

**Responses of Bar Leaders  
To Threats to Judicial Independence  
Statements, Op-eds, Letters to Editors & President's Messages  
Compiled by ABA Staff, May 2005**

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**Judges' Duty, and Safety, *New York Times* letter to the editor by Sandra Thompson, president of the National Association of Women Judges**

April 13, 2005

To the Editor:

"The Judges Made Them Do It" (editorial, April 6):

On behalf of 1,200 dedicated members of the American judiciary, I urge public vigilance to protect and defend the role of an independent judiciary in the wake of the tragic Terri Schiavo case and the horrific violence against judges in Chicago and Atlanta.

Our system of democracy depends on judges being supported in the exercise of their constitutional obligation to protect the basic rights of individuals and decide cases fairly. Those decisions must be made according to the law, without regard to public pressure and without fear of political reprisal. We are especially concerned about the inflammatory post-Schiavo political rhetoric urging punishment of the judges who ruled in the case. In this overheated political environment, it is particularly irresponsible to urge retaliation against judges who, with near unanimity, made difficult decisions under the most stressful of circumstances.

As Justice Anthony M. Kennedy has said: "The law makes a promise -- neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob."

**Sandra Thompson**

Torrance, Calif.

The writer is president of the National Association of Women Judges

## **Protecting Our Fair and Independent Judicial System, Florida Bar Journal president's page article by Kelly Overstreet Johnson**

March 2005

The Florida Legislature begins its 60-day regular session later this month. The efforts by your Board of Governors to protect the core values of our profession are reflected in the board's legislative positions taken as of January. Those positions are aimed at furthering the independence of the judiciary, maintaining the public's access to courts and lawyers, and protecting the independence of the legal profession.

You can see the complete list of legislative positions on the Bar's Web site, [www.flabar.org](http://www.flabar.org). Click on Legislation on the left side menu and then scroll down to the link to legislative positions. (You can also find the lists of section and committee legislation positions. Under federal and state rulings, sections, which have voluntary membership and use their own separate money and not Bar fees for legislative activities, have a much wider scope of issues on which they can lobby than does the Bar.)

Bar positions include maintaining the Supreme Court's authority to regulate the legal profession and the court's procedural rule-writing authority, continued funding for family-related needs under the Civil Legal Assistance Act, and adequate Article V funding for courts, state attorneys, public defenders, appointed counsel, and related court operations.

There is, of course, no more important task than ensuring that our citizens have access to the courts and, once there, that they have the opportunity to have their case heard fairly. It was with this goal in mind that the Board of Governors has approved the creation of the Special Board Committee on Judicial Independence, which is being chaired by Board of Governors member Jesse Diner of Hollywood.

U.S. Supreme Court Justice Sandra Day O'Connor, quoting President Woodrow Wilson, stressed the importance of this concept in a speech to an Arab judicial forum 18 months ago. Wilson, she said, wrote that "government 'keeps its promises, or does not keep them, in its courts. For the individual, therefore, . . . the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts."

Perhaps nothing in the American experiment with free government is so unique, and likely so responsible for its success, as the notion of an independent judiciary.

It is a concept that our founding fathers understood thoroughly and took great pains to embody in our governments, both state and federal.

Alexander Hamilton, in one of his Federalist Papers, argues that the judiciary is the vital check that prevents the other two branches from breaking their covenant with the people, as expressed in the Constitution.

Specifically rejected as unsuitable by Hamilton was the British system where Parliament could override any judicial decision it disliked. To put it plainly, these founding fathers saw the courts as the place where anyone and everyone could get a fair hearing, without the thumb of any special interest or other branch of government tilting the scale.

Despot after despot has ruled other countries by controlling the judiciary and squelching its independence.

Nevertheless, there are periodic and continuing attacks on judicial independence. Last year, a Florida House committee debated a constitutional amendment to take over all procedural rule-making authority for Florida courts from the Supreme Court. (A similar constitutional amendment was proposed in the 2001 New Hampshire legislature and was on this past fall's ballot where it was

defeated by the voters.) The Florida Bar opposed that effort, which essentially would allow the legislature to set the agenda for the courts—the very thing Hamilton warned so strongly against.

We have also seen in recent years a change in state law that gives the governor the authority to appoint all nine members on each of the state's 26 judicial nominating commissions, although four of the seats of appointees comes from slates nominated by the Bar. Since then, there have been some charges that inappropriate and political questions have intruded into some commission interviews of judicial aspirants, and that the system has lost its nonpartisan, independent nature, and that the change has resulted in fewer applicants to serve on JNCs or the bench, because they are the wrong party.

I strongly prefer the previous system where the Bar appointed three members, the governor chose three, and those six picked three public members, which in my opinion resulted in a more independent, nonpartisan screening process. This is not a Republican or Democratic, liberal or conservative issue. It is, as Hamilton so wisely observed, a case where people who control one branch of government have an opportunity to gain sway over another. And Hamilton argued that everyone's best interest is served by choosing judges based on their knowledge and experience, not to achieve political goals.

This is not an abstract concern. As a 2001 Bar *News* article reported on a 2001 survey by the League of Women Voters of Tallahassee, “[M]any judges in Florida believe politics are increasingly infringing on their ability to do their jobs. Florida's 833 judges at all levels of the state judicial system were polled about their feelings on judicial independence. The judges' biggest concerns regarding judicial independence seem evenly spread among 1) the public perception that judges should be more responsive to the current mood of the public; 2) attacks on the judiciary by other branches of government or special interest groups; and 3) the failure of the public and the legislature to realize the need for a fully independent judiciary.”

It is up to us, as the guardians of the justice system we have inherited, to continue as watchdogs and advocates to keep our judicial system fair and independent, the way it was so carefully designed to operate.

**Statement by Kelly Overstreet Johnson, President of the Florida Bar President, Florida Bar Association**

March 24, 2005

The tragic and high visibility case of Terri Schiavo has resulted in an unprecedented and unjustified attack upon our judiciary. Regardless of anyone's personal or political feelings about the Schiavo case, this is a critical time for Americans to recognize the vital role of the judiciary in maintaining the rule of law and the importance of the separation of powers among the three branches of government.

"It is in times like these that we should recognize that our judges, on a daily basis and not just in high profile cases, have the duty and responsibility to protect the rights and liberties afforded to all of us by law. Judges have no control over which cases come before them and they will inevitably be involved in deciding difficult and unpopular cases. When presiding over a case, judges make rulings based solely on the Constitution and other laws, and not their own feelings or personal beliefs.

"While we may disagree with decisions and actions of public officials including judges, it is entirely unacceptable and unfair for our judges to be criticized and even vilified when no judicial basis for such criticism exists. Unfortunately that is what is happening as emotions heighten in the Terri Schiavo case. Florida newspapers are now reporting that Circuit Judge George Greer has not only been accused of murder and terrorism by congressional leaders in Washington, but has received death threats and was pressured to leave his church.

"Societal dilemmas should never be confused with constitutional responsibilities. Florida's legal profession knows from polling that Floridians want nothing less than a fair and impartial judiciary. Judge Greer is an ideal representative of the type of judge citizens want to hear their case. His rulings are based on laws, not emotions and not politics. Indeed, his rulings have been repeatedly reviewed and scrutinized by many different courts on many different occasions. We must continue to have confidence in our legal system and expect our judges to act with the knowledge and integrity required of their position.

"Judges are limited by duty to responding to such unfair criticism. But Florida's editorial boards, community leaders and the 75,000-member Florida Bar are not. The Florida Bar joins many of the state's major newspapers and democratic advocates in denouncing the unwarranted attacks on the judges and courts which serve everyone in this great country. "

**Allow Judgment Without Fear: Attacks on Judges Erode a Free Society, *Houston Chronicle*  
op-ed by Kelly Frels, president of the State Bar of Texas**

April 16, 2005

Recent news events have compounded and heightened what I have found to be a consistent negativism and lack of knowledge about our justice system. It is directed not just at lawyers, but at judges, juries, and the rest of our third branch of government.

Have we forgotten our high school civics lessons? We might all recall that the framers of the United States Constitution created three branches of government: the legislative, the executive and the judicial. Each has an important role in our democratic republic.

A strong, independent judiciary is essential to our democracy and freedom. This lesson was reinforced to me when I visited Eastern Europe last year supporting a United States sponsored program to encourage the teaching of democracy in schools. We found emerging democracies such as Romania struggling to establish an independent judiciary, a condition of joining the European Union.

I perceive the recent attacks on judges in the United States as symptomatic of a broader assault on our system of justice. Under the United States and Texas constitutions, the legislative branch makes the laws and the courts apply those laws to the facts of each case. In a recent conversation, a former social studies teacher, now serving as an elected representative in local government, criticized activist judges. When reminded that many decisions are reversed on appeal, he replied, "The judges should have ruled like I wanted them to in the first place."

The recent killings of the family members of a federal judge in Chicago and of a state judge and three others in a courthouse in Atlanta, as well as a courthouse shooting in East Texas, briefly focused the nation's attention on the courageous and commendable sacrifice and service of the members of our judiciary. But during the final weeks of Terri Schiavo's life, politicians excoriated judges at all levels of our judicial system for their perceived arrogance and lack of deference to the will of members of Congress. It seems the concept of "activist judges" often equates not to whether a particular judge followed the law but whether the person making the accusation agreed with the judge's ruling.

In times such as these, we should recognize that judges are called upon daily to rule in cases to protect the rights and liberties afforded to all of us by our Constitution and laws. Judges do not have control over the cases they hear, so judges inevitably will become involved in high-profile cases where someone is sure to find the results offensive. Each judge must rule solely on the U.S. and state constitutions plus other laws passed by Congress or the state legislature.

All jury verdicts and lower court judgments are, of course, subject to review and change by appellate courts. Members of the public must resist judging the judicial process until the appellate process is completed. Many lower court decisions are reversed or modified on appeal.

After 35 years as a lawyer, I'm accustomed to lawyer jokes and unfriendly comments about my profession. Occasionally they're deserved. More often, they're not. But it hits close to home when Texas politicians weigh in, especially when the targets are judges. After the death of Terri Schiavo, the Florida woman at the center of a right-to-die controversy, some declared ominously that judges will "answer for their behavior" for not reversing a judicial order to remove her feeding tube. Impeachment of some judges was suggested.

Public discourse, even criticism of judges or the judicial system, is our right under the First Amendment; but threats of retribution against judges in the environment of judges being the victims

of violence and death is unacceptable. Instead, we must help secure the individual safety of all judges so they can independently administer the laws without fear of retribution.

We must firmly support the integrity of a strong and independent judiciary. If citizens do not like the result of how a law is applied by the courts, they can change the law through the legislative process. The recent approval of tort reform, regardless of your views on the issue, demonstrates that legislative change is a viable process.

As a free society, we must all remember our civics lessons, educate our children, and ensure that the adult population knows how and why our judicial system works the way it does. Legislative bodies make the laws and members of the judiciary apply the laws to the facts before them.

Most important, in our public discourse and our private conversations, we must affirm and support our judicial system as an independent third branch of government. Our system of democratic government, the most admired in the world, depends on it.

*Frels, a Houston attorney, is president of the State Bar of Texas.*

**Letter to the Editor sent out by Charles J. Vigil, President of the State Bar of New Mexico**

March 29, 2005

Dear Editor,

As president of the State Bar of New Mexico, I feel compelled to respond to the recent attention focused on our judiciary as a result of the tragic circumstances of the Terri Schiavo case in Florida.

Clearly, this emotionally charged case has elicited strong feelings from all sides. This is understandable and expected in our society where democracy provides us all freedom to voice our opinions. Many commentators and observers, however, have crossed the line in using this tragedy to needlessly, gratuitously and viciously attack the dedicated men and women who serve as America's judges. This needs to stop.

Regardless of how one feels about the specific circumstances of this situation, the role of the judiciary in it is clear and straightforward. The federal and state judges who have been assigned this case have been charged with weighing the facts of the case and the remedies set forth in the law, responsibilities they have carried out valiantly and with great dignity and sensitivity to the anguish that all of the participants in this case have endured.

While it is appropriate for commentators, policymakers and the public to debate the societal challenges and dilemmas brought to light by the Terri Schiavo case, there is no need for personal attacks on the judges in this case. They are not killers. They are not activists bent on pushing an ideological agenda. They are dedicated public servants called on to serve as impartial arbiters in a very difficult case.

Instead of maligning them for applying existing law to the case at hand, even though it may not reflect the current will of Congress, we should praise them for dispensing even-handed justice and upholding the independence of the judiciary even under the most difficult circumstances. These judges deserve our respect, not our scorn.

Sincerely,



Charles J. Vigil  
President  
**State Bar of New Mexico**

**Safe Access to the Justice System Essential, Statement by Heather G. Sowald, President of the Ohio State Bar Association**

March 21, 2005

As president of the Ohio State Bar Association, I am appalled at and concerned about the recent string of violence occurring against our judicial servants. Our sympathies and support go out to the judges and their families who have been the recent targets of violence. There is no more sacred concept in our democracy than the safe access to justice for all. Preserving the safety of our guardians of justice – our judges, lawyers, jurors and court personnel -- and providing safe access for all citizens who seek redress in our courts are paramount.

We have an obligation to see that our judges and courtrooms are safe. We need to install adequate security measures in all of our courthouses. This should not be a budget line item subject to reduction in tough economic times. We also need to protect personal information about our judges that places them at risk of attack, and to ensure the removal of any personal information about our judges that is available in the public domain.

Ohioans want and deserve safe and free access to our courts, and those who dedicate themselves to seeing that justice is available deserve our protection from those would seek to harm them.

**The Schiavo case and the importance of an independent judiciary, Statement by Heather G. Sowald, President of the Ohio State Bar Association**

March 31, 2005

On yard signs and car bumpers across America, “Support Our Troops” messages appear. They remind me that our military men and women are risking their lives in distant lands to defend, and to instill in other nations, our core principles of democracy.

At the same time, our nation is witnessing another struggle – that of the Schiavo family. Much has been said by all sides – except this: Our justice system worked. Whether or not you agree with the outcome, the issues were aired and our state and federal courts acted within their purview to consider the legal issues at hand. The judges at every level followed proper channels, they gave consideration to all the arguments of the parties, and they issued decisions promptly on agonizing issues. Our independent judiciary fulfilled its proper function.

As we proudly support our troops abroad fighting to protect our democracy, we should also support our independent judiciary on the home front – our judges who remain true to their oaths of office. We should take pride in the role they play in our democracy, our system of laws and our concept of justice. Just as we applauded the judges in Ukraine who stood up for fair elections despite the resistance of the administrative and legislative branches there, we should applaud and protect those judges here who protect individual rights and uphold the rule of law.

Our republic has survived wars, depressions, impeachments and scandals. Our forefathers anticipated that a system of democracy with checks and balances among the branches of government could stand the test of time. How right they were! I am proud to be an American. I am proud to be a lawyer. I am proud of our justice system. And I am proud to defend the principles of American democracy – especially an independent judiciary. I invite you to share in my pride.

## **Defense of Independence, by James E. “Ted” Roberts, Chair of the Ohio State Bar Association Committee on the Independent Judiciary and Unjust Criticism of Judges**

The King of England had established an absolute tyranny over the colonies in America, and our Declaration of Independence submitted facts to the world to prove his tyranny. Among the king’s actions were:

- “He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.
- “He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.”

Based on these and other royal decrees, the states declared their freedom and independence, absolving their allegiance to the British crown and dissolving all political connection with Great Britain.

How many of us recall that an independent judiciary was at the core of the freedom and independence sought and established by those who signed the Declaration of Independence, fought the Revolutionary War, and adopted the Constitution of the United States? How many of us can withstand the tests of our times which may injure or usurp the independence of the judiciary, bedrock of our justice system?

For it to survive with the quality of justice we ideally expect, it will take more of us to be actively concerned about and to overtly challenge the “dangers of dependence.”

If, under the crown, the administration of justice was obstructed by judges being dependent on the will of the king for keeping their jobs and obtaining a salary, what are the forces today which would similarly compromise the administration of justice?

Typically, these concerns are raised during election years when judges of all levels in Ohio are subject to election or reelection. It is then that the will of the people determines which candidates will have jobs as judges. Our structure of laws is adopted by legislators who are elected by the people to determine the length of tenure for judges. As such, legally speaking, they are not dependent on the king or any other one person to stay in office. The structure of our law, as far as it goes, provides a mechanism to protect the independence of the judiciary because the will of the people, not the will of the crown, determines tenure. Or does it?

More and more concern has been expressed that undue influence on the judiciary has been inflicted by modern-day “kings” -- campaign contributors of large donations, including individuals and organizations. Such large contributions may cause some candidates to become dependent upon such contributors for continued success in getting elected, and keeping their office. Such circumstance sounds eerily like the actions of the king cited in the Declaration of Independence as a reason for revolting against the king.

These concerns permeate each generation of Americans. They are not new. They demand our constant vigilance to protect our freedoms and the independence of our judiciary. That independence provides us with a level playing field when parties at odds with each other seek the decision of a true neutral in the courtroom.

We must continue to decry the “dangers of dependence” and protect the independence of our judiciary from the actions of modern day “kings.”

Members of the legal profession, both lawyers and judges, are called upon daily to make personal and professional decisions and choices which will strengthen that independence or weaken it. Those decisions and choices may be relatively insignificant in and of themselves, but devastating

or strengthening, depending on a wrong or right choice, with respect to their cumulative impact over time. It is there, in those daily moments of choice, that the difference will be made; that the defense of independence will be mounted; that the dangers of dependence will be avoided; and justice will be honored...or not.

**The American form of government: Schiavo case shows strength of judicial system, *Buffalo News* op-ed by Kenneth G. Standard, president of the New York State Bar Association**

March 30, 2005

For the past several weeks, we've seen passion, drama and tragedy as Terri Schiavo's life plays out on center stage in print and electronic media. To the casual observer, the legal wrangling that has taken plaintiff and defendant from federal to statecourt and back again, to Congress and the Florida Legislature and back again, may seem akin to a chess match with Terri as the pawn.

But no matter what your opinion may be of the merits of the numerous challenges brought by Schiavo's family, they have demonstrated that the checks and balances put into our legal system by the framers of our Constitution continue to work more than 200 years after they were established.

I am proud of our judiciary, which once again showed that it is strong and vital and will not collapse under the weight of numerous and contentious court battles.

Our unique and successful system of self-government, based on three co-equal cornerstones of executive, legislative and judicial branches, has remained valid, viable and undeterred during more than two centuries of wars, political scandals and social unrest.

While our system of government remains imperfect and has made mistakes, this "grand experiment of ours" has survived and has done so precisely because it is not fragile. Nonetheless, our government can be messy and certainly is not for the faint of heart.

Despite what appears to cynics and the uninitiated as disorganized chaos, our legal system is, in fact, robust and thoughtful and has endured scores of "calamities" that would have toppled a more fragile system of government that does not enjoy the support of the people.

We need to remember that democracy frequently is a messy, disordered business. There is a dynamic to it that defies the neatly packaged, predetermined outcomes that some might want. Criticizing judges, Congress and the president is as old as our democracy itself. It is the healthy expression of a vigorous and unfettered people.

All of us - congressional leaders, activists, religious leaders, media commentators, the U.S. Supreme Court, federal appeals judges, state judges, cynics, and every citizen - are stakeholders in this democracy. Each of us has a voice, and each of us deserves to be heard.

While it is natural and healthy to disagree with a judicial ruling, we should not let that criticism degenerate into a personal attack on a particular judge. Our system of government is based on respect for the rule of law. That system relies on our consent to that rule and on self-restraint by each of us as well as the three equal branches of government if it is to remain effective.

Let us take the time now to remember just how precious and fragile life can be. And let us celebrate that distinctly American spirit that in all its wondrous glories and foibles has managed to confound its critics and naysayers, and to survive what some will term as yet another "crisis of monumental proportions."

Kenneth G. Standard is president of the New York State Bar Association.

**Judges Deserve Respect, Protection, *Philadelphia Inquirer* op-ed by Andrew A. Chirls, Chancellor of the Philadelphia Bar Association**

“A judge?” Wendy DeLong said. “A judge is a symbol of law and order and civility. It’s just the most heinous crime.” Wendy DeLong is right.

DeLong lives near the Atlanta home of the late Judge Rowland Barnes, who was murdered on March 11. Brian G. Nichols, who was on trial before Judge Barnes for rape and other violent felonies, is now also charged with shooting a deputy sheriff and killing the judge, a courthouse guard, a court reporter and a federal customs agent.

All of this started in the Fulton County Courthouse, spilled into Judge Barnes’ chambers and courtroom and continued outside the building and into Atlanta’s fashionable Buckhead neighborhood where the federal agent was murdered. And these killings come on the heels of the murder of a federal judge’s husband and mother in Chicago last month.

In fact, three federal judges have been murdered since 1979 and last year there were 674 threats recorded against judges. What’s more, the threat figure has tripled since the late 1980s. At the very least, these recent crimes and statistics remind us that our judges assume a difficult, lonely and dangerous role. Judges are on the cutting edge of the most critical and contentious issues facing our society. Often they have to deal with the burdens, problems and offenders that no one else wants to face. They encounter some of society’s most hardened and violent criminals and they deal with litigants and victims and witnesses who are in a heightened emotional state. We need to appreciate the important and often dangerous role that our judges assume at every level: federal, state, county and local.

I join with American Bar Association President Robert J. Grey Jr. in strongly condemning “the horrific and devastating attacks on judges, their families and court personnel that have taken place.” Our deepest sympathy is extended to the families, friends and colleagues of the victims. Lawyers understand some of the dangers that are faced because we sometimes find ourselves in tense situations and/or in the presence of disgruntled individuals within office settings that do not have heightened security.

The point is that our judges shouldn’t have to live in fear for their safety. They need to be free to carry out their duties and rightfully serve as our guardians of law and justice. Anyone who even thinks about harming judges, court personnel or other officers of the court needs to know that making such threats or acting on them will result in prosecution to the fullest extent of the law.

And there are other things we can do to support and protect our judges and our courts:

1) Our courts must be fully and adequately funded and security needs to be given a high priority. Judges and court administrators should not have to go hat-in-hand begging for the funds they need. Economies must never be achieved in a way that compromises security. Here in Pennsylvania, the Judicial Council Committee on Judicial Safety and Preparedness was created in May 2002, with state Supreme Court Justice Sandra Shultz Newman serving as chair. So far, with the Governor’s approval, the courts have sought and received funding from the legislature for \$4.4 million this year to introduce targeted security features into more than 500 magisterial district judge offices throughout the state. Another \$4.3 million will be needed next state year to assist counties in upgrading courthouse security systems (magnetometers, duress alarms, etc.) Additionally, Pennsylvania’s courts have pilot tested and will introduce an automated statewide incident reporting system for use in magisterial district judge offices. This system will eventually be extended to trial courts as well. And a judicial security manual will be introduced statewide later this year with

appropriate training for judicial staff. These are positive developments that remind us that we need to continue to agree on long-range court funding formulas and follow through on those agreements.

2) Judges must be adequately compensated. No one expects to become rich on a public servant's salary. But many of our judges take significant pay cuts to enter public service. Their salaries must be regularly increased not just to keep pace with inflation but to reflect the importance of their positions, the stress under which they often work and the dangers that they face.

3) We must continue to restrict access to information about judges that might expose them to harm. Congress should permanently extend the law that now allows such information to be removed from the financial disclosure forms of federal judges. That law is scheduled to expire this December.

4) In some courts, judges are assigned to the same kind of cases for many years. Judges who try criminal and family law cases need to be periodically rotated off the criminal bench not merely to provide those judges with a break from the stress of criminal and family trials but also to prevent regularly identifiable judges from being associated with certain types of cases.

5) Finally, we must think about new and innovative measures to protect our judges and our courts. We should not shy away from using the latest technology in this effort consistent with a free and open society and mindful of the need to protect everyone's rights. In Philadelphia, we support a new Family Court facility combining the latest security features with the need for public access. And our effort should not end at the courthouse door. For example, we should consider providing home security systems for every judge.

These are some of the actions that we can take to respond to threats against our judges and our judicial system. Our courts are meant to be quiet sanctuaries of order and reason. Our judges are charged with carrying out their enormous responsibilities in a thorough, deliberate and ordered manner. When we begin to allow murder and mayhem into this environment the highest calling of a civilized society is placed at risk. We cannot allow that to happen.

Andrew A. Chirls, a partner at WolfBlock, is Chancellor of the Philadelphia Bar Association.

**Judges deserve respect, not scorn, *Deseret Morning News* op-ed by Charles R. Brown, former President of the Utah State Bar**

April 6, 2005

In my favorite play, "A Man for All Seasons," there is a very profound discussion between Sir Thomas More (who was, above all, a man of God in addition to being one of the leading lawyers of his time) and his daughter's suitor, regarding the body of man's laws in existence at that time and how they serve us all. The young man feels it is all right to "cut down" every law to get "the Devil," who broke "God's law." But Sir Thomas explains to him that although man's laws are far below those of God, we are only men and must " . . . stick to what's legal." Sir Thomas points out that he is not God. "The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager." Men can only navigate man's laws. One must give " . . . the Devil benefit of the law," for one's own safety's sake. The rule of law is there to protect us all.

Such is the case in the recent in the events surrounding the Schiavo matter. They have been disturbing and upsetting to all of us. There is conflict on many aspects of the matter. Issues are seldom black and white. However, the one aspect of the issue which is black and white and which causes me great concern is that there are commentators out there who are attempting to capitalize on this tragedy and further increase the cultural divide in our country. Attacks on the judiciary and movements to radically modify the operation of the rule of law, and our time-tested system of justice, will ultimately benefit no one and will likely cause serious harm.

We are a country of laws and must be so to survive. Our Constitution and the rule of law, including the doctrine of separation of powers, have served us well over the past two and a half centuries and are the primary reasons our country is so great. For anyone to utilize a tragedy such as this to promote the radical modification of our time-tested system of justice is not only inappropriate, but, subject to inevitable shifts in the political wind, may some day come back to harm those who are now promoting that modification.

My friend, Robert J. Grey Jr., the current president of the American Bar Association, issued a short release last week on this issue, which states far more eloquently than I could the concerns of all of us who believe in the preservation of the rule of law. "Regardless of how one feels about the specific circumstances of this situation, the role of the judiciary in it is clear and straightforward. The federal and state judges who have been assigned this case have been charged with weighing the facts of the case and the remedies set forth in the law, responsibilities they have carried out valiantly and with great dignity and sensitivity to the anguish that all of the participants in this case have endured."

"While it is appropriate for commentators, policymakers and the broader public to debate the societal challenges and dilemmas brought to light by Terri Schiavo's case, there is no need for personal attacks on the judges in this case. They are not killers as some have called them, nor are they activists bent on pushing an ideological agenda. They are simply dedicated public servants called on to serve as impartial arbiters in a very difficult case. Instead of maligning them for applying existing law to the case at hand, even though it may not reflect the current will of Congress, we should praise them for dispensing even-handed justice and upholding the independence of the judiciary even under the most difficult circumstances. These judges deserve our respect, not our scorn."

*Charles R. Brown is a tax attorney and former President of the Utah State Bar.*

***The Daily Journal article by Ken Petrulis, President of the Beverly Hills Bar Association***

While the Beverly Hills Bar Association recognizes everyone's right to disagree with a jury verdict or court decision, District Attorney Steve Cooley's reckless statement calling jurors in the Robert Blake case "incredibly stupid" hurts everyone and seriously damages our jury system. Steve Cooley owes an apology to the individual jurors in the Blake case and to jurors in general for his personal attack. Our fate and our access to the courts depend upon jurors who make decisions on the facts without fear of retribution or ridicule. It is his duty to make sure that honest men and women will continue to serve on juries. If he doesn't apologize, it hurts us all.

The Beverly Hills Bar Association has always supported of the independence of our judicial system, one of the cornerstones upon which our nation was founded. If judges and jurors are subject to personal attacks, it undermines their ability to be independent and fair. The integrity of our democratic system depends on the freedom of judges and jurors to decide cases solely on the law and the facts before them. Jurors take time from work and family to do their civic duty. They should not be demeaned and embarrassed, especially by public servants sworn to uphold the law.

It hurts to have a district attorney humiliating jurors at the very time we are trying to encourage people to serve as jurors. Only by serving can jurors make sure that juries represent everybody from all walks of life. Only by serving can jurors learn what the system is really about. We need to increase the participation of ordinary people in our juries, not discourage participation. Personal attacks on judges, or jurors, are contrary to this goal.

It hurts because the constant harangue against our courts leads to a mob mentality where rumors and passions rule instead of reason. Personal attacks like Cooley's put pressure on juries to make decisions which are popular, regardless of the facts of the case. We all need to fear a day when our fate will be determined like some contestant on American Idol.

– Ken Petrulis  
President, Beverly Hills Bar Association

**Beverly Hills Bar Association Decries Political Circus Surrounding Theresa Schiavo,  
statement by Ken Petrulis, President of the Beverly Hills Bar Association**

**March 31, 2005**

(Beverly Hills, CA) – We of the Beverly Hills Bar Association express our condolences on the passing of Theresa Marie Schiavo. We join with Robert Grey, the President of the American Bar Association, in decrying the circus that surrounds the Theresa Schiavo case. Her memory deserves to have the facts of her case accurately stated, to have the hate mongering cease, and to not have the law manipulated to interfere with individual rights.

Judicial independence and the Rule of Law are part of the foundation of our country's greatness and success. While everyone has a right to disagree with court decisions, Congress and the President's legislative attempt to intervene in the Theresa Schiavo case was fundamentally flawed and set a dangerous precedent. It interferes with Theresa's rights and threatens the very liberties that the President and Congress have sworn to uphold. It fostered intolerance and hate. It undermined the separation of powers. And, it ignores 200 years of the tradition of judicial independence that has protected liberty and justice for all in the United States.

Many courts have heard Theresa's case. Theresa has been represented by an independent court appointed guardian. Medical experts from both sides and independent medical experts have presented evidence to the court. By clear and convincing evidence, the courts have confirmed that Theresa, herself, would not have wanted to be kept alive in her persistent vegetative state. The pseudo retrial of Theresa Schiavo's case whether in Congress, the White House, or the media, tramples on her rights. It hurts each of us and damages the judicial independence that is at the heart of our freedoms by misleading the public as to the actual safeguards and protections afforded Theresa and the parties.

Justice Scalia, one of the most conservative of judges, reminded us in his Cruzan decision in 1990 that these matters of life and death health care decisions are for the state courts to decide and that federal courts should stay out of such matters. Ignoring this, the President and Congress violated Theresa's rights when they manipulated federal law for their political purposes.

By passing a special law giving federal courts jurisdiction in this one particular case, they sought to set aside the decisions of the trial court, at least four appellate courts, and the Supreme Court of Florida. Throughout this process, they played to the media, seeking popular support and misstating the facts and the law of Theresa's case. We all need to fear a day when our legal rights are determined by politicians in the media, like some contestant on "American Idol." Our rights guaranteed by the Constitution and the Bill of Rights should not so easily be cast aside. Otherwise, any of us could become the next victim of the media circus. The millions of people now signing their own living wills are testament to the desire of most Americans to avoid such a fate.

The constant harangue in the media and in Congress against the judges and their decisions in this case has led to a mob mentality where rumors and passions rule instead of reason and the rule of law. Tom Delay's calling Schiavo's attorney "the embodiment of evil" is just one of many intolerable statements. These personal, verbal attacks have already lead to threats against a judge in this case. Such threats seek to pressure judges into making decisions that are popular, but not based on the law and facts of the case. The strength of our nation is based upon an independent judiciary that is not subject to threats. Robert Grey has noted how damaging this is to our legal system. The federal courts and the United States Supreme Court have, by their recent decisions affirmed, the rule of law and the integrity of the judicial process.

In 1803 Chief Justice John Marshall established the principles of judicial independence and review that made the United States a leader in the cause of freedom and justice. Judicial independence is one of the primary reasons for our success as a nation. Our fate and our access to the courts depend upon judges who make decisions based on the law and facts without fear of retribution or ridicule. Without independent judges, we are subject to the tyranny of public opinion. We cannot silently surrender those principles and allow that tyranny.

We at the Beverly Hills Bar Association have long supported the principle of judicial independence. We know that it is at the heart of our success as a nation and our individual freedoms. We are encouraged by the consistent rulings of both the state and federal courts on this issue. Conservative judges and justices, as well as liberal, have said that Theresa's rights should be determined in the courts, not in the street, not in the media and not in the Congress. Competent evidence and fair decisions, not intolerance and hate should rule. Over 200 years of freedom and justice should not be thrown away for political gain.

## **Standing With Heroes, op-ed by Ken Petrulis, President of the Beverly Hills Bar Association**

More than 200 years ago, a judge from a developing nation, sitting with his fellow justices in his court, told his president and his legislature that they were wrong and he was right. With no army to back them up, and little support to be found in the Constitution, he expected them to obey the order of the court.

Today, it is easy to see that this judge, United States Supreme Court Chief Justice John Marshall, changed the course of history. Justice Marshall declared that an independent judiciary was a critical limit on the President and the Congress. What's more, he then created the tool of judicial review to allow the Court to strike down unconstitutional laws. By standing up to unchecked power, Marshall was one of the first heroes of our new nation.

Marshall's heroism has echoes today in countries around the world that are trying to develop democracy. Just last December, my local bar association, the Beverly Hills Bar Association, joined legal professionals in Ukraine who were supporting the independent judicial review of their democratic electoral process. We commended the courage of the Justices of the Supreme Court of Ukraine who, despite terrible pressures from opposition within the country and from Russia's President Putin, stood up for independent judicial review of their elections. Inspired, we called on the global legal community to support the Rule of Law and the independence of the judiciary in Ukraine.

Judges in Albania shared a similar experience. A few weeks ago, I met with justices from their Constitutional Court. While we had a great discussion about the U.S. legal system, we also found common ground discussing the fierce attacks they face at home as they try to be independent judges. I compared their situation to a soccer referee who faces a hostile crowd after a controversial call. But they corrected me quickly: while the anger toward the referee is forgotten by the next match, the anger toward the judge remains.

Sadly, I couldn't disagree – anger toward judges in the United States is on the rise. When I suggested it is a never-ending process of vigilance to protect our judges and our judicial system, they shook their heads knowingly.

In Cuba, I had a chance to see the other side of the struggle – a place where judges lack the independence they need to be heroic. In conversations with Cuban jurists, I learned that the Cuban Constitution has many similarities with our Constitution. Judges and lawyers were convinced that their system worked, since the wise Cuban legislature would never pass an unjust law. I couldn't help asking: What happens if the rights guaranteed under the Constitution conflict with a law passed by the Cuban legislature, or with the manner in which the law was enforced by El Presidente? They deflected me several times. "Justice will prevail." "You are entitled to an attorney." "Our laws are fair." Finally, I heard their revealing answer: "We have no right of independent judicial review."

American greatness is not the product of "traditional values" or even mainly due to our natural and strategic resources. Instead, our success is due to our willingness to listen to the judicial process, with its vigorous debates and independent fact-finding role. "Traditional values" tolerated and even endorsed slavery, child labor, discrimination against women and non-whites, unfair economic competition, and unsafe products and working conditions.

But over the last 50 years especially, judges have often been heroes in setting the moral standard when others in power were afraid to. In 1954, Chief Justice Earl Warren and his fellow Justices of the Supreme Court created a moral revolution in *Brown v. Board of Education*. They acted unanimously to end segregation in the schools. Justice Warren knew if they didn't, they

couldn't convince a reluctant nation to follow them. Subsequent Courts followed with defenses of privacy, the rights of defendants, and other challenges to arbitrary government power.

We are seeing heroism again today, as liberal and conservative judges stand together against attacks from vocal public groups, the Congress, and the President. One judge in the Terri Schiavo case has been expelled from his religious congregation. Judges and their family members are being shot and killed. Another has been threatened with recall for making an unpopular decision in a domestic partners case. The group that made this last threat says it will do the same to any other judge with whom they disagree.

In the face of threats against their bodies and souls, judges demonstrate courage simply by making independent decisions. Like John Marshall before them, they deserve to be recognized as heroes for standing up to defend our rights. They deserve to have us standing with them in support of our system of government.

## **A Judiciary Under Attack, President's Message by Julie Emede, President of the Santa Clara County Bar Association**

April 8, 2005

I do not recall a period during my lifetime, or know of such a period historically, when the judiciary has been more front and center – and in the process more viciously attacked – than in recent days. The attack seems only to be gaining ground and more virulent voices. Consider for a moment some of the most recent criticism leveled at our judiciary and judges, while keeping in mind that this criticism is coming most strongly from the executive and congressional branches of our government. The criticism includes statements such as the following:

- The judiciary is out-of-control and unwilling to submit itself to the will of Congress;
- Judges are not elected and are unaccountable to the people, thus leaving them to create law and make policy at will;
- Judges are making political/policy decisions and reversing the expressed will of the people and their representatives;
- Decisions that should be made democratically are being made by activist judges;
- Judges need to understand that all rights are derived from God and that understanding should guide their decisions; and
- We should remove judges who do not follow the directions of Congress.

In one of the most recent and outrageous attacks, Sen. John Cornyn of Texas, on April 4, 2005, delivered a half-hour Senate floor speech denouncing the recent U.S. Supreme Court decision overturning the death penalty for juvenile under the age of eighteen. In a cynical leap of logic, he suggested that recent cases of violence against judges may be a result of judges' lack of real accountability to the people or Congress.

"The increasing politicization of the judicial decision-making process at the highest levels of our judiciary has bred a lack of respect for some of the people who wear the robe," Cornyn said. "I wonder whether there may be some connection between the perception in some quarters . . . where judges are making political decisions yet are unaccountable to the public, that it builds and builds to the point where some people engage in violence, certainly without any justification."

Sadly, this was posited by not just any congressman – Senator Cornyn is a former Texas Supreme Court Justice.

Closer to home, our local judges have not been without their share of similar attacks. Superior Court judges in San Francisco and Sacramento have recently found themselves facing an onslaught of criticism for finding certain laws (around the issue of same gender marriage) unconstitutional. The Sacramento judge is facing a recall election.

All these attacks share a common flaw: they display a fundamental lack of understanding of the role of the judiciary and its relationship to the executive and legislative branches of government, as well as the judiciary's role vis-à-vis the electorate. They ignore the fact that the judiciary is the crucial check and balance for acts by the legislative branch and the executive branch that violate existing law and/or the U.S. constitution.

It is this traditional role of the judiciary that makes the United States a democracy that has worked for over 200 years. It is the role of our judiciary as defined by the U.S. Constitution and the landmark case of *Marbury v. Madison* that fends off the tyranny of the majority and extra-constitutional acts of the legislature and the executive, and keeps our government from devolving into

totalitarianism. For leaders of our country to be leading the attacks against the judiciary should gravely concern all of us. Lawyers, in particular, must be deeply concerned since it is we who are the gatekeepers to the judiciary.

Lawyers are uniquely positioned to stand up for and help protect the inspired constitutionally mandated separation of powers. To preserve this type of government, the U.S. Supreme Court noted in the 1989 case of *Misretta v. United States* that the “Constitution mandates that each of the three general departments of government [must be] entirely free from the control or coercive influence, direct or indirect, of either of the others.” And, as noted by the court in *Marbury*, it is this principle “on which the whole American fabric has been erected.”

Without the judiciary exercising its proper role, it may have taken decades longer (if ever) to eliminate segregation; the ban against inter-racial marriage; laws prohibiting blacks from voting and entering into professions such as law and medicine; and laws prohibiting women from voting, holding property in their own name and entering into professions such as law and medicine. All of these legal rights, just to name a few, had been and likely would have continued to be trampled by the majority will of the people. It is the possibility of tyranny and the exercise of arrogant power by the legislative and executive branches that the judiciary was meant to check and keep in balance.

The most recent, startling display of the legislative and executive branches attempts to exert their will over the judiciary was in the Terry Schiavo case. With an astonishing disregard for the separation of powers, Congress directed the federal courts to intervene in a particular case, created federal jurisdiction for this one case, directed the court to disregard all the judicial proceedings that had occurred in the state courts, and directed the court to hold a de novo hearing.

ABA President Robert Grey, in a press statement released March 25, 2005 about the Terry Schiavo case, pointed out that “many commentators and observers have crossed the line in using this tragedy to needlessly, gratuitously and viciously attack the dedicated men and women who serve as America’s judges. This needs to stop.”

But stop it has not. Lawyers, individually and collectively, must speak out loudly, confidently and often to ensure that these ill founded and misdirected attacks do, in fact, stop. Otherwise, the attacks threaten to tear at the fabric of our prevailing democratic principles, leaving us all exposed to the missteps, mistakes and excesses inherent in the political process and changes in executive leadership. We have been, and must continue to be, protected as a country by laws of the people, and ultimately, the Constitution as interpreted and protected by the judiciary.

Ours will continue to be a unique democracy. But we, as lawyers, must speak out to ensure the judiciary remains the truly independent, co-equal branch of government it was intended to be.

## **Protecting Judicial Independence, *The Oregonian* op-ed by Sylvia E. Stevens, President of the Multnomah Bar Association**

Monday, April 25, 2005

It is bitter irony that our soldiers are dying in furtherance of our mission to bring democracy to Iraq at the same time that some people in positions of power and influence are working to dismantle democracy here at home.

House Majority Leader Tom DeLay may be the most quoted, but he is not alone in attacking the judiciary and suggesting that Congress should assert authority over the courts. According to DeLay, the House Judiciary Committee is reviewing the activities of justices on the Supreme Court and in the circuit courts to determine whether they have overstepped their authority and need to be "reined in," presumably by impeachment proceedings.

These critics of the judicial system appear to have forgotten what they learned in civics class. The form of government created by our founders 200 years ago is the model for the world, especially for emerging democracies in Russia, Central Europe and, most recently, Iraq. The key component to our democratic system of government is the concept of check and balances that allocates the three different functions of creating, enforcing and interpreting laws among the three different branches of government.

A fundamental part of this system is an independent judiciary applying the steady hand of the rule of law. The rule of law refers to the principle that every citizen is governed by the same law, applied fairly and equally; that government favors may not be bought; and that justice is administered blindly, in the sense that it never stoops to favoritism. Under the rule of law, judges act without concern for the day-to-day whims of politics and public opinion, protecting individual liberties while preventing a tyranny of the majority.

For as long as our nation has existed, this separation of judicial and legislative powers has worked to protect and defend our freedoms. Indeed, our progress as a society often has been forged by a judiciary free from partisan politics; a judiciary acting on the basis of what is just, not just what is popular; a judiciary able to protect ordinary citizens from politicians, big government, uncaring corporations and from each other.

Unfortunately, too many people seem willing to upset this delicate balance by giving our legislators or executive branch officials the right to influence or control judges. And why? None of the judges who are the targets of criticism has been accused of wrongdoing or improper conduct sufficient for removal through impeachment or other disciplinary proceeding. Their error has been only to make rulings with which some politicians and interest groups disagree.

To subject the judiciary to the will of Congress or partisan executive branch officials would undermine the fundamental freedom that results from judges' ability to serve as buffers against society's excesses and the prevailing political currents.

Removal of judges because of policy differences would bring chaos into our system of democracy. Each year, the American courts resolve some 100 million cases, from the simple to the complex, from routine to extraordinary. Nearly all are resolved successfully, that is, fairly and impartially.

Our courts are the defenders of our most precious freedoms, the protectors of individuals against the tyranny of the majority. Our judicial system is held up as an example for the rest of the world. If we allow partisan politics to undermine the independence of our judicial system, we jeopardize the fundamental basis of our free society and risk becoming the very thing that we seek to eradicate in the rest of the world.

*Sylvia E. Stevens is the president of the Multnomah Bar Association.*

**Letter to the Editor in the *Toledo Blade* by Steven R. Smith, President of the Toledo Bar Association**

**American Judiciary Deserves our Respect**

May 1, 2005

I am writing to support and defend the independence and integrity of the judiciary. I feel compelled to take this public stand on behalf of all members of the Toledo Bar Association in response to the recent gratuitous and vicious verbal attacks on America's judges by some politicians and commentators.

As school children, we learn that the strength of our republic is derived from the Founding Fathers' genius in creating a democracy based upon the unique idea of the separation of power. Three equal, and independent, branches of government have been established, each with a distinct, but different role. Together, each operates as a "check and balance" to the others.

The executive and legislative branches are elected officials and, as such, are directly accountable to the voters: the executive branch to the majority that elected it and the legislators each to their own constituency. Although an over-simplification, the will of the majority of the populace should control the actions of both the executive and legislative branches. The judiciary, however, is answerable to a less visible and more amorphous "public," being charged with upholding the Constitution. Having a 200-year-old document as your primary constituent sometimes leads to lonely times.

The judiciary's role has always been to protect our individual rights and freedoms in the face of a majority bent on pursuing its own ideological agenda. This role may make a judge's decision unpopular, but it is no reason to malign the entire judicial system.

Without the judiciary we might not have a free press, integrated schools, and jury trials. Judges are not meant to be "enforcers of political decisions made by elected representatives of the people," as one recent politician unabashedly suggested.

Judges serve as impartial arbiters, and they deserve our respect.

STEVEN R. SMITH  
President  
Toledo Bar Association

## **Citizens Have a Duty to Respect and Defend an Independent Judiciary, op ed by Michael H. Reed, President, Pennsylvania Bar Association**

A disgruntled medical malpractice plaintiff allegedly kills the mother and husband of a federal judge in Chicago. A defendant on trial for rape in Atlanta escapes from custody and, instead of immediately fleeing, allegedly shoots the trial judge and other court officers. A state court judge in Florida, after hearing both sides of a very difficult case, makes a ruling for which he is condemned as a “murderer.” That judge and a federal judge involved in the same litigation subsequently have bounties placed on their heads on the Internet.

Is there a common theme in these recent events? Perhaps. Every citizen has a constitutional right to criticize the courts. Indeed, if the Legislature or the Executive Branch ever sought to abridge the right of any citizen to criticize the courts, the citizen could go to court to defend that right. And, ironically, the individuals who allegedly committed the slayings and posted the bounties mentioned above will each “get his day in court.” But do we as citizens also have a duty to respect and defend the independence of the judiciary?

Each of the events noted above involves an attack upon or challenge to the authority of an individual judge in the context of a specific case. Collectively, however, they symbolize a growing antagonism in certain quarters to the judicial process and those who work in it.

Public criticism of the performance and character of individual judges is inevitable and sometimes justified, particularly given the fact that many of our state court judges are elected. But when judges are physically attacked or threatened because of their rulings, the integrity and independence of our judicial system is imperiled.

Throughout American history, the courts have played an important role in bringing stability to our democracy. As the American nation matured, its citizens generally chose to settle disputes in court rather than through violence. Even during periods of domestic strife, such as our Civil War, and when the nation has been at war, the courts have remained open to do the people’s business.

Democracy simply does not work without an independent judiciary. For evidence of that, one need look no further than the other countries not blessed with independent judicial systems. That is why we were so inspired by the recent performance of the judiciary in the Ukraine which, by invalidating a fraudulent election, paved the way for democratic reform. Indeed, the existence of an independent judiciary is one of the most important barometers of a true democracy in the world today.

There is much public discussion and debate today about our national values. One of our most important values is our democratic culture. Our independent judiciary is a fundamental part of our American democratic values that we should zealously protect even when judges make rulings with which some of us strongly disagree. This is not a “liberal” vs. “conservative” or Republican vs. Democrat issue. Happily, recent polls suggest that the people “get it.”

*Michael H. Reed, a partner in the Philadelphia office of the national law firm of Pepper Hamilton LLP, is the 110<sup>th</sup> president of the Pennsylvania Bar Association.*

## **Editorial in the *California Bar Journal* by Representative Adam Schiff of California**

### **It's Up to Judges to Restore Public Trust**

For the last two years, Chief Justice Rehnquist has used his year-end reports to warn of the growing deterioration in relations between Congress and the federal judiciary. In urging the restoration of comity between the two branches, he has quoted Chief Justice Hughes' admonition to the Congress of his day that "in the great enterprise of making democracy workable we are all partners. One member of our body politic cannot say to another — 'I have no need of thee.'"

Lately, however, Congress has been saying precisely that. In bill after bill, many of my colleagues have been calling to strip the courts of jurisdiction over issues where they believe the courts have erred — or might err — and arguing we have no need of them.

Bills have now been passed or introduced to strip the courts of jurisdiction over the pledge of allegiance, over marriage, over the Ten Commandments, and "the acknowledgement of God as the sovereign source of law." The sheer number and breadth of these proposals prompted me to ask in Judiciary Committee whether we should simply strip the courts of jurisdiction over the First Amendment and be done with it.

The proposed sanction for judges who tread on this prohibited ground — and a word spoken in the halls of Congress with less and less restraint — impeachment. Indeed, one federal judge who had the temerity to accept a Congressional invitation to testify on the sentencing guidelines and expressed an opinion at odds with the majority now finds himself the subject of endless committee investigation. Some constituent groups and Congressional leaders now encourage or entertain fantasies of impeaching Justice Kennedy.

The independence of the judiciary, a matter so fundamental to our separation of powers, seems suddenly a matter of great contention. Even those at the highest levels of leadership in Congress are threatening to "look at an unaccountable, arrogant, out-of-control judiciary that thumbed their nose at Congress and the President" and are warning that "the time will come for the men responsible for this to answer for their behavior . . ."

Although these comments and others like them have been retracted or dismissed as merely "inartful," there is no disguising the growing hostility towards the courts from Congressional leadership and the adverse effect on the judiciary. As a result of this disharmony, the federal caseload continues to increase, courthouse funding and judicial compensation are woefully inadequate and judicial confirmations continue to be mired in political brinksmanship.

This hostility has taken many forms beyond that of defunding the courts and court stripping, and includes resolutions condemning the judiciary for the citation of international precedent and still other measures that would split circuits out of a dislike for their jurisprudence. One proposed constitutional amendment recently circulated on the House floor would end life tenure for the lower courts and replace it with retention elections.

Perhaps the single greatest example of the magnitude of the challenge to the independence of the courts, though, came with Congress's extraordinary intervention in the case of Terry Schiavo. This heartrending private tragedy became the focus of efforts to overturn the Florida courts' interpretation of Florida law regarding end of life decisions. When the federal courts rejected this private bill and its effort to provide jurisdiction to courts that could not properly exercise it, the reaction among many in Congress was one of wrath.

The same Congressional leaders who had spent the last several months trying to strip the federal courts of jurisdiction were now trying to extend it where it did not belong. If this irony was lost on its authors, it was for good reason — a higher principle of consistency applied: Some members of Congress want to dictate results to the courts regardless of the separation of powers, principles of federalism or other obstacles. They have decided that the independence of the judiciary is an inconvenient impediment to a results-at-all-costs philosophy.

Judges bear partial responsibility for the loss of confidence in the judicial branch. Some recent high-profile rulings in the Courts of Appeal and Supreme Court have not been well reasoned and invite derision. Others smack of a desire to reach a particular result at odds with clear Congressional intent, notwithstanding precedent or plain statutory language.

Judges also spend little time interacting with members of Congress. Sound ethical canons prevent judges from lobbying, but judges can have good relationships with legislators and can help them understand the challenges and duties of the bench. The vast majority of those appointed to the court have risen to the bench due in part to a relationship with a senator, a member of Congress, or the president himself. The need for good relationships with the legislative and executive branches does not end after appointment, but a dialogue with Congress — once a staple of judicial life — has become a rarity.

It is not just the members of Congress who need to be reacquainted with the judiciary and its unique constitutional role. Judges must also work to educate the public about their power to review a law's consistency with constitutional standards and their decision-making process. Some eight years ago, an ABA Commission reported "mounting evidence" of a loss of confidence in our courts and "a diminished understanding of the role of an independent judiciary in protecting the rights of the people." I seldom see judges at the local Rotary, Kiwanis or Lyons club meetings and other civic organizations that give me the opportunity to explain my job and my actions to my constituents. In the end, only judges themselves can restore public confidence in the courts, and it is too big and too personal a job to be done from the detached loft of the bench.

Chief Justice John Marshall once warned that, "the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary." Efforts by the Congress to force the courts to look at our transient wishes, rather than the Constitution, will damage the courts and undermine our own integrity. In the end, we cannot expect to belittle the courts without belittling ourselves. But while I would certainly welcome a better relationship with the bench, as to a dependent judiciary, well, "I have no need of thee."

## STATEMENT

### IN SUPPORT OF JUDICIAL INDEPENDENCE

To secure liberty, our constitutional system of checks and balances divides governmental power among the legislative branch, the executive branch and the judiciary, by giving the legislative branch the power to make laws, imposing on the executive branch the power to enforce laws and assigning to the judiciary the power to interpret laws. This is the doctrine of separation of powers. As opposed to the political branches of government, the judiciary must be independent, meaning a judiciary which acts fairly and impartially, in consideration of what is just, not what is popular, and which makes decisions after careful legal scrutiny firmly grounded on the rule of law applied to the evidence presented in the particular case, but without concern for politics, the demands of special interest groups, or even the popular opinions of the majority. Furthermore, the judiciary, to fulfill its independent function as a co-equal branch of government, must be free from encroachment from either the legislative or executive branches of government.

The North Carolina Bar Association affirms the principle that an independent judiciary is a cornerstone of democracy and that the independence of the judiciary must be preserved. The North Carolina Bar Association rejects any contention that the judiciary should be dependent and subservient to either the other branches of government or popular opinions, for surely and inevitably, a dependent judiciary would be neither fair nor impartial and would constitute a dire threat to justice, our constitutional democracy, and freedom itself.

Adopted this the \_\_\_\_ day of June 2005.

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G. Gray Wilson  
President, NC Bar Association