

**American Bar Association**

**ADOPTED BY THE HOUSE OF DELEGATES**

**February 2, 1998**

**Federal Judicial Improvements (Report Nos. 112)**

RESOLVED, That the American Bar Association supports the following principles to preserve and strengthen federal judicial independence and separation of powers, derived from the July 4, 1997 Report of the ABA Commission on Separation of Powers and Judicial Independence, *An Independent Judiciary*:

1. Public officials should refrain from threatening to initiate judicial impeachment proceedings because of disagreement with isolated decisions of a federal judge;
2. State, local and territorial bar associations should develop effective mechanisms for evaluating and, when appropriate, promptly responding to misleading criticism involving judges and judicial decisions;
3. Congress should enact legislation to exclude from the presidential line-item veto authority budgetary items involving the federal judiciary's appropriations;
4. Congress should de-link congressional pay from judicial pay and make judicial salaries subject to the same periodic and automatic cost-of-living adjustments granted career federal employees.

FURTHER RESOLVED, That the American Bar Association should take the lead in the formation of a consortium of organizations dedicated to an independent judiciary and impartial system of equal justice to (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, as well as for the public generally, with defined goals and strategies focused upon improving public understanding of our system of justice and within it the vital concept of an independent judiciary.

## REPORT

### **I. BACKGROUND:**

The Commission on Separation of Powers and Judicial Independence was established in August 1996 by then ABA President N. Lee Cooper to study judicial independence and accountability, to evaluate recent events perceived by some as threatening judicial independence, and to make recommendations.

In furtherance of its charge, the Commission gathered information from a range of sources, including testimony from twenty-eight witnesses who offered their views during the course of three days of hearings, interviews with the United States senators and representatives who chair committees or subcommittees with jurisdiction over the courts; correspondence with judges, academicians and bar leaders, and an extensive review of the existing written materials and published speeches. The Commission prepared a report of its deliberations, findings and conclusions, and recommendations titled *An Independent Judiciary* which was released and widely distributed during the 1997 ABA Annual Meeting.<sup>1</sup> After its release, the Commission was dissolved.

The Standing Committee on Federal Judicial Improvements, half of whose 1996-97 members served on the Commission, was directed to take the lead in reviewing the Report, determining which recommendations were ripe for implementation activity, and submitting any of them not covered by current policy to the House of Delegates for adoption. While the Standing Committee approved the entire Report at its 8/97 meeting, it is submitting the following seven recommendations to the House of Delegates at this time for consideration. The other Report recommendations are not being submitted for a variety of reasons: some are already covered by existing policy; some are statement-oriented rather than implementation-oriented; some do not require further action, and some are not ripe for adoption at this time.

### **II. DISCUSSION OF RECOMMENDATIONS:**

**1. Public officials should refrain from threatening to initiate judicial impeachment proceedings because of disagreement with isolated decisions of a federal judge.**

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.

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<sup>1</sup>COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997).

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.<sup>2</sup>

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."<sup>3</sup> There are, however, situations in which additional concerns arise.

There is a difference between intemperate criticism of a judge for making a wrongheaded 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 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.

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<sup>2</sup> *Bridges v. State of California*, 314 U.S. 190, 197. Opinion by Justice Hugo Black. (1941).

<sup>3</sup> Michael Daly Hawkins, *Dining With the Dogs: Reflections on the Criticism of Judges*, 57 OHIO ST. L. J. 1353, 1354 (1996).

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.<sup>4</sup> The decision sparked public outrage and culminated in a grassroots petition of over 100,000 signatures calling for the impeachment of the three judges.<sup>5</sup> 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 at that.<sup>6</sup>

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. Appellate review and reversal is the best remedy for claimed judicial error.

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<sup>4</sup> *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.").

<sup>5</sup> Regional 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.'").

<sup>6</sup> *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.").

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.

**2. State and local and territorial bar associations should develop effective mechanisms for evaluating and, when appropriate, promptly responding to misleading criticism involving judges and judicial decisions.**

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.<sup>7</sup> 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.<sup>8</sup> Unfortunately, most of the current response mechanisms were not developed 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 judges are victimized by false or misleading criticism, they need help in correcting a

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<sup>7</sup> Robert H. Henry, Address at the Meeting of the American College of Trial Lawyers, Boca Raton, FL ( March 21, 1997).

<sup>8</sup>This model has recently been updated the preface has been modified to recommend its applicability to situations involving federal judges as well as state judges. It will be submitted to the House of Delegates for policy adoption at the February 1998 meeting.

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.

**3. All participants in the judicial appointment process should give full consideration to the procedures recommended in *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges*;**

A strong and independent judiciary 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:<sup>9</sup>

- 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

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<sup>9</sup> THE 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.

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.
- 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.

**4. Congress should enact legislation to exclude from the presidential line-item**

**veto authority budgetary items involving the federal judiciary's appropriations.**

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. However, the newly enacted presidential line-item budgetary veto authority, if used to excise certain judicial appropriations, would undermine this process. The Commission, therefore, 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.

**5. Congress should provide for judicial review of constitutional questions in cases involving administrative and regulatory actions, and should ordinarily provide for judicial review of enforcement and coercive actions of the government in administrative and regulatory actions.**

While Congress has authority to structure judicial review of executive and administrative action, even to the point of denying review altogether, congressional decisions to limit, curtail, or bar federal court jurisdiction to hear challenges to governmental actions have generated great concern. Some challenges to governmental actions raise constitutional questions while others are based on objections to executive decisions interpreting federal laws which may result in serious impairment of liberty or property interests of litigants.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>10</sup> is a recent example of legislation which curtails judicial review in troublesome ways. It contains a series of provisions intended to reduce and, in some instances, eliminate review of INS orders and judicial oversight of INS activities, including, but not limited to the following: no court may review a final deportation order based on a criminal conviction; with the exception of asylum decisions, discretionary relief decisions of the Attorney General, such as cancellation of removal, adjustment of status, and waiver applications, cannot be judicially reviewed; judicial review of the manner in which expedited exclusion is being implemented is barred; class action challenges to the statute, regulations, or written policies of INS respecting expedited exclusion are barred; and jurisdiction of district courts to hear cases under Title II of the Act (covering virtually every activity and function under the Immigration and Nationality Act, including admissions, visa issuance, detention, deportation, asylum adjudication, employer sanctions, and the like) is limited to cases brought by the United States, thereby excluding cases brought by any other party.

This statute and similar laws reflect a congressional determination to immunize executive actions from judicial review for compliance with laws and regulations. Congress clearly has power to regulate the availability and scope of judicial review of administrative actions. But the power is not plenary and its exercise must be carefully evaluated in each instance.

The above-referenced recommendation reflects the view that Congress should not preclude review of constitutional questions raised by a particular statute or the implementation of the law by agency officers. Preclusion of review of constitutional issues is itself constitutionally suspect and may in fact be invalid.<sup>11</sup> Even where the issue may simply be the compliance of an executive officer with the provisions of federal statute or regulation, persons subject to governmental coercive action should be entitled to judicial review, especially if they cannot secure their rights in any other way.<sup>12</sup> In particular, in the immigration context where the government is forcibly

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<sup>10</sup>110 Stat. 3009-546 *et seq.*, §§ 304-306, 381, 604.

<sup>11</sup>The Court has several times suggested that a "serious constitutional question" would be raised by a federal statute that denied any judicial forum for a colorable constitutional claim. E.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 367-73 (1974).

<sup>12</sup> Indeed, there may be instances when review of these kinds of issues also is constitutionally mandated. See, e.g., *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987)(due process requires that aliens be permitted to challenge the regularity of prior deportation proceeding, when it is predicate of present deportation proceeding); *Crowell v.*

removing an individual from the country, the Suspension Clause of the Constitution (Article 1, § 9) guaranteeing the Writ of Habeas Corpus entitles a person to judicial review of constitutional and non-constitutional claims, including claims of legal error and abuse of discretion.

**6. Congress should de-link congressional pay from judicial pay and make judicial salaries subject to the same periodic and automatic cost-of-living adjustments granted career federal employees.**

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 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 spectacle of judges appearing, hat in hand, to request periodic raises from Congress -- which enacts the laws that judges 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 blocked by the practice in Congress of tying proposals to increase judicial pay to more controversial proposals to increase congressional pay and by a longstanding statutory provision, commonly referred to as "Section 140," which provides that no salary increase shall be administered to federal judges absent specific legislative action.

This recommendation, which supplements and reaffirms existing ABA policy on the issue, supports the enactment of legislation that would de-link salary adjustments of federal judges from congressional members and would provide federal judges with periodic and automatic cost-of-living adjustments.

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*Benson*, 285 U.S. 22, 61 (1932) ("when fundamental rights are in question, this Court has repeatedly emphasized the difference in security of judicial over administrative action").

**7. The American Bar Association should take the lead in the formation of a consortium of organizations dedicated to an independent judiciary and impartial system of equal justice to (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, as well as for the public generally, with defined goals and strategies, focused upon improving public understanding of our system of justice and within it the vital concept of an independent judiciary.**

There is substantial concern that public confidence in the judiciary – at both the federal and state level – is in a state of decline. The problem does not appear to have defined racial, ethnic or socioeconomic boundaries, nor is it confined by urban or rural boundaries. The Western Regional Counsel to the NAACP Legal Defense and Educational Fund described the sentiments of some of the most alienated segments of the population at a hearing before the Commission on Separation of Powers and Judicial Independence:

[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.<sup>13</sup>

Polling data reveal a gradual, progressive decline of public confidence in federal and state courts over the past decade. For example:

- Gallup polls conducted between 1986 and 1994 reveal that the percentage of respondents expressing "quite a lot" or "a great deal" of

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<sup>13</sup> February 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).

confidence in the Supreme Court declined from 54% to 42% in that time.<sup>14</sup>

• 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.<sup>15</sup> 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.

During the last two or three years, there have not been any polls conducted to assess the present state of public confidence in the judiciary which have been reported in Westlaw or other data bases. Although the absence of current polling information compromises efforts to understand the scope of the problem, other recent events suggest a continuing erosion of public confidence in our courts.

The recent proliferation of criticism directed at individual federal judges, as chronicled in the Report of the Commission on Separation of Powers and Judicial Independence, 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.

If judicial independence is to be preserved, public confidence in the judiciary must be maintained. A public that does not trust its courts 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:

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<sup>14</sup> *The Military Earns the Highest Public Confidence Rating*, RESEARCH ALERT, June 17, 1994.

<sup>15</sup> Poll data provided in this paragraph was obtained from the Roper Center for Public Opinion Research and is available on the Westlaw poll database. The results of additional polls are reported in the REPORT, *supra* note 1 at 60-61.

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.<sup>16</sup>

According to the Commission Report, 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; a judicial system that is free from bias in every aspect of its operation; and success with 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. The first two conditions are not addressed by this proposed recommendation; the third condition -- public education -- deserves more explanation.

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 to 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.<sup>17</sup> 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 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.

Research to identify causes of the erosion of confidence has been undertaken by several organizations, including the ABA, the National Center for State

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<sup>16</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN OF THE FEDERAL COURTS (1995).

<sup>17</sup> See REPORT, note 1 at 60-61.

Courts, the State Justice Institute and the American Judicature Society. These research efforts should continue and 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 and the following educational venues should be explored:

- **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 of the justice and judicial systems is crucial to the success of any educational program. The Internet and television are crucial 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.

### III. CONCLUSION

The recommendations of the ABA Commission on Separation of Powers and Judicial Independence were proposed to address major concerns identified by witnesses and others who shared their views with the Commission during the course of its year-long investigation of recent events that have raised concerns about the current state of judicial independence. The Standing Committee on Federal Judicial Improvements is ready to take the next step and coordinate efforts within the bar to implement some of the recommendations which require action. The Association does not have current or complete policy covering the recommendations contained in this report. The Standing Committee therefore requests the House of Delegates to approve this recommendation.

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Respectfully submitted,

David Wagoner, Chair  
February 1998

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Federal Judicial  
Improvements

Submitted By: David E. Wagoner, Chair

1. Summary of Recommendation(s).

This proposal presents the substance of seven recommendations contained in the July 4, 1997 Report of the ABA Commission on Separation of Powers and Judicial Independence. Intended to preserve and strengthen separation of powers and judicial independence, the proposal addresses improper calls for judicial impeachment; responses to misleading criticism of judges; exclusion of the judiciary's budget from the president's line item veto authority; judicial review of administrative and regulatory action; judicial pay; and enhanced ABA efforts to increase the public's understanding of our system of justice.

2. Approval by Submitting Entity.

The Standing Committee on Federal Judicial Improvements approved this recommendation and report during its 10/30/97 - 11/02/97 Fall Meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association has many policies that support different aspects of judicial independence which are listed in Appendix A to this General Information Form.

Paragraphs 1, 2, 3, and 4 of the proposed policy respond to

recent events affecting judicial independence and separation of powers and have not been addressed by prior ABA policies.

Paragraph #5 is an extension of policies adopted in 1981 and 1982 that address congressional limits on or curtailment of federal court jurisdiction. It also complements and expands a 1983 policy which opposes legislation to limit judicial review administrative decisions regarding certain immigration proceedings. This proposal urges Congress not to curtail jurisdiction by prohibiting judicial review of regulatory or administrative actions.

Paragraph #6 expands on existing policy regarding federal judicial pay. It goes beyond existing policy which supports periodic and automatic cost-of-living adjustments for federal judges by recommending that judicial salaries be made subject to the same periodic and automatic cost-of-living adjustments granted federal career employees.

Paragraph #7 expands on existing policies which address the need for enhanced public education to foster an understanding of our Constitution and our justice system.

5. What urgency exists which requires action at this meeting of the House?

The ABA Commission on Separation of Powers and Judicial Independence developed recommendations to respond to recent events affecting the operation of the federal judiciary and in some cases, threatening its independence. Many Commission recommendations are not covered by existing ABA policy. This proposal contains those recommendations and should be adopted promptly so that implementation efforts may be pursued.

6. Status of Legislation.

Current legislation affects federal judicial COLAS, the subject of paragraph #5. While federal judges will receive a COLA in 1998 because of a provision in the 1998-99

appropriations bill for Commerce Justice, State, Judiciary and Related Agencies which was just signed into law, efforts to de-link judicial pay from congressional pay and to make future COLAS automatic through amendment to a different appropriation bill were not successful. Another bill, H.R. 1252 (Hyde, R-Ill), is still alive and contains a provision which would repeal Section 14 of P.L. 97-92, thereby allowing future automatic COLAS. It was approved by the House Judiciary Subcommittee on Courts and Intellectual Property on 6/10/97, and will be the subject of further legislative action next session.

7. Cost to the Association. (Both direct and indirect costs.)

No direct cost; indirect costs may be incurred if time is spent advancing the proposed policy by direct lobbying activities.

8. Disclosure of Interest. (If applicable.)

There are no disqualifying conflicts of interest. For your information, however, by design, five current members of the Standing Committee on Federal Judicial Improvements were also members of the Commission on Separation of Powers and Judicial Independence, and three other current members are federal judges.

9. Referrals.

This recommendation was sent to all divisions and sections, and to select commissions and special committees on November 16, 1997.

10. Contact Person. (Prior to the meeting.)

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Special Advisor to the Standing Committee  
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Fax: 215/981-4750

Denise A. Cardman  
Staff Liaison

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Phone: 202/ 662-1761  
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11. Contact Person. (Who will present the report to the House.)

Edward W. Madeira, Jr.  
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12. Contact Person Regarding Amendments to This Recommendation

Denise A. Cardman  
Staff Liaison  
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## APPENDIX A

CURRENT ABA POLICIES RELATED TO THE SUBJECT OF THIS PROPOSED  
RECOMMENDATIONJUDICIAL INDEPENDENCE● **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.

● **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.

● **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.

**CONGRESSIONAL LIMITS ON, OR CURTAILMENT OF, JURISDICTION**

- **February 1983:**

Be it Resolved, that the American Bar Association opposes legislative proposals relating to immigration and naturalization that would..... limit the availability and scope of judicial review of administrative decisions under the Immigration and Nationality Act to less than what is provided for in applicable provisions of the relevant section of the Administrative Procedure Act: in particular judicial review of decisions regarding the reopening and reconsideration of exclusion or deportation proceedings, asylum determinations outside of such proceedings, the reopening of applications for asylum because of changed circumstances, denials of stays of execution of exclusion or deportation orders, administrative decisions to exclude aliens from entering the United States and constitutional and statutory writs of habeas corpus.

- **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

- **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.

**JUDICIAL COMPENSATION**

- **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 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

- **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.

**JUDICIAL VACANCIES**

● **October 1997:**

Resolved, That the Board of Governors of the American Bar Association, which includes members of both political parties, urges the United States Senate promptly to hear and vote on the pending nominations for United States District Courts and Courts of Appeal.

● **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

**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 fundamental 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.