - (d) Because of their position, judges are not wholly free to defend themselves and it is ordinarily not appropriate for them to personally answer charges made against them or their decisions (EC 8-6, M.R. 8.2).
 - (e) Lawyers, under the Code of Professional Responsibility and the Model Rules of Professional Conduct, have a duty to defend judges against unjust criticism (EC 8-6, M.R. 8.2).
 - (f) The particular criticism or attack is unjust because [give reasons].
- Note: Avoid taking a position on the merits of the controversy, since to do so will probably eliminate any educational benefit the balance of the points might have for those who agree with the criticism. Accordingly, it may be best to omit discussion of why the particular criticism is unjust. This should be decided on a case-by-case basis.*
- (g) The need for independent judges, who will not be influenced by unjustified criticism of them or their decisions, requires that the Organized bar remind both lawyers and the public of these facts.
 - (h) The law has established appellate courts so that the decisions of judges may be reviewed and corrected. Our present judicial system provides for change in the law through legislative action or by constitutional revision.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES¹

RECOMMENDATION

BE IT RESOLVED that the American Bar Association amend the first and second paragraphs of the Commentary to Section 5(C)(2) of the Code of Judicial Conduct (1990), to read as follows:

Canon 5

**A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM
INAPPROPRIATE POLITICAL ACTIVITY**

...

C. Judges and Candidates Subject to Public Election

...

Commentary:

There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. This is among the reasons that merit selection of judges is a preferable manner in which to select the judiciary. Notwithstanding that preference, Section 5(C)(2) recognizes that in many jurisdictions judicial candidates must raise funds to support their candidacies for election to judicial

¹This Report with Recommendation is not presently ABA policy. The recommendation will be considered by the ABA House of Delegates for adoption as policy during the 1997 ABA Annual Meeting in San Francisco.

office. It therefore permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. In order to guard against the possibility that conflicts of interest will arise, the candidate must instruct his or her campaign committees at the start of the campaign to solicit or accept only contributions that are reasonable and appropriate under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification as provided under Section 3(E).

Campaign committees established under section 5(C)2 should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising to the extent possible. Such Committees must at all times comply with applicable statutory provisions governing their conduct.

REPORT

The American Bar Association strongly endorses the merit selection of judges, as opposed to their election, in no small part because of the potential for conflicts of interest created by the solicitation and acceptance of significant amounts of money by committees established to manage judicial candidates' election campaigns. Five times between August 1972 and August 1984 the House of Delegates has approved recommendations stating the preference for merit selection and encouraging bar associations in

jurisdictions where judges are elected in partisan or non-partisan elections to work for the adoption of merit selection and retention.

Of particular concern to the bar is the common practice whereby candidates for election to judicial office, especially in partisan political contests, accept significant amounts of money in the form of statutorily-permitted campaign contributions from parties whose interests regularly come before the court, or from lawyers who practice before the court.

This Committee, when it drafted revisions to the judicial ethics rules between 1987 and 1990 (leading to the House's adoption of the Code of Judicial Conduct (1990)), recognized its mandate to provide practical guidance to judges (and lawyers) with respect to real-life judicial selection methods, including partisan and non-partisan elections. Although in ideal circumstances the Committee might have had to address only the Association-preferred situations in which judicial candidates are identified and take the bench based upon merit, in fact the majority of judges are selected through the electoral process, and the Code therefore recognized that campaign contributions are solicited and accepted in this context.

Nevertheless, a survey of ethics opinions, judicial disqualification cases, and news articles from the general media on this subject convinced the Committee that, although permissible from a legal standpoint, the fund-raising that accompanies judicial campaigns frequently gives rise to conflicts of interest that may reflect adversely upon the impartiality of the judiciary. Mindful as well of the ABA's strong support for merit selection of judges, the Committee decided to encourage attention to the ethical problems presented by judicial campaign fund-raising by proposing an appropriate amendment to the Code of Judicial Conduct (1990).

The proposed amendment amends the Commentary to Section 5(C)2 of the Code

to state the Association's preference for merit selection, and suggests that election campaign contributions made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about the judge's impartiality and be cause for disqualification.

A legislative draft version of the proposed amended commentary appears below, following the black-letter Rule provision 5(C)(2) on which it is based.

The Committee urges the House of Delegates to adopt this amendment in order that the Association's model standards for judicial ethics - as we present them for consideration and adoption by each jurisdiction - will reflect its commitment to merit selection and judicial impartiality.

Rule 5(C) (2):

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 through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

Legislative draft of proposed revised paragraphs (1) and (2) of Commentary, with additions underlined and deleted portions struck through:

5(C)(2) ...

Commentary:

There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. This is among the reasons that merit selection of judges is a preferable manner in which to select the judiciary. Notwithstanding that preference, Section 5(C)(2) recognizes that in many jurisdictions judicial candidates must raise funds to support their candidacies for election to judicial office. It therefore ~~Section 5(C)2~~ permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign ~~In order to guard against the possibility that conflicts of interest will arise,~~ the candidate must instruct his or her campaign committees at the start of the campaign to solicit or accept only contributions that are reasonable and appropriate under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for relevant ~~to disqualification as provided~~ under Section 3(E).

Campaign committees established under section 5(C)2 should manage campaign finances responsibly, avoiding deficits

that might necessitate post-election fund-raising, to the extent possible. Such committees must at all times comply with applicable statutory provisions governing their conduct.

RELEVANT POLICIES OF THE AMERICAN BAR ASSOCIATION

JUDICIAL INDEPENDENCE

A. Policies pertinent to the federal judiciary:

■ May 1997:

RESOLVED, that the American Bar Association reaffirms its support for the lifetime appointment of federal judges, during good behavior, as provided in Article III of the Constitution.

BE IT FURTHER RESOLVED, that the American Bar Association opposes any proposals by statute or constitutional amendment to limit the lifetime tenure or Independence of Article III federal judges by establishing a term-of-years or by other limitation.

■ April 1996:

The Board of Governors expressed concern over recent political attacks by both Democrats and Republicans on the independence of the judiciary and called on lawyers everywhere to speak out on the critical role that an able, competent and independent judiciary plays in protecting the rights and freedoms of all Americans under the Rule of Law.

■ February 1996:

RESOLVED, that the American Bar Association opposes the recent 1995-1996 Congressional initiatives that infringe upon the separation of powers between Congress and the courts, and have the potential to inhibit the independence of the judiciary.

B. Policies pertinent to state judiciaries:

■ August 1996:

RESOLVED, that the American Bar Association (ABA) opposes efforts to adopt any measure to place an automatic limit on the number of terms a person may serve in a judicial position and urges voters and legislators to oppose such efforts;

FURTHER RESOLVED, that the ABA urges all bar associations, and other organizations whose goals include the improvement of the legal profession, judiciary and system of justice in the United States, to speak against such measures.

BIAS/DISCRIMINATION IN THE COURTS

A. Policy pertinent to the federal judiciary:

■ August 1991:

RESOLVED, that the American Bar Association supports the enactment of authoritative measures, requiring studies of the existence, if any, of bias in the federal judicial system, including bias based on race, ethnicity, gender, age, sexual orientation and disability, and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch.

BE IT FURTHER RESOLVED, that the American Bar Association urges that such studies should include the development of remedial steps to address and eliminate any bias found to exist.

B. Policies pertinent to the federal judiciary and state judiciaries:

■ August 1995:

RESOLVED, that the American Bar Association:

- a) condemns the manifestation by lawyers in the course of their professional activities, by word or conduct, of bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors and others, based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, unless such words or conduct are otherwise permissible as legitimate advocacy on behalf of a client or a cause.
- b) opposes unlawful discrimination by lawyers in the management or operation of a law practice in hiring, promoting, discharging or otherwise determining the conditions of

employment, or accepting or terminating representation of a client;

- c) condemns any conduct by lawyers that would threaten, harass, intimidate or denigrate any other person on the basis of the aforementioned categories and characteristics; and
- d) discourages members from belonging to any organization that practices invidious discrimination on the basis of the aforementioned categories and characteristics;
- e) encourages affirmative steps such as continuing education, studies, and conferences to discourage the speech and conduct described above.

■ February 1990:

BE IT RESOLVED, that the ABA urges judicial leaders to encourage and promote the full participation in the work forces of the court systems under their jurisdiction of all persons regardless of their race, sex, color, national origin, religion, age or handicap; and

BE IT FURTHER RESOLVED, that the ABA encourages each court system, and each major local court with significant control over personnel administration, to adopt merit-based personnel systems, including specific equal employment opportunity and affirmative action plans, that encompass all facets of court personnel management including recruitment, hiring, training, promotion and advancement; and

BE IT FURTHER RESOLVED, that the ABA calls upon officials within the legislative and executive branches of government who select and appoint persons to the judiciary, and members of judicial selection commissions or advisory groups who assist them, to incorporate affirmative action values as they decide whom to recommend and appoint to judicial positions; and

BE IT FURTHER RESOLVED, that the ABA encourages executive agencies that control or share in the selection of court personnel to implement equal employment opportunity and affirmative action plans and programs as they staff the courts.

■ **August 1986:**

BE IT RESOLVED, that the American Bar Association recommends that state and federal education programs for judges include (a) a course devoted to fairness and the judiciary's role in ensuring a courtroom atmosphere free of both overt and subtle forms of race and sex bias; and (b) analysis of race and sex biased stereotypes, myths, beliefs and biases that may affect judicial decision-making, as part of substantive law courses dealing with subjects such as sentencing, treatment of domestic violence and rape victims, alimony and child support awards and damages awards.

CONGRESSIONAL LIMITS ON, OR CURTAILMENT OF, JURISDICTION

■ **August 1981:**

BE IT RESOLVED, that the American Bar Association opposes the legislative curtailment of the jurisdiction of the Supreme Court of the United States and the inferior federal courts for the purpose of effecting changes in constitutional law.

■ **June 1982:**

The Board endorsed and concurred in the President's interpretation and implementation of Association policy as opposing legislation which proposes to curtail the jurisdiction of federal courts as well as legislation which seeks to curtail remedies available to federal courts in cases involving constitutional rights.

JUDICIAL COMPENSATION

A. Policies pertinent to the federal judiciary:

■ **February 1994:**

RESOLVED, that salary levels of federal, state, and territorial judges and the administrative judiciary should be reviewed on a regular, periodic basis and adjusted to ensure that judicial salaries are not, in effect, diminished by increases in the cost of living.

■ **February 1989:**

RESOLVED, that the compensation currently paid to the federal judiciary is grossly insufficient, inadequate and inappropriate;

RESOLVED FURTHER, that a crisis will arise in the nation's justice system if immediate steps are not now taken at least to restore the erosion which has occurred in judicial salaries in the past two decades;

RESOLVED FURTHER, that the American Bar Association urges Congress to permit the judicial salaries recommended by Presidents Reagan and Bush and the 1988 Commission on Executive, Legislative and Judicial Salaries to go into effect.

■ **December 1984:**

RESOLVED, that the American Bar Association urges Congress not to impose a freeze on federal judicial salaries and to enact a minimum 3.5 percent cost of living adjustment for the federal judiciary.

■ **August 1980:**

RESOLVED, that the American Bar Association urges federal and state governments to adjust compensation schedules for judicial officers to provide relief from the cumulative reductions in the value of their earnings as the result of inflation.

B. Policies pertinent to the state judiciaries:

■ February 1994:

RESOLVED, that salary levels of federal, state, and territorial judges and the administrative judiciary should be reviewed on a regular, periodic basis and adjusted to ensure that judicial salaries are not, in effect, diminished by increases in the cost of living.

■ August 1981:

BE IT RESOLVED, that the American Bar Association recommends that the salaries of the justices of the highest courts of the States should be substantially equal to the salaries paid to judges of the United States courts of appeal, and the salaries of State trial judges of courts of general jurisdiction should substantially equal the salaries paid to judges of the United States district courts.

■ August 1980:

RESOLVED, that the American Bar Association urges federal and state governments to adjust compensation schedules for judicial officers to provide relief from the cumulative reductions in the value of their earnings as the result of inflation.

JUDICIAL DISCIPLINE AND REMOVAL

A. Policies pertinent to the federal judiciary:

■ February 1994:

RESOLVED that the American Bar Association supports efforts within the ABA and by state, territorial and local bar associations to increase the awareness and understanding among the practicing bar regarding the availability of proce-

dures for handling complaints against and disciplining federal judicial officers under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. Sections 332, 372 ("the Act").

BE IT FURTHER RESOLVED that the American Bar Association supports the appointment by circuit judicial councils, either directly or by delegation, of one or more committees within the circuit, its districts or its divisions, broadly representative of the bar and, perhaps including informed lay persons, (a) to provide a vehicle for presenting on behalf of others, complaints against federal judges which the committee deem suitable for referral to the chief judge of the circuit, (b) to work with chief judges to identify instances or patterns of alleged judicial misconduct that might be resolved informally or otherwise, (c) to defend the judiciary against unjustified attacks and lawyers against retaliation by judges, and (d) to educate the profession and the public about procedures under the 190 Act.

BE IT FURTHER RESOLVED that the American Bar Association urges a chief judge who dismisses a non-frivolous complaint or concludes a proceeding to prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition, which memorandum should not include the name of the complainant or of the judge or magistrate judge whose conduct was complained of; and requests that the Judicial Conference devise and monitor a system for the dissemination of information about these complaint dispositions with the goal of developing a body of precedent and enhancing judicial and public education about judicial discipline.

■ **February 1993:**

RESOLVED, that the American Bar Association reaffirms its support in principle for the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C.332, 372 which provides a mechanism within the Judicial Branch for handling complaints against and disciplining federal judicial officers.

BE IT FURTHER RESOLVED, that the American Bar Association concludes that no significant benefit would be realized by adding statutory removal from office to the methods of discipline under the Act, especially in light of the serious constitutional question whether Article III judges may be removed by means other than impeachment.

BE IT FURTHER RESOLVED, that the American Bar Association through the Task Force on Judicial Removal shall monitor the work of the National Commission on Judicial Discipline and Removal and report on it to the House of Delegates, so that the American Bar Association can continue to advise the Commission of its views and recommendations.

■ **August 1986:**

BE IT RESOLVED, that the American Bar Association urges the House of Representatives promptly to consider impeaching any federal judge who is convicted of a felony and who has exhausted his appeals but who has failed to resign from office forthwith.

B. Policy pertinent to state judiciaries:

■ **August 1994:**

BE IT RESOLVED, that the American Bar Association adopts the *Model Rules for Judicial Disciplinary Enforcement*.

JUDICIAL VACANCIES

A. Policies pertinent to the federal judiciary:

■ **February 1990:**

BE IT RESOLVED, that the American Bar Association urges the President of the United States to expedite the appointment to vacancies existing in the United States judicial system and that the Senate take prompt action in considering confirmation of such nominees.

BE IT FURTHER RESOLVED, that the American Bar Association urges the President and Senate to act expeditiously with respect to the District Court of the Virgin Islands where there is currently no sitting judge, other than those temporarily assigned from time to time by the Third Circuit Court of Appeal

MERIT SELECTION OF JUDGES

A. Policies pertinent to the federal judiciary:

■ **February 1991:**

RESOLVED, that the American Bar Association supports the participation of state and local bar associations in merit selection mechanisms developed to assist in evaluating and recommending candidates for judicial appointment.

■ **August 1986:**

BE IT RESOLVED, that the American Bar Association urges appointing authorities selecting members of merit selection judicial nominating commissions to ensure that there are no barriers to the selection of women and minorities for service on the commissions;

BE IT FURTHER RESOLVED, that judicial nominating commissions and the appointing authority are urged to ensure that there are no barriers to the selection of women and minorities as judges;

RESOLVED, that the American Bar Association recommends that efforts to eliminate such barriers include the conscious consideration of qualified women and minorities, and that qualifications should be viewed with greater emphasis on professional capabilities and achievements, than upon socio-economic status or financial history.

■ **August 1980:**

BE IT RESOLVED, that the American Bar Association reaffirms its commitment to the appointment to the judiciary of judges qualified on the basis of merit and renounces any appointment process repugnant to that concept.

BE IT FURTHER RESOLVED, that the House of Delegates of the American Bar Association hereby calls upon all presidential candidates to disavow any platform plank inconsistent with this concept and affirm their commitment to the selection of judges on the basis of merit and not on the basis of particular political or ideological philosophies that may or may not be held by the judicial candidate in question.

BE IT FURTHER RESOLVED, that copies of this Resolution be transmitted to the Chairpersons of the Republican and Democratic National Committees and to all presently declared presidential candidates.

■ **August 1980:**

RESOLVED, that the American Bar Association urges that presidential executive orders, standards and guidelines for merit selections of district judges, affirmatively provide that political affiliation shall not be a consideration in evaluating proposed nominees for appointment as district court judges.

B. Policies pertinent to state judiciaries:

■ **August 1994:**

BE IT RESOLVED, that the American Bar Association urges state, territorial and local bar associations in jurisdictions where judges are elected in partisan or non-partisan elections to work for the adoption of merit selection and retention, and to consider means of improving the judicial elective process, including improving campaign conduct and financing, and adopting programs that are best suited to the needs of their jurisdictions.

BE IT FURTHER RESOLVED, that the following types of actions be considered for such adoption:

1. Seek legislation to improve financial reporting requirements governing judicial election campaigns, so that meaningful, relevant reports are widely available.
2. Develop guidelines for the proper funding and conduct of judicial election campaigns, tailored to local circumstances, to assure that judicial campaigns are conducted with the highest standards of fairness and propriety, and seeking voluntary compliance with those guidelines.
3. Inform judicial candidates of applicable ethical and legal constraints.
4. Help form and support community-based campaign monitoring committees.
5. Educate the public and the press about the nature of judicial work and the proper limits of judicial campaigning.

6. Sponsor candidate forums.
7. Develop procedures for responding quickly and publicly to unfair criticism of judges, whether or not in the context of an immediate judicial election.

■ **February 1991:**

RESOLVED, that the American Bar Association supports the participation of state and local bar associations in merit selection mechanisms developed to assist in evaluating and recommending candidates for judicial appointment.

■ **August 1986:**

BE IT RESOLVED, that the American Bar Association urges appointing authorities selecting members of merit selection judicial nominating commissions to ensure that there are no barriers to the selection of women and minorities for service on the commission;

BE IT FURTHER RESOLVED, that judicial nominating commissions and the appointing authority are urged to ensure that there are no barriers to the selection of women and minorities as judges;

RESOLVED, that the American Bar Association recommends that efforts to eliminate such barriers include the conscious consideration of qualified women and minorities, and that qualifications should be viewed with greater emphasis on professional capabilities and achievements, than upon socio-economic status or financial history.

PUBLIC EDUCATION

■ **February 1995:**

RESOLVED, that the American Bar Association (1) commits its support for public education to foster understanding of the Constitution and the rights and responsibilities of citizenship and advance this goal of civil literacy as fun-

damental to the continued functioning of the United States as a constitutional democracy and a nation under the rule of law; and (2) urges the legal profession and the organized bar to engage the support of policy makers, educators, the media and the general public to further this goal through implementation of the national education goals and voluntary standards for civics education at the elementary and secondary school levels.

■ **August 1992:**

RESOLVED, that the American Bar Association urges judges, courts, and judicial organizations to support and participate actively in public education programs about the law and justice system, and further, that judges be allotted reasonable time away from their primary responsibilities on the bench to participate in such public education programs, consistent with the performance of their primary responsibilities and the Code of Judicial Conduct.

■ **February 1992:**

RESOLVED, that the American Bar Association reaffirms its support for citizenship education in elementary and secondary schools, including, as essential components, study of the Constitution, the extended Bill of Rights and law generally; and urges the legal profession, policy makers, educators, members of the private sector, the media, and the general public to support effective citizenship education in public policy at the federal, state, territorial, and local levels.

MISCELLANEOUS

■ **August 1995: Long Range Plan for the Federal Courts**

RESOLVED, that the American Bar Association supports efforts by the

Judicial Conference of the United States to plan for the future of the Federal Courts and adopts the policy position set forth in Appendix C in response to the Proposed Long Range Plan for the Federal Courts which was submitted to the Judicial Conference of the United States in March 1995.

■ **August 1991:** Judicial Impact Statements

BE IT RESOLVED, that the American Bar Association supports legislation by each state legislature and the United States Congress mandating the preparation of judicial system impact statements to be attached to each bill or resolution that affects the operations of State or Federal courts; and

BE IT FURTHER RESOLVED, that the American Bar Association urges each state legislature and Congress to establish a mechanism within its budgeting process to prepare judicial system impact statements determining the probable costs and effects of each bill or resolution that has an identifiable and measurable effect on the dockets, work loads, efficiency, staff and personnel requirements, operating resources and currently existing material resources of appellate, trial and administrative law courts; and

BE IT FURTHER RESOLVED, that the American Bar Association urges that if proposed legislation has an identifiable and measurable effect on the judiciary, a

judicial impact statement be attached to each such bill or resolution before a committee hearing may be conducted on the bill or resolution and that the judicial impact statement must be printed on the first page of such committee report and all subsequent printings and must remain on the bill or resolution throughout the legislative process, including submission to the chief executive, (Governor or President) for approval.

■ **August 1991:** Justice System Funding

RESOLVED, that the American Bar Association recognizes that the highest priority of the bar and bench must be to promote improvements in the American system of justice by ensuring balanced and adequate funding for, and timely access to, the entire justice system and urges Association entities, state and local bars, and affiliated organizations to form coordinated action committees with nonlawyer groups to:

1. Assess the depth and breadth of the crisis in their jurisdictions;
2. Design and implement an action plan to attack the crisis and maintain and improve balanced and adequate funding and the entire justice system; and
3. Educate policy makers that their actions may have consequences for the entire justice system well beyond their intended purpose.

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Commission Biographies

EDWARD W. MADEIRA, CHAIRMAN:

Edward W. Madeira, Jr., of Philadelphia, Pennsylvania is a partner in the law firm of Pepper, Hamilton & Scheetz. He has been with the firm since 1953. His practice, concentrated in civil litigation, includes products liability defense of major pharmaceutical companies, automobile manufacturing, asbestos mining companies, and major equipment and consumer product manufacturers. He has represented major clients in civil antitrust litigation and grand jury investigative proceedings. His civil litigation and trial practice also includes environmental catastrophe and toxic tort matters. He has addressed various conferences and seminars on product liability and management of mass tort litigation. Mr. Madeira graduated from the University of Pennsylvania Law School in 1952. He clerked for Justice John C. Bell, Jr. in the Pennsylvania Supreme Court before joining Pepper, Hamilton & Scheetz. He is a former member of the Board of Governors of the Philadelphia Bar Association and served as Chairman of its Commission on Judicial Retention. He served as Chair of the American Bar Association's Standing Committee on Federal Judicial Improvements from 1992-1996. He is a Fellow of the American College of Trial Lawyers, a permanent member of the Judicial Conference for the Third Circuit and an Associate Trustee of the University of Pennsylvania. He currently serves as President of the Board of Directors of the Defender Association of Philadelphia; adjunct Professor of Law at Villanova University School of Law; and a member of the Council for the Future of the National Judicial College.

MAYOR SHARON SAYLES BELTON

Mayor Sharon Sayles Belton is the first African American and the first female Mayor of Minneapolis, Minnesota, currently serving a four-year term which began January 1, 1994. She was also the first African American President of the Minneapolis City Council, serving from January 1989 to December 1993. While she served as a Minneapolis City Council member from 1983-93, she developed a reputation for bringing people together to clean up neighborhoods, fight crime, and develop local business and industry. As City Council President, she led the successful effort at the Minnesota State Legislature to get approval for the

Neighborhood Revitalization Program, and helped establish the Civilian Review Authority to monitor citizen complaints against the police department. A leading advocate for women's safety, Mayor Sayles Belton was a co-founder and President of the Harriet Tubman Shelter for Battered Women and was President of the National Coalition Against Sexual Assault. Mayor Sharon Sayles Belton has served on several Boards, including the Bush Foundation, the Neighborhood Revitalization Policy Board, United Way, the Affordable Housing Coalition and the Minneapolis Initiative Against Racism.

HAROLD T. DANIEL, JR.

Harold T. Daniel, Jr. is a partner of the Atlanta office of Holland & Knight LLP, where he is the Executive Partner. He also serves on the firm's Directors Committee. He practices in the litigation area at Holland & Knight, emphasizing antitrust, securities, business tort and other commercial litigation. He is a Fellow of the American College of Trial Lawyers and a Fellow of the American Bar Foundation. Mr. Daniel is a member of the State Bar of Georgia, which he served as president in 1994-1995; the American Bar Association; the Atlanta Bar Association; and the Lawyers Club of Atlanta, which he served as president in 1983-1984. He is a trustee of the Georgia Legal Services Program; the Georgia Public Service Foundation of the State Bar of Georgia; and the Institute of Continuing Judicial Education of Georgia. He is a former chair and trustee of both the Institute of Continuing Legal Education in Georgia and the Atlanta Lawyers Foundation. He is a graduate of Emory University, where he received his undergraduate degree in 1965 and his law degree in 1969. He is a member of the Emory Law School Council and a Governor of the Association of Emory

Alumni. In January 1996, Mr. Daniel received the Peace and Justice Award from the Martin Luther King Center for Nonviolent Social Change.

JOHN P. DRISCOLL, JR.

John P. Driscoll, Jr., of Boston, Massachusetts, is a partner in the law firm of Nutter, McClennen & Fish, L.L.P. He is active in the Litigation Section of the ABA, and is a member of the ABA Standing Committee on Federal Judicial Improvements. He formerly served as Chairman of the ABA Standing Committee on Substance Abuse and as a member of the Ad Hoc Committee on Civil Justice Improvements. Mr. Driscoll has served as President of the Boston Bar Association and currently serves as a Trustee and Treasurer of the Boston Bar Foundation. Mr. Driscoll is a member of the American Law Institute. He has served as a member of the Civil Justice Reform Act Advisory Committee for the U.S. District Court, District of Massachusetts, and the Commission on Federal Judicial Appointments. He has served as a special Assistant Attorney General of the Commonwealth of Massachusetts. He currently serves on the Board of Overseers of Children's Hospital, the Board of Trustees of the Catholic Schools Foundation, and the Board of Directors of the Freedom Trail Foundation and the Irish-American partnership. He is current chair of the Boston Coalition Against Drugs and Violence. Mr. Driscoll is a graduate of the University of New Hampshire and Harvard Law School.

ROBERT W. KASTENMEIER

Robert W. Kastenmeier of Arlington, Virginia, was elected to the United States House of Representatives in 1958 to represent the Second District of Wisconsin. He served continuously until 1991, becoming ranking majority member of the House

Committee on the Judiciary and the Chairman of its Subcommittee on Courts, Intellectual Property, and the Administration of Justice. He also served as a member of the House Intelligence Committee, and was appointed by Chief Justice Rehnquist to serve on the Federal Courts Study Committee. While in Congress, Mr. Kastenmeier participated in several impeachments, drafting the rules of procedure in the Watergate inquiry, and the articles of impeachment against one federal judge. He also was the author of the Judicial Conduct and Disability Act of 1980. In 1990, he was appointed chair of the National Commission on Judicial Discipline and Removal, and served in that capacity until the Commission concluded its business in 1993. Mr. Kastenmeier is a graduate of the University of Wisconsin and the University of Wisconsin Law School. He has received national recognition for his legislative work on court reform, civil rights, intellectual property and peace issues.

JOHNNY H. KILLIAN

Johnny H. Killian, of Washington D.C. has served in a number of capacities with the Congressional Research Services, Library of Congress since 1963. Mr. Killian is now a Senior Specialist in American Constitutional Law, dealing with a great variety of constitutional issues for Congress, but with special emphasis in the areas of the federal courts as well as separation of powers and federalism. Mr. Killian is editor of *The Constitution of the United States of America - Analysis and Interpretation*, published as a Senate Document and containing a narrative analysis of the Constitution, both as interpreted by the courts and as applied in practice by the political branches. Mr. Killian is a graduate of the University of North Carolina and of the University of North Carolina Law School.

ABNER J. MIKVA

Abner J. Mikva of Chicago, Illinois served as White House Counsel from October 1, 1994, until November 1, 1995. Prior to his appointment, he served as Chief Judge on the United States Court of Appeals for the District of Columbia Circuit. He was appointed to the bench in 1979, and became Chief Judge on January 21, 1991. Before coming to the bench, Judge Mikva was elected to Congress for five terms, representing portions of Chicago and its suburbs. He served on both the Ways and Means Committee and the Judiciary Committee while in Congress. He started his political career in 1956 in the Illinois House of Representatives, where he served five consecutive terms. While in the legislature, he was Chairman of the House Judiciary Committee and helped enact a new criminal code as well as a new mental health code. Judge Mikva received his law degree from the University of Chicago in 1951, graduating cum laude. He was editor-in-chief of the Law Review and member of the Order of the Coif, the national legal honor society. He is a member of Phi Beta Kappa and was a law clerk to United States Supreme Court Justice Sherman Minton. After his clerkship, he returned to Illinois, where he entered the practice of law, becoming a partner of the late Justice Arthur Goldberg. His practice included extensive litigation and appellate work, and he presented several constitutional cases to the U.S. Supreme Court. Judge Mikva has taught courses in "The Legislative Process" at Northwestern University, Georgetown University, the University of Pennsylvania, American University and the University of Chicago.

THEODORE B. OLSON

Theodore B. Olson is a partner in Gibson, Dunn & Crutcher's Washington, D.C. office. He specializes in constitutional law,

appellate litigation, federal legislation, and media and commercial disputes. He is co-chair of his firm's Appellate and Constitutional Law Practice Group. From 1981 through 1983, Mr. Olson served as Assistant Attorney General, Office of Legal Counsel, United States Department of Justice. In that capacity, he provided legal guidance to the President and to the heads of the Executive Branch departments, issued formal legal opinions on a wide range of federal statutory and constitutional questions, and assisted in formulating and articulating the Executive Branch's position on constitutional issues. Mr. Olson has handled Supreme Court cases involving a variety of constitutional issues, including constitutional separation of powers, First Amendment issues, the Tenth Amendment, civil rights, and the Equal Protection and Due Process Clauses. Mr. Olson is a member of the national advisory board of the Independent Women's Forum and the legal advisory committees of the National Legal Center for the Public Interest, the Center for Individual Rights and the Washington Legal Foundation. He is the president of the Washington, D.C. Chapter Lawyers Division, of the Federalist Society and has been a member of the Council of the American Bar Association's Administrative Law Section. He is a Fellow of the American College of Trial Lawyers and a Fellow of the American Academy of Appellate Lawyers. Mr. Olson received his law degree in 1965 from the University of California at Berkeley (Boalt Hall) where he was a member of the California Law Review and Order of the Coif. Mr. Olson has written and lectured extensively on appellate advocacy, oral communication in the courtroom, civil justice reform, punitive damages, and constitutional and administrative law.

ANDREA SHERIDAN ORDIN

Andrea Sheridan Ordin of Los Angeles, California is a partner in the Litigation and Government Regulation Sections of Morgan, Lewis and Bockius. Her practice with the firm has focused on complex business litigation, including securities class actions in state and federal court, antitrust defense and appellate litigation. Over the years, Ms. Ordin has led trial and negotiating teams in a variety of complex civil cases and has argued or participated in the briefing of more than 100 appellate cases in the state and federal courts. Ms. Ordin served as the United States Attorney for the Central District of California from 1977-1981. She was Chief Assistant Attorney General of the State of California, in charge of environmental, consumer, antitrust, charitable trust and civil rights litigation from 1983 through 1990. Ms. Ordin is a former president of the Los Angeles County Bar Association and chair of the Los Angeles County Bar Committee on Minorities in the Profession. She served on the Independent Commission to Study the Los Angeles Police Department (known as the Christopher Commission), that was formed after the Rodney King beating in Los Angeles. A former adjunct professor at U.C.L.A. School of Law, Ms. Ordin is a frequent author and panelist for continuing legal education programs, emphasizing litigation and antitrust topics. After receiving her undergraduate degree from U.C.L.A. in 1962, Ms. Ordin received her law degree in 1965 from U.C.L.A. School of Law.

JAMES R. THOMPSON

James R. Thompson served as Governor of Illinois for four consecutive terms from 1977 through 1990. During his tenure, he cut the

size of government, helped reform the state's criminal sentencing laws, created the Project Chance welfare-to work program, and promoted economic development. He was awarded his law degree in 1959 from Northwestern University Law School. From 1959 to 1964, Governor Thompson served as a prosecutor in the Cook County State's Attorney's Office. In 1964, he joined the faculty of Northwestern University Law School as an Associate Professor. In 1969 he joined the Illinois Attorney General's Office, serving as U.S. Attorney for the Northern District from November 1971 until June 1975. Governor Thompson has served as chairman of a variety of organizations, including the National Governors' Association (NGA) in 1983; the NGA Task Force on Electric Utility Transmission Policy in 1986; the NGA Task Force on Teen Pregnancy in 1987; the NGA Task Force on Transportation Infrastructure in 1988; and the NGA Task Force on Global Climate Change in 1989. Governor Thompson currently serves as Chairman of the Board of Trustees of the Illinois Academy of Fine Arts and of the Illinois Mathematics and Science Academy Foundation. He also serves as a member of the Board of Trustees of The Art Institute of Chicago. Governor Thompson has co-authored several books on criminal law and has been the recipient of 17 honorary degrees and numerous national and local civic awards.

DAVID E. WAGONER

David E. Wagoner of Seattle Washington serves as arbitrator, mediator and consultant in international and domestic disputes. He has been appointed to arbitration panels throughout the world and most recently to the CIETAC Panel in China. He has published numerous articles on international arbitration and served on the faculty of various arbitration workshops. He was a partner of Perkins Coie, Seattle, from 1965 to 1996, specializing in international and complex commercial litigation. During that period, Mr. Wagoner was a member of the Board of Directors of the Seattle Public Schools and its President on two occasions; trustee and later chairman of the Evergreen State College Foundation; and member of the board of the Pacific Northwest Ballet. Mr. Wagoner graduated from Yale University with a B.A. and from the University of Pennsylvania with an L.L.B. After law school, he clerked for two federal judges, including Supreme Court Justice Harold H. Burton, Jr.. Mr. Wagoner is a Fellow of the American College of Trial Lawyers, the Chartered Institute of Arbitrators and the Singapore Institute of Arbitrators and has received international recognition for his work in dispute resolution. He currently is chair of the American Bar Association's Standing Committee on Federal Judicial Improvements.

