

**Chief Justice Thomas J. Moyer
Columbus Metropolitan Club
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Jim, I appreciate your kind words. And I also extend my thanks to Suzy Swanson for inviting me to appear before you today.

I also congratulate you on the anniversary of the Columbus Metropolitan Club. For thirty years, you have provided a voice, a civil conversation for many of the critical issues affecting both the central Ohio region and the nation...while also providing a much needed community for both men and women.

Too often today, what passes for a discussion of important issues is simply a shouting match by pundits whose expertise has more to do with raising our blood pressure, than raising our understanding of issues affecting society.

The Metropolitan Club provides a much needed voice of calm reason, and for that I commend you.

I will spend the next few minutes talking about an area of concern that is in great need of informed, rational discussion: the importance of an impartial judiciary, which has been under increasing attack in recent years.

To highlight the situation in this country, you should hear about the judiciary in Ukraine, where that country's fledgling democracy is gaining new strength from an impartial judiciary.

I have had the great fortune of meeting Oleksandr Potylachak, the justice of the Supreme Court of Ukraine who joined his colleagues in declaring invalid, the 2004 presidential election due to massive voter fraud. That decision marked the first time the judiciary of a former east bloc country had overturned the illegitimate action of a ruling political party.

It was a bold move; it was a courageous act.

During a visit to Columbus in March of 2005, Oleksandr described the fear of retaliation that accompanied the Court's decision.

The names of the 20 justices participating in the decision were not public; their children were kept home from school until the fear subsided.

In many ways, that decision was to Ukrainians what *Marbury vs. Madison* is to Americans—the moment the judiciary defined itself as the impartial interpreter of the Constitution—the moment that balance was established in a constitutional democracy.

Justice Potylachak sent word to me recently that the judiciary in Ukraine has experienced remarkable progress since the elections.

The democratically-elected President Yushchenko did not purge the Ukrainian judiciary, most of whom had been appointed by his predecessor.

No mass firings, no patronage on the bench. And the Rada, Ukraine's parliament, did not attempt to change the jurisdiction of Ukraine's Supreme Court.

And the phone calls have stopped.

Telephone calls from the presidential palace were common under the old regime; calls that attempted to assist judges in deciding cases—calls that often included a bribe or even a threat. But no more. Not a single call since President Yushchenko took office. Perhaps the days of telephone justice are at an end in Kiev.

Justice Potylachak says the lack of outside pressure allows judges to be impartial. Decisions are based on a judge's interpretation of the law, not on fear that they will be removed from their position or suffer attacks on the jurisdiction of the Court.

What else has changed? Judges on the appellate and trial courts in Ukraine told us they now believe that they too may be impartial, without fear of retribution.

Citizens of Ukraine have responded to the change as they look to the courts to protect their constitutionally-protected rights.

They now expect that they will receive a fair and impartial disposition of their case.

If Justice Potylachak were here today, what message would I give him about the state of our own judiciary here in the United States, the world's oldest constitutional democracy?

How would I explain to him the reports of virulent attacks in America on state and federal court judges for their decisions in specific cases—threats of retribution and calls to diminish the jurisdiction of courts by members of the legislative branch?

In the past year we have witnessed the continuation of two phenomena in this country that have converged to threaten the impartiality of American courts.

The first is attacks from organizations and public officials on judges for their decisions in specific cases—attacks that threaten retribution and urge changes in jurisdiction of courts.

The second phenomenon is the dramatic increase in the funding and politicization of judicial selection.

Why should Americans be concerned?

The foundation of a constitutional democracy is impartial courts—courts adjudicating civil and criminal cases free from political and other influences. Consistent standards and principles guide the decisions of impartial courts.

Partial justice is decision-making in response to the popular will or the inclinations of the decision-maker. Partial justice is decision-making subject to inappropriate influence. Partial justice is no justice at all.

Impartiality and fairness are the bedrock principles from which all courts in America are created. When a citizen stands before an impartial judge, the citizen expects the facts of his or her case to be held up to and determined by the light of the law—nothing else.

An impartial court protects a protestor with the same authority that it protects a holder of public office.

An impartial court opens the door of justice to an investigative reporter, to a parent seeking child support, to a person accused of criminal conduct.

An impartial court is the only institution that can prevent the majority from infringing on the rights of the minority.

James Madison observed, an impartial judiciary is “the impenetrable bulwark against every assumption of power in the legislature or executive.”

Should we be concerned that attacks on judges for their decisions in specific cases have increased and become more hyperbolic?

We know that almost from their creation, the courts have been criticized for their judgments. That is a part of life in a democracy. It is a rare court decision that does not displease someone.

The Jeffersonian Democrats tried to remove judges from office. The Jacksonian Democrats looked with great suspicion on the courts and tried to limit their jurisdiction. Justices during the turbulent New Deal era were burned in effigy. And open defiance of decisions and calls for impeachment were commonplace during the social changes of the 1950s and '60s and the tenure of the Warren Court.

Through the years attacks have focused on a wide variety of legal areas, but one thing has been constant: The attacks have almost always been political.

In John Quincy Adams' memoirs we find his views of the motives of Representative William Brantz Giles, whose attempt to impeach Supreme Court Justice Samuel Chase was justified by this motive, “Removal by impeachment was nothing more than declaration by Congress to this effect: You hold dangerous opinions, and if you are

suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them better.”

When Franklin Roosevelt attempted to pack the Supreme Court, he justified his attempted act by describing the American form of government as a three-horse team so that citizens’ field might be plowed and observed that the three horses are the three branches of government—the Congress, the executive, and the courts.

He concluded, “Two of the horses are pulling in unison today; the third is not.”

To place today’s attacks in context, we should remember that attacks on the authority of American courts have come from both liberals and conservatives.

The role of aggressor and of target, and therefore the defenders of judicial independence, have always been identified in relation to specific decisions of courts.

With the exception of an act of Congress, stripping the federal courts of jurisdiction during reconstruction, attempts to strip courts of jurisdiction in response to specific cases have been unsuccessful. Attempts to eliminate the courts of jurisdiction over busing, abortion, or school prayer decisions have gone nowhere.

We can take some comfort in the fact that history reveals the citizens of our country have consistently supported the justice system against ad hoc proposals for change that would interfere with the independence of American courts.

What is the status of this contentious relationship in the year 2006? Who are the detractors? What actions do they propose in response to decisions with which they disagree? How are these attacks perceived by members of the general public?

In Kansas and Missouri, legislatures reacted to Supreme Court opinions regarding the funding of public education, a defective death penalty law, and a concealed carry law with a proposed constitutional amendment that would give the legislature the authority to remove judges who make decisions with which the legislators disagree.

Describing the action as payback for the Supreme Court’s school funding decision, the Kansas House reduced the judicial branch appropriation by 3.7 million dollars.

At a recent speech to lawyers at Georgetown University, former Justice Sandra Day O’Connor warned that without an independent judiciary, the nation would find itself under a “dictatorship.”

O’Connor said: “Whatever courts do, we have the power to make the President or Congress really, really angry. In fact, if we do not make them mad some of the time, we probably aren’t doing our jobs. Our effectiveness, therefore, relies on the knowledge that we won’t be subject to retaliation for our judicial acts.”

The major phenomenon to which she was referring was the extraordinary act of the U.S. Congress to demonstrate its unhappiness with the decisions of several judges in the state courts by granting a federal court the jurisdiction to override the decision of the state courts.

That conduct was followed by statements from a leader of the House suggesting retribution against the judges and a member of the Senate who seemed to trump his colleague in the House by suggesting that there may be a connection between violence against judges and the “political” way in which judges rule.

The case to which the Senator was referring of course had nothing to do with the ideology or the politics of the judge or the persons who violently attacked the judges.

This is particularly dangerous rhetoric at a time when actual deadly violence against our judges is tragically real.

In South Dakota a group called J.A.I.L., “4 judges” is promoting one of the most radical threats to justice since the Spanish Inquisition.

Forty-thousand people signed petitions placing a constitutional amendment on the ballot that would eliminate judicial immunity that dates back to the 13th century, protecting judges from personal liability for making difficult decisions.

The amendment would create a special grand jury that would indict judges for offenses that include “deliberate disregard of material facts,” judicial acts without jurisdiction, and “blocking of a lawful conclusion of a case.”

If a judge were convicted three times by the special grand jury, the judge would be “fired” and would lose half of his or her retirement benefit.

J.A.I.L. supporters are a disparate network of tax protestors, conspiracy theorists, jury nullification supporters, and assorted malcontents who are disaffected with cases in which they have been involved. The movement is headed by a person with a history of suing state and federal officials for alleged conspiracies, including judges on his own trials for burglary and a traffic offense.

The list of grievances and assertion of authority is reminiscent of the common law court leaders with whom we contended in Ohio a few years ago. Their message seeks to capitalize on the perpetual talk radio palaver against the courts.

The leader has written that if they win in South Dakota in November and around the country, “that people are slowly waking up to realize who the enemy is and it isn’t Bin Laden.”

And in Ohio, a trial judge, exercising his statutory authority, sentenced to probation a sex offender of two juveniles; a popular TV personality, his opinion was un-constricted

by knowledge of facts, called for the judge's removal from office; the Attorney General, the Governor, and members of the General Assembly agreed, and for a short time the sentiment of the day moved us toward a blurred vision of separation of powers.

Intersecting with the attacks on judges is the unprecedented influence and importance of money in the selection of judges. That development is combined with the erosion by federal courts of attempts by state supreme courts and legislatures to insulate judicial campaigns from political processes.

In the 2004 races for positions on supreme courts of the states, a total of 24.4 million dollars was spent on TV. That amount obliterated the previous record of 10.6 million dollars set in 2000. In Ohio, the combined TV expenditure was five million, four hundred thousand dollars.

In 2004, 17 interest groups in six states spent roughly 7.4 million dollars. Nearly 89% of attack ads in supreme court races were paid for from interest groups or political parties. The fundraising disparity between winners and losers has grown in two years by 45%.

When placed in the context of all surveys that indicate 75% to 80% of persons surveyed believe that contributions to judicial campaigns influence the decisions of judges, the conflict with our concepts of impartiality and fairness is obvious.

Decisions of various federal courts have not helped our condition. A succession of decisions has weakened the wall that separates a judicial candidate from typical campaign activity.

Just four months after the U.S. Supreme Court struck the announce clause from most judicial canons, the Eleventh Circuit Court of Appeals invalidated a Georgia canon that prohibited a judicial candidate from personally soliciting and accepting campaign contributions. That portion of the canon was not even a subject of contention by the parties to the case.

The Eighth Circuit invalidated a similar rule in Minnesota earlier this year. Despite the urging of the Conference of Chief Justices and other organizations, the Supreme Court did not accept the case for review on the merits.

Most observers expect that judicial campaigns in the states in the Eighth and Eleventh Circuits will increasingly look like high profile contested elections for governor or the U.S. Senate.

District judges in Kentucky, North Dakota, and Alaska have invalidated Supreme Court rules that prohibit pledges, promises, and commitments.

The sentiment in the federal judiciary is reflected in the opinion of a North Dakota federal district judge when he stated, "Justice O'Connor said that states which provide for the election of judges have : 'Voluntarily taken on the risks to judicial bias ***.'

Justice O'Connor noted in her concurring opinion that when a state decides to elect its judiciary, it must accept the fact that the state interest in maintaining impartiality will likely suffer some harm."

The conclusion is that the federal courts have decided that principles of federalism are not sufficient to permit state courts and state legislatures the freedom to define judicial campaigns differently than campaigns for political offices.

The importance of this point is that insulating judges from politics ultimately protects individual rights.

I have painted a fairly bleak picture, but the picture is not complete. Across the country individuals and myriad groups including bar associations are responding to the challenges created by the circumstances I have described. Some are specific. Some are overarching.

In September, Justice Stephen Breyer and former Justice O'Connor will convene a National Symposium on Independence and Impartiality of American Courts.

The leader of J.A.I.L., who lives in California has been told by leaders of the movement in South Dakota to not participate in the campaign there because of his inappropriate conduct. The bar associations and other organizations have joined efforts to defeat the ballot issue and its prospects for approval are now in doubt.

The majority of citizens believe that Congress in the Terri Schiavo matter erred in its intrusion into the regular judicial process for what appeared to be blatant political reasons.

In Ohio, a constitutional conflict was averted when leaders of the General Assembly demonstrated that the first decision is not always the best decision. The news media played a dual role in the short lived effort to remove the trial judge from the bench. The Fox channel entertainment news personality instigated the removal frenzy but editorial writers and some stories placed the issue in the context of the appropriate exercise of judicial and legislative authority.

Interestingly, the *Columbus Dispatch* in its reporting on that matter published several well-balanced stories that placed the issue into its proper context.

An online survey of readers performed by the *Dispatch* revealed that 69% of those surveyed stated the legislature should not remove a judge from office because the legislature disagreed with the judge's decision.

The experience confirmed the value of knowledge in the development of public opinion. It also reminds us that as civic leaders we should assist others in discerning which

media sources are reliable and careful disseminators of information regarding the courts.

A number of states, including Ohio, have adopted a variety of positive measures:

1. In Ohio, the requirement that third-party entities report the source of their funding provides voters with important information.
2. A successful plan to provide public financing of appellate court races in North Carolina in 2002 could be a model for other states.
3. Candidate or state-funded comprehensive online voter guides have proven to aid voters in making more informed decisions when voting for judges.
4. The creation of campaign conduct committees such as the committee of the Ohio State Bar Association and the Columbus Bar Association has increased in the states.

We know intuitively and from formal surveys that the more knowledge one has about the purpose and role of courts in our country, the more prepared they are to assess the quality of the arguments about the courts. But our democracy suffer from a profound deficiency in civic education. There are many efforts, local and national in scope, from schoolrooms, electronic media, bar associations, speakers' bureaus, and sophisticated educational aides.

The Cleveland Bar Association announced it would begin a major effort to teach law and court related issues to school children in Cleveland and East Cleveland. And the Columbus Metropolitan Club performs a vital service by hosting speakers and discussion groups on issues of great importance.

The American Bar Association's is engaged in an ambitious project called "The Least Understood Branch," which the Ohio State Bar Association has joined.

It is a long-term, marathon project that should produce measurable enhancement of the public's understanding of the importance of judicial impartiality. As important as each activity is to the preservation of fair and impartial courts, there is an even more significant reality that appears to be as strong today as it has been for 230 years.

In one of the most comprehensive surveys performed on the issue, Justice at Stake produced the most important response to those who would politicize the courts.

The survey revealed these important facts about citizens' attitudes relating to courts:

94% either strongly or somewhat agreed with the statement, "We need strong courts that are free from political influence." The importance of that finding in 2006 is that some critics of the courts attempt to portray strong courts as the enemy of mainstream

values. Their goal is to energize their political base by accusing judges of being unaccountable.

These are the words of a member of a focus group in Raleigh, North Carolina:

“Representatives are only in office for a short period of time, and the Constitution has been around for hundreds of years. So let’s go with something that has been there for awhile instead of someone who just got into office.”

And on the question of Congress’ authority to impeach a judge for a decision with which Congress disagrees, 63% opposed—not quite as high as Ohio.

One of the participants said this, “it just seemed like that was one of the main purposes of having the courts there, as part of the checks and balances. And if you get the legislature to start telling them what they can and cannot do then you lose that.”

Critics of the courts must understand that an impartial judiciary is the best custodian of our constitutions. Judges who are free of physical and political attacks are our nation’s best protectors of individual rights.

An impartial judiciary requires all parties to understand that a judge fulfills his or her constitutional responsibility when they apply judicial review.

An impartial judiciary is a nation’s best protector against the excesses of an unchecked majority.

An impartial judiciary ensures that all citizens will be given their day in court, and that their case will be determined by applying the law to the facts of the case.

Surveys prove that when citizens are provided information about the proper role of the courts, they will support an impartial judiciary.

Americans want their courts to be accountable only to the Constitution and the law. They are the only constituents of the courts.

Thank you for providing me this opportunity.