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Address to State Bar of South Dakota

June 23, 2006

Theme: Independence of the Judiciary

Thank you, President Bob Riter, Colleagues in the Bar and on the Bench, and Friends.

It is a pleasure to be with you today. Having lived much of my life in Minnesota, my wife Sandy and I have visited your beautiful state many times. We are always struck by the friendlessness of South Dakotans – and especially by so many dear friends we have in the South Dakota Bar.

Gene and Pat Lebrun – friends from NCCUSL; Tom and Pam Fritz – Tom served on ABA Board of Governors; Charlie Thompson – leader -- nearly President of the ABA; Wynn and Lorraine Gunderson – Wynn chaired ABA General Practice Section and serves on the Nominating Committee of State Delegates; and your great South Dakota State Bar Exec and one of the outstanding state bar execs in the country -- Tom Barnett.

As I prepare to move on to the next phase of my career, I have reflected on the changes our profession has undergone during the twelve years that I have been privileged to serve as Executive Director of the American Bar Association.

We have seen the lawyer population continue to grow, with the number of licensed lawyers in the U.S. now reaching 1.1 million. In South Dakota you now have 1,715 licensed lawyers. While that number is less that the number of lawyers in many other states, you have experienced an increase of 14% in the number of lawyers over the past twelve years.

We have seen the practice of law "go global," with the globalization of the world economy and internationalization of legal issues touching nearly every lawyer in America.

We have seen the legal profession become more diverse and reflective of the society we serve, although we have many more miles to travel until we can say that our profession fully reflects the richness of the diversity of America.

We have been faced with numerous threats to the independence of the legal profession, from the Federal Trade Commission's attempts to regulate lawyers under the Gramm-Leach-Bliley Act of 1999, to the ongoing efforts by the U.S. Department of Justice to coerce corporations and other organizations under investigation or indictment to waive the attorney-client privilege in order to demonstrate "cooperation" to qualify for lenient treatment in charging or sentencing decisions.

But among the trends of the past twelve years, one that I find particularly troublesome and one with the potential to have the most serious long-term adverse consequences is the change in public attitudes towards our judiciary.

The debate over the proper role of the judiciary is nothing new -- it dates back to the founding of our republic.

The degree of independence to be afforded the judiciary was a hotly contested point of discussion during the Constitutional convention. Fortunately, in my view, the model put forth by John Adams and others carried the day for our federal judges. Article III of the U.S. Constitution was modeled on the Massachusetts Constitution, with the independence of the judicial branch protected by lifetime tenure during good behavior, a prohibition on diminution of salaries, and the exclusive right to exercise judicial power.

Scholar Charles Geyh, in a new book exploring the history of conflict between courts and Congress, observes that we have seen five discrete periods of acute conflict, separated by periods of relative calm.

The first serious political conflict over the role of the judiciary flared up with Jeffersonian outrage over the packing of the courts by outgoing Federalists in the John Adams administration

and in Congress. The subsequent failed impeachment trial of Justice Samuel Chase swung the pendulum back against the notion of removing judges for the content of their decisions.

It took Chief Justice John Marshall's decision in *Marbury v. Madison* to solidify the role of the judiciary through the establishment of the doctrine of judicial review, and that was only the first shot in a long war over the bounds of judicial power.

President Andrew Jackson famously challenged judicial authority when he reportedly said, "John Marshall has made his decision, now let him enforce it." *(In response to a case in which the Supreme Court invalidated a Georgia statute involving the Cherokee Indian tribe.)*

Throughout much of the 19th Century, states struggled to find the proper balance between judicial independence and accountability to the people as they adopted direct popular election of judges, and subsequent reforms, such as nonpartisan elections, intended to insulate the judiciary from prevailing political winds.

Republicans also clashed repeatedly with the Supreme Court before, during and after the Civil War over decisions such as *Dred Scott* and others that ran contrary in particular to the aims of the radical Republicans during Reconstruction.

The next two major periods of conflict came in the 20th Century – first with criticism of the conservative, pro-business rulings of the Supreme Court by progressives and New Deal supporters, and then with the backlash against the Warren Court in the 1950s and 1960s. Some of us are old enough to remember the billboards calling for the impeachment of Earl Warren.

Even though it is clear the judiciary has never been immune to criticism and conflict with Congress and the Executive branch, something *feels different* about the current climate.

Maybe it's the vitriol with which critics on both ends of the political spectrum attack what they perceive to be excesses of judicial power.

Maybe it's the cavalier and irresponsible charges of "judicial activism" that fly with such frequency and imprecision that the term itself has been rendered void of any real meaning – beyond, of course, a judicial decision that you don't like.

Maybe it's the red-hot politics, driven by narrowly-focused interest groups on the left and the right, surrounding appointments to the federal courts.

And maybe it's the astronomical growth in spending on state judicial elections, which have gone from sleepy, low-cost affairs to media-driven negative campaigns in the space of a single generation.

I suspect it's all of these phenomena, and more, that leave me with the impression that we are drifting into dangerous and uncharted waters when it comes to the independence of our judiciary, which the late Chief Justice William Rehnquist so eloquently described as "the crown jewel" of our system of government.

I am deeply concerned that criticism of the judiciary has reached such a fever pitch that we are opening the door to unwise policies that ultimately could do great damage to the practical application of the separation of powers doctrine and the system of checks and balances that have served our nation so well since its founding.

While criticism of the judiciary or any other institution of government is rightfully protected under the First Amendment, we should be mindful of the consequences of the more strident, *ad hominem* attacks on the very legitimacy of the judiciary.

The deterioration of public discourse about the judiciary is having real consequences in the halls of federal and state government. In Washington, some members of Congress are proposing drastic curtailment of the courts' jurisdiction to hear constitutional claims in cases involving controversial issues such as the Pledge of Allegiance, flag burning, religious expression, the definition of marriage, and writs of habeas corpus. Others are proposing the creation of an Inspector General for the judiciary – purportedly to look into judicial misbehavior – a step that

clearly would erode the separation of powers and could lead to widespread intimidation of judges and chilling of judicial decision-making. These proposals are buoyed by constituents who view the judiciary as an imperial, unaccountable, unelected group of elitists who routinely thwart the will of the majority. The concept of the judiciary serving as a valuable check on the powers of the legislative and executive branches, in order to protect the rights and freedoms of individuals and ensure the constitutionality of government actions, is not viewed favorably by many people who feel that judges are not on their side of a particular controversial issue or set of issues.

Still others in Congress employ extraordinary measures, such as the filibuster, to attempt to block judicial nominees who do not comport with their political philosophy, but who are otherwise qualified to serve on the bench.

And you in South Dakota are no strangers to controversy involving the role of the judiciary. The proposed Judicial Accountability Initiative Law, or J.A.I.L. 4 Judges, has received considerable attention around the country. It is heartening to see that the South Dakota legislature has spoken out so forcefully against this mean-spirited attack on the independence and integrity of the judiciary. The unanimous votes in the South Dakota Senate and House this past February urging voters to reject the J.A.I.L. 4 Judges amendment on the 2006 ballot is an important message for the public to hear. I also commend the organized bar in South Dakota for working with civic leaders to educate the public about the grave threat posed by this ballot measure. The American Bar Association stands with you in this fight, and the ABA is ready to provide any support that you may need.

These legislative proposals and ballot measures are troubling, and must be resisted at every turn. Perhaps in the long run, however, the greatest damage that is done is to the opinions that average Americans hold about the judiciary. As members of the legal profession, we appreciate the vital role that the judiciary plays in our system of government. The real battleground may not be within government, which is known to move cyclically on these issues, but in the public's view of the judiciary.

To the average American, the judiciary is all about fairness and impartiality. Several public opinion surveys and other studies in recent years have shown that the public tends to be fearful and mistrustful of terms like "judicial independence," which seem to set judges apart from everyone else. But Americans are instinctively protective of the non-political position of courts and reject attempts to compromise the perceived and real fairness and impartiality of the judiciary.

Lawyers know that judges are held appropriately accountable for their performance in office through several means, including judicial disciplinary systems, the appellate process, and peer pressure from fellow judges to respect the tradition of moderation that has kept our judiciary above the partisan fray. But if we keep using terms like "judicial independence" in talking with the lay public, we will not persuade them, and the opponents of an independent judiciary will sway more people to their side – with simple denunciations of judicial activism that appeal much more to the emotions than to the rational mind.

It is our responsibility, as lawyers, to take the lead in educating our fellow citizens about the fundamental, irreplaceable role that judges play in upholding the rule of law and safeguarding our democracy. We must remind people that judges have a difficult job to do. Their decisions often displease large numbers of people and they can't answer criticism effectively, lest they become indistinguishable from elected officials in the political branches.

This last point is especially important, as we are struggling to redefine the ethical rules governing political speech by judges and judicial candidates in the wake of the Supreme Court's decision in *Republican Party of Minnesota v. White* (2002). The American Bar Association filed an amicus brief in that case, and has expressed concerns about progeny of the *White* decision that have further eroded long-standing canons of judicial conduct and ethics dealing with political speech. On the one hand, the argument that if judges are to be elected, the people ought to know something about their beliefs sounds reasonable and appropriate for a democracy. But peel the layers of this onion back just a bit and you see where virtually unrestrained political speech by judges can lead.

Consider the hypothetical judicial candidate who clearly aligns herself with a powerful interest group and the policy positions they favor. She accepts large financial contributions to her campaign from donors closely aligned with the interest group. She speaks at the group's events, announcing that her "judicial philosophy" is in keeping with the values espoused by the group. She appears on promotional materials as an endorsed candidate of the group. The candidate does all of this without making an explicit pledge or promise to rule one way or another in specific cases if elected, but by signaling her views very clearly. She is elected, primarily on the strength of the financial and political support she receives from this interest group and its allies.

Now, if you are representing a client whose position is contrary to the views espoused by the judge during her campaign, are you confident of receiving a fair hearing in her courtroom? Do you consider making a motion to disqualify the judge based on her past statements? Can you dare to file such a motion if you want to continue to practice law in your community?

These are questions we shouldn't have to ask about our judiciary. All of us – lawyers, clients, members of the public who may never even be a party to a court case – should be able to trust implicitly in the unimpeachable fairness and impartiality of our judiciary. But in states where judges campaign in the manner of our hypothetical judicial candidate, these questions will continue to haunt the judiciary's reputation and create doubt in the minds of many Americans.

I say this not to condemn any individual judge for operating within the rules of the game as they currently exist. As long as judicial elections exist, we need qualified candidates to run for judicial office. But even the most upstanding, well-respected, impartial judge can be tainted by association with the kind of elective system that appears to compromise independence and fairness, even if it does not in reality. It is an old saw that the judiciary, which lacks the power of the purse and sword, relies almost entirely on public trust and confidence for its legitimacy. Once people start to believe that justice can be bought and sold, it is very difficult to regain their trust.

So what can the organized bar do better, and more of, to defend the independence of our judiciary? For starters, we can speak out in our communities. Not just to other lawyers or

people who are already part of the choir on this issue, but to people who do not have an understanding about the role of the judiciary in our system of government. We must reach out to people who may be susceptible to the anti-judicial messages being delivered by politicians, interest groups, pundits, and others who would sacrifice an independent judiciary to advance their own agendas.

It reminds me of the old saying that the cure for hateful and objectionable speech is more speech – of the responsible and rational variety. As lawyers, we are the respected symbols of the law and the justice system in our communities. Our neighbors look to us to explain how the law really works – and how it can work better. Take advantage of your positions as leaders in your community to remind people that the courts, and judges, exist to protect all of our interests and rights. Remind them that anyone can be in the minority of opinion on a given issue, and that the courts are there to make sure that the majority doesn't trample on the rights of the minority. Remind them that we all can name judicial decisions that we disagree with – and that we should voice our opinions of the actions of our government. But if we start tearing down our system of government and marginalizing judges because we disagree with a handful of controversial court decisions, the judiciary won't be around in the future to resolve disputes peacefully, to guarantee our rights and freedoms, and to hold the legislature and executive accountable to our constitution and laws. In short, it won't be around to guarantee the rule of law, our great and fragile blessing, that is the foundation of our democracy.

I thank the leaders and members of the State Bar of South Dakota for your work to improve our laws and system of justice. You have been an inspiration to the rest of the country during the past year. May you continue to be vigilant in defending our liberty and pursuing justice. That is the most precious gift we can give our children and our children's children.

Thank you very much.