

Opening Statement

Memorandum to the President

by Judith A. Miller

Chair, Section of Litigation

At this time in the political season, it is a tradition for many organizations to pause and consider what they would like the new president of the United States—regardless of party—to focus on after being sworn in. The Section of Litigation currently has a group reviewing existing ABA policy and putting together such a report. In the meantime, I'd like to identify a few points that might be worth including in such a list.

First on my list is making the continuing independence of our judiciary a top priority. It is sometimes hard to recognize just how fundamental a functioning and independent judiciary is to the strength of our country. We are inclined to take it for granted—to assume that courts will be open and working every day to guarantee that contractual issues can be resolved, rights vindicated, and grievances addressed. It is not an overstatement to say that our economy would be much less vibrant or resilient if we lacked the fair framework for dispute resolution that the courts provide.

Even if litigation is the last step in an effort to resolve a dispute—whether that dispute is with a neighbor, a local government, an employee, or a multinational corporation—the mere fact that independent courts are available ultimately facilitates both commerce and a more transparent democracy.

It seems almost silly to say, but I truly understood this point for the first time only in the 1990s, when I was fortunate enough to be the general counsel of the Department of Defense. In that job I met a number of government officials—from Georgia to Hungary to South Africa to Moldova to Bosnia. Each country was a newly developing democracy, and each was struggling in its own way to make the rule of law a reality so that citizens' rights could be secured and economies could grow. And whether they were struggling to throw off the history and repression of apartheid or communism or sectarian violence, each had to struggle from the outset with a crucial missing piece: there was

no really strong independent judiciary to provide the springboard from which all these other goals could be secured.

When Katrina hit Louisiana and Mississippi, our fellow citizens confronted a similar problem for too long in Katrina's aftermath—a non-functioning judicial system—and quickly discovered how crucial it was to get the courts up and running again.

As our founders recognized and embedded in our Constitution, courts are not only central to an effective and functioning democracy, they do not function properly without an independent judiciary: judges who can be fair and impartial, and on whom we can count to make decisions without worrying about whether those decisions please the president, Congress, or anyone else.

What can the next president do to advance the judiciary's independence? One thing to do is to vigorously pursue more money for Article III courts. These courts cannot operate at the level needed if the very best among us cannot afford to answer the president's call to the bench because the salary is lower than that of junior associates. The impact of low pay that doesn't even keep pace with inflation is enormously corrosive. Despite appointments for life (assuming good behavior), judges too often find themselves forced to resign to take jobs in the private sector—thereby significantly undermining the idea that judges should be free to make the right call in a case free from any concern that their decisions will be held against them after they leave the bench.

Adequacy of pay is, however, only the tip of the iceberg. The operational budget of the courts also has to be funded in a way that gives confidence to the public that cases will be promptly addressed, and that judges have the basic support they need to do the job we have entrusted to them.

Aside from the question of providing adequate financial resources to the judicial branch, and budgeting accordingly, I would urge our incoming president and

his or her team truly to strive to attract the very best of the practicing bar to the bench. When I emerged from law school in the 1970s, it was not uncommon for many of the best judges on the federal bench to become district or court of appeals judges relatively late in their careers. They brought a high level of wisdom and experience to bear in their courtrooms, along with a desire to give something back in service to our country. This gave a special patina to being named a federal judge. I would urge the next president to return, at least for some appointments, to the substantial reservoir of talent and commitment among our country's finest lawyers—people who may not be applying for the job but who can be persuaded, under the president's leadership, to agree to a period of public service at the conclusion of their careers.

To attract the best, our new president must try to find a way to put the nomination and confirmation process back on an even keel, so that potential nominees feel they can count on a fair and prompt evaluation of their suitability for the job. To make this happen, our new president must make this a priority and effect this policy through his or her team at both the Department of Justice and the White House. Nominating capable but not politically incendiary lawyers would be a step in the right direction. It would be a remarkable legacy for any president to achieve both of these goals of extraordinary appointments and a firm financial foundation—but doing so would certainly strengthen and bolster the independent and diverse judiciary that is central to our country's success.

As a second broad area of focus, our new president should grapple with re-drawing the balance between our national security and our civil liberties. It is almost a cliché to say that in times of peril to our country we tend to tip towards protecting security at all costs—and then as a result the pendulum swings so far in that direction that the result is not just a correction but an over-correction. Since 9/11, the ABA—and this Section—has urged a course that promotes both security and our civil liberties. We have been adamant that both can and should be preserved.

Our liberties, after all, define us as a nation. If we sacrifice those liberties as the price for hoped-for but possibly elusive enhanced security, we may find that we have changed, perhaps irrevocably, the very character of the nation we seek to preserve and defend.

There is no better time to take a fresh—and ideally bipartisan—look at these issues than at the beginning of a new administration. As I write this column, legislation governing domestic electronic surveillance activities of the executive branch is still being debated in Congress. The ABA has urged that Congress take responsibility for enacting legislation in this area, rather than deferring to asserted inherent executive power, and perform its oversight function accordingly. Our new president can make an immediate difference here by proposing legislation that strikes the right balance.

There is a similar opportunity to revisit due process questions concerning the utility and soundness of military commissions, as well as the propriety of federal courts hearing habeas petitions

of detainees held at Guantanamo Bay. Ideally our new president would also revisit these issues in the international law context of applicable treaty obligations and opportunities. Although some of these issues do not come up every day in the practice of most Section members, they nevertheless relate to fundamental constitutional liberties—and the continued jurisdiction of the courts to decide issues concerning those liberties—which have been an abiding concern of the Section.

Finally, I would draw our new president's attention to the trend, through several administrations, to erode the attorney-client privilege. Bipartisan legislation has been introduced to correct executive branch privilege waiver policies. The legislation would prohibit federal agencies from pressuring companies or other entities to waive their privileges or take certain unfair punitive actions against their employees as conditions for receiving cooperation credit during investigations. At the same time, however, the legislation specifically preserves the ability of prosecutors and other federal officials to obtain the important, non-privileged factual material they need to punish wrongdoers and enforce the law. This legislation would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product, and employee legal protections. More importantly, if embraced by our new president, the legislation would reaffirm the fundamental basis on which this Section's members do their work, by allowing clients to come to us for help with complete confidence. □