Opening Statement

The Rule of Law: Still the Cornerstone

by Kim J. Askew

Chair, Section of Litigation

The rule of law is the focus of two of the key initiatives that the Section of Litigation will undertake during the 2006-2007 year. To some, these are mere words that have little, if any, significance. For lawyers, however, the rule of law is a sacrosanct principle that anchors our democracy and guides our work. It captures much of what I honor and respect about our legal system.

Mamie Farley was my fourth-grade teacher. She introduced me to the principles of "rule of law" and "independence of the judiciary." I remember Miss Farley for a lot of reasons, but certainly because she made civics and government come alive in the classroom. She believed in our constitutional system and made its principles a lot more interesting than the usual math and reading assignments. She explained *separation of powers* and the three separate and equal branches of government. She introduced me to the concept of *checks and balances*. Because of her, the terms *independent* and *impartial* became a part of this young student's lexicon. I did not know what the Constitution was before Miss Farley mentioned it, but through her I learned of *Marbury v. Madison* long before my law school days.

As an African American woman who grew up in the South in the 1960s and '70s, I watched as the concept of the independent judiciary took on even greater significance. The courts decided many important issues that had a significant impact on my community, and on me. Voting rights, busing, and the desegregation of schools—these decisions were very real for me. I understood little about "busing" but knew that my life had changed because I had to leave my neighborhood, friends, and trusted teachers to go to another school in an unknown part of town, supposedly for a better and equal education. My parents voted for the first time, even though they had to go with a group of church members to ensure their safety. People in my neighborhood regularly talked about "*Brown*."

I am sure that few, if any, of the people in my neighborhood had read the Federalist Papers, considered John Marshall's position on judicial independence, or studied the balance of powers as set forth in the Constitution. Like most everyday people, however, they did have a sense that judges did "justice." Judges and the important civil rights cases they decided were the topics of discussion in our homes, schools, and churches. We talked of judges making decisions based on the rule of law and how they could do so because they were independent. That independence allowed them to make many controversial decisions that were quite popular where I lived. My elders whispered about "brave" judges who took risks in ruling on "civil rights." Judges, even those who lived in states far away from our communities, were known by name. Ministers prayed for judges from the pulpits. As children, we wrote book reports about judges and their independence, and added new terms to our vocabulary like *civil rights*, *integration*, *busing*, and *voting rights*. I learned the difference between federal and state courts. My mother peppered my sisters and me with articles from the *Savannah Morning News* and *Savannah Evening Press* that highlighted key cases by judges. I have forgotten the names of those judges, but the concept of the independence of the judiciary was firmly established in my system of values. A judiciary that acted independently gave ordinary citizens the sense that the Constitution protected them.

Of course, as lawyers, we are trained to understand judicial independence and its role as a cornerstone of our constitutional system. We are enforcers of the rule of law. We know that our system works, and is a model for the world, largely because every-

Published in Litigation, Volume 32, Number 4, Summer 2006.

day citizens have confidence that the laws will be applied fairly and equally to all. With every jury case I try, I marvel that members of juries talk about our judges and our legal system and why they believe it is the best in the world. They are proud to serve on juries and to be a part of the system. They understand that our judiciary functions effectively because independent judges can uphold the rule of law and thus protect their rights.

Alexander Hamilton was right: As citizens, and especially as trial lawyers, we must defend the role of the judiciary in our constitutional system. His words in Federalist No. 78 are as powerful today as they were when first written in 1788: "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers."

Like many in the profession, I am particularly concerned about the recent and often unwarranted attacks on the independence of the judiciary. Of course, the judiciary has been the subject of debate and scrutiny since the earliest days of our democracy. Reasonable debate informs our citizenry and often improves practices in our judicial system. The recent tone of the debate, however, is dramatically changing, and for the worse. Many believe, as do I, that the judiciary is being attacked today in a way that threatens its independence. These unwarranted attacks shake public confidence in our system of justice.

We have all read about the high-profile Terri Schiavo case and the efforts of Congress to intervene in those court proceedings. Other troubling trends are afoot. Judges are the targets of negative attacks, but ethical considerations and judicial canons preclude their responding to many of the questions being raised in the public arena. Judges can't explain their opinions on the evening news or before our civic clubs. Moreover, disputes about the funding of the operations of the courts continue to be of paramount concern at both the state and federal levels.

Recent legislative sessions have included bills to remove jurisdiction in certain cases from the federal courts. These efforts have extended even to constitutional cases, including cases involving important rights under the First Amendment. Attempts have been made to limit habeas corpus rights. We have all watched the judicial review issues that have arisen from the treatment of detainees at Guantanamo Bay. Some bills have gone even further and sought to limit the power of judges in determining sentences in federal criminal cases.

Similar and equally dangerous attacks on judicial independence have been launched at the state level. Initiatives are under way that would strip state judges of judicial immunity in criminal and civil cases. These initiatives seek to amend state constitutions to allow unspecified "special grand juries" as a check on judges. Wholly lacking in any legal standards, these citizen jurors would review judicial opinions and decide if judges are properly applying the law.

Given this backdrop, it is critical that judicial independence be a focus of the Section's work this year. Who better than trial lawyers to address this issue? A task force of influential lawyers, judges, and academicians will address these important issues. How do we as lawyers continue to inform the debate on judicial independence? We will consider ways to better educate the public about the critical role of the courts and why judicial independence is so necessary in a democracy that prides itself on the rule of law.

Of course, the Section's work on judicial independence will be sensitive to the line between unwarranted attack and meaningful debate on and evaluation of judges and judicial opinions. Criticism of public officials is the right of every citizen. Indeed, as trial lawyers, we question precedent and argue for and against the application of laws every day. We challenge jurisdiction and often remind judges of limitations based on statutes and accepted legal standards. Within the bounds of zealous advocacy, we forcefully inform judges when we disagree with them. As Chief Justice John G. Roberts Jr. recently noted when he discussed judicial independence in his comments before a meeting of the American Law Institute, we must distinguish between "informed criticism of judicial decisions" and "collateral attacks" made because of disagreement with judicial opinions.

Our Section will continue the work of the ABA in this important area. During the 2005 ABA Annual Meeting, a meaningful debate took place among Professor Charles Ogletree, Senator Lindsey Graham, Justice Stephen Breyer, and former Solicitor General Ted Olson on the question, *Is the independence of the judiciary at risk?* Our House of Delegates went on to unanimously pass a resolution that deplored the attacks that demean the judiciary and affirmed the belief that an independent judiciary is fundamental to a free society. I was proud to work with the State Bar of Texas in bringing that resolution to the House, and applaud the ABA for continuing to be in the forefront of this issue so critical in our society.

The Section will work on another important aspect of the rule of law this year—maintaining the rule of law in times of crisis. During this new century, national attention has been focused on the legal system when we have been confronted by natural or man-made calamities, but those issues are often no longer in the headlines. Lawyers, however, must continue to think about such matters and be ready for the next crisis before it occurs.

I first started thinking about the issue of crisis in our legal system shortly after September 11. What if our court system had been inundated with litigation arising from this disaster? How would our courts have handled it? Would they have been overwhelmed? What impact would that have had on our economy? Congress avoided that threat by creating the Victim Compensation Fund as an alternative to litigation. We escaped the immediate crisis, but the fund itself raised other issues. Many of us questioned whether a fund was the right way to compensate suffering caused by disasters. What was the right remedy? How should we determine compensation? Who should be allowed to participate in such a fund if one is created in the future?

Just as we began our planning on those issues, the 2005 hurricane season caused us to focus on another aspect of crisis in the legal system: What happens to the rule of law when the court system itself is washed away? Hurricanes Katrina and Rita exposed deficiencies in our legal system that few of us had previously recognized. Yes, courts had emergency preparedness plans and disaster

recovery plans, but our legal system certainly had not addressed how we administer justice when a crisis stops the operation of the system of justice dead in its tracks.

We now know that it can happen. Katrina brought the legal system in a major American city to its knees. Courthouses were not just temporarily closed, they were completely disabled. Lawyers, judges, staff, and the litigants who populate the courts were displaced, some never to return. Parties had no knowledge of the status of pending cases. To all intents, there were no courts. It was not business as usual after the rain stopped and the water went away. Trials were suspended. There were no docket calls. Many legal files and databases had been destroyed forever. Evidence rooms were flooded, and much evidence was lost.

These catastrophic blows were particularly devastating to the criminal justice system. Yes, we have always faced issues in the criminal justice system, but nothing like those that arose after Katrina had done her work. Speedy trial issues and loss of evidence raised important constitutional issues. Indigent defendants were incarcerated but largely unrepresented. The post-Katrina public defender's offices were nonfunctional for many months. Even today, these offices are struggling, having lost a significant number of lawyers and investigators. A handful of public defenders is managing immense caseloads. At one point, the New Orleans *Times Picayune* noted that the number of staff lawyers at the city's indigent defender's office had dropped from 48 lawyers and investigators to only seven.

With the change in population after Katrina, it will become more difficult to assemble an adequate jury pool, or one that represents a cross section of the community. It is likely that fewer civil cases will be tried as limited resources continue to be devoted to the criminal justice system.

As I write this column, New Orleans is holding its first state criminal jury trial since Hurricane Katrina. All of us are happy that New Orleans courts are finally back, and we are justifiably proud of the many lawyers around the country who helped ensure that the courts could resume operations. The reopening of the courts should serve as a call to arms, to remind us that the Section must lead the way to improvement before the next disaster. Our Rule of Law in Times of Crisis Task Force will work with Section committees to establish a set of principles for the initiation and operation of programs that can respond to disaster. We will consider principles of compensation and procedural justice as well as criminal justice. The task force will assemble packages of emergency laws that should be on the books in every state.

This is a full plate. The Section will tackle some tough issues in examining these critical components of the rule of law. I am willing to pursue these issues because of the dedicated lawyers who will work with me.

I am honored to serve as the Chair of the Section of Litigation of the American Bar Association. I follow in the footsteps of many fine lawyers who have set the standards for excellence in our courtrooms and throughout the profession. Many of these lawyers trained me in the work of this Section and encouraged me to become its leader. I am grateful for their guidance. I appreciate the time and commitment of the great lawyers and staff who serve our members and the profession through their work. I look forward to a successful year.