



Without Fear or Favor in 2011

A New Decade of Challenges to
Judicial Independence and Accountability



DRI—*The Voice of the Defense Bar* is an international organization of defense attorneys and corporate counsel that is recognized as a thought-leader and an advocate for the defense bar at the national and state level as well as in Europe. With more than 22,000 members, DRI provides members and their clients with access to world-class education, legal resources and numerous marketing and networking opportunities that facilitate career and law firm growth. For more information log on to www.dri.org.

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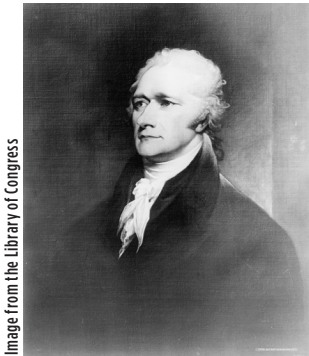
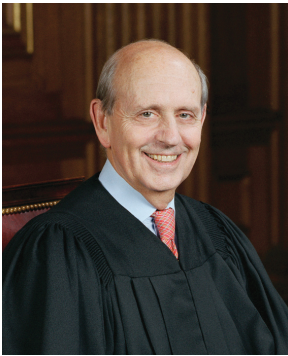


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The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST NO. 78. (Alexander Hamilton)



An orderly society, in which people follow the rulings of courts as a matter of course, and in which resistance to a valid court order is considered unacceptable behavior which most people would not countenance, is the core assurance that if cases are heard by impartial judges, who are free from the influences of political actors, and who decide independently according to law, then the people subject to court orders, as well as state and federal officials, will behave according to law.... The good that proper adjudication can do for the justice and stability of a country is only attainable, however, if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful actors.

Stephen G. Breyer, Associate Justice, Supreme Court of the United States
Judicial Independence In The United States
40 ST. LOUIS U. L.J. 989, 996 (1996)

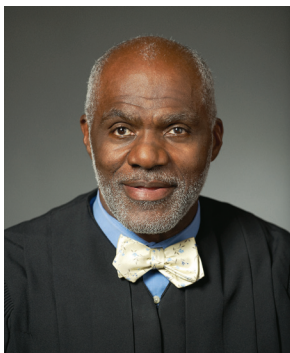
The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Mistretta v. United States, 488 U.S. 361, 407 (1989)



Judges certainly must be accountable to the citizens, both professionally and in their personal lives. Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an important role in maintaining judicial accountability. However, attacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligns one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment. Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions. What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government. Judges should not have “political constituencies.” Rather, a judge’s fidelity must be to enforcement of the rule of law regardless of perceived popular will.

Paul J. De Muniz, Chief Judge, Oregon Supreme Court
Politicizing State Judicial Elections: A Threat To Judicial Independence
38 WILLAMETTE L. REV. 367, 387 (2002)



The judiciary simply cannot be impartial or trusted when party politics encourages judges to behave as traditional politicians. ... [O]ur role is distinctly different. Whereas executive and legislative officials commit themselves to enacting their political agendas, a judge’s role is to interpret the law fairly and ensure due process to every litigant.

Alan C. Page, Associate Justice, Minnesota Supreme Court
Judicial Independence vs. Judicial Selection: Due Process in the Balance
Speech to the National Press Club (Nov. 15, 2001)

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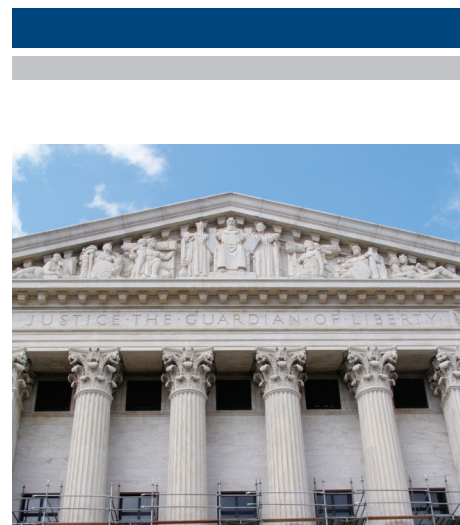
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Executive Summary

In June 2005 DRI's Judicial Task Force was formed to examine issues and problems facing the judiciary. The Task Force's mission statement was to research and identify issues that threaten to disrupt the independence of the judiciary. Its groundbreaking 2007 report, *Without Fear or Favor*, identified a number of significant issues that threatened judicial independence.

Since that report was issued, several dramatic developments have triggered new and even greater challenges to judicial independence and accountability. The country spiraled into one of the worst recessions since the 1930s, causing state and local government tax revenues to plunge. As a result, funding for our court systems, already precariously low before the recession, has been further slashed. The added pressure these economic conditions have imposed on our judiciary cannot be understated. They have placed "some court systems on the edge of an abyss," in the words of Georgia Chief Justice Carol Hunstein.¹ The financial crisis facing many states has triggered budget cuts "so deep they threaten the basic mission of state courts."² Almost half of our state courts are operating under hiring freezes; others have instituted cost-cutting measures such as staff pay cuts, judicial furloughs, elimination of special court programs, and even the reduction of hours courts are open each week.³ While some of these measures may be unavoidable, "[a]t some point, slashing state court financing jeopardizes something beyond basic fairness, public safety and even the rule of law. It weakens democracy itself."⁴ Continued increases in the number of cases filed in our state courts compounds these problems.⁵

Even before the recession, inadequate court funding was deemed a serious threat by 52 percent of a DRI survey group in 2005.⁶ Further investigation revealed that significant numbers of the public had little or no interest in supporting increased court budgets or needed renovations to aging courthouses.⁷ The examples outlined below in several sections of this 2011



¹ The Honorable Chief Justice Carol Hunstein, Supreme Court of Georgia, 2010 State of the Judiciary Address (Mar. 16, 2010), available at http://www.gasupreme.us/press_releases/2010_state_judiciary_address.pdf.

² Richard Y. Schauffler & Matthew Kleiman, *State Courts and the Budget Crisis: Rethinking Court Services*, in BOOK OF THE STATES 2010, 289 (The Council of State Governments ed., 2010), available at <http://knowledgecenter.csg.org/drupal/system/files/Schauffler.pdf>.

³ National Center for State Courts (NCSC), Budget Resource Center, Cost-saving measures by state, available at <http://www.ncsc.org/information-and-resources/budget-resource-center.aspx>; David Rottman & Jesse Rutledge, *Facing Down a Budget Crisis, Rising Workloads, Two Judicial Elections and Living with Facebook: The State Courts in 2009*, in BOOK OF THE STATES 2010, 283 (The Council of State Governments ed., 2010), available at http://knowledgecenter.csg.org/drupal/system/files/Rottman_and_Rutledge.pdf.

⁴ Editorial, *State Courts at the Tipping Point*, N.Y. TIMES, Nov. 24, 2009, at A30, available at <http://www.nytimes.com/2009/11/25/opinion/25weds1.html>.

⁵ Rottman, *supra* note 3, at 284.

⁶ DRI JUDICIAL TASK FORCE, WITHOUT FEAR OR FAVOR 6 (2007).

⁷ *Id.* at 8, 10.



The explosion of special interest funds in judicial campaigns also brings with it heightened concerns over politicization of the judiciary and the appearance of fairness in the American legal system. The challenges to judicial independence triggered by campaign contributions and the impact that the flow of money into judicial elections has on the perceived fairness of our courts have reached a critical state.

report provide stark reminders of how precarious judicial independence can be when there is inadequate funding for our courts.

The controversy surrounding judicial elections reached new heights following the Supreme Court's decision in *Citizens United v. Federal Election Commission*⁸, which invalidated limits on union and corporate campaign contributions. While *Citizens United* did not involve judicial elections, the import of the decision was clear: unlimited monetary contributions to judicial campaigns were now fair game. In his dissent, Justice Stevens observed:

The consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch... the Court today unleashes the floodgates of corporate and union general treasury spending in these races.⁹

Justice Stevens' concern has quickly been realized. Campaign contributions in 2010 state supreme court retention elections reached unheard-of heights. The vast sums being contributed to judicial campaigns create the appearance of a judiciary indebted to campaign contributors, who include attorneys and parties likely to appear before the winning candidate.

The explosion of special interest funds in judicial campaigns also brings with it heightened concerns over politicization of the judiciary and the appearance of fairness in the American legal system. The challenges to judicial independence triggered by campaign contributions and the impact that the flow of money into judicial elections has on the perceived fairness of our courts have reached a critical state. These concerns, repeatedly expressed by legal commentators, were vividly acknowledged by the Supreme Court in *Caperton v. A.T. Massey Coal Company*,¹⁰ which outlined a constitutional standard for judicial disqualification based on financial contributions to a judicial campaign. However, *Caperton*'s constitutional standard is admittedly imprecise, and only intended to reach extraordinary cases. Thus, real reform is needed at the state court level to ensure that our legal system is perceived to be fair. If the perception of fairness is ever lost, the public will lose respect for the rule of law, a cornerstone of American democracy.¹¹

As "independent" funding swept its way into judicial campaigns, the manner in which the campaigns are run also dramatically changed. Attack ads have become commonplace. One journalist graphically described his state's supreme court campaign in the following terms:

⁸ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 968 (2010).

⁹ *Id.* at 968 (Stevens, J., dissenting).

¹⁰ *Caperton v. A.T. Massey Coal Co. Inc.*, 129 S. Ct. 2252 (2009).

¹¹ Stephen G. Breyer, *Judicial Independence In The United States*, 40 St. Louis U. L.J. 989, 996 (1996).

If you only saw the ads, you might think [the] State Supreme Court election pits a partisan pit bull dedicated to Republican causes against a trial lawyer's lapdog whose insider status helped contribute to one of the worst courthouse scandals in state history... the voters had to wade through a lot of mud to get to this [election] week.¹²

Because judges are asked to decide cases involving sensitive social and political issues,¹³ they are being subjected to harsh and often unfair criticism with increasing frequency. In controversial cases, the losing side, whether they are labeled Democrats or Republicans, conservative or liberal, typically blame the outcome on "activist judges." However, judges must be allowed to decide cases based on the facts presented and the applicable law, free from ideological influence, even when their decision will likely be unpopular.

Judicial independence, however, does not mean a lack of accountability. While fair criticism of judicial decisions is to be expected and can be vital to the development of the law, threats, attempts to intimidate or influence judicial decisions are not, but frequently are made under the guise of holding judges accountable. Judicial performance evaluations are being increasingly used in some states as a mechanism to improve the quality of judicial decision making and to establish fair accountability standards. Such evaluations can be used to educate the public on the factors and qualities to consider when evaluating a judge, rather than focusing on the outcome of a specific case. Accordingly, judicial performance evaluations can help to depoliticize the electoral process, and their use should be encouraged.

The Internet has provided a new venue for expressing severe and inappropriate criticism of judicial decisions and individual members of the judiciary. The World Wide Web provides a forum for every critic to speak his mind to an unlimited and potentially like-minded audience. The growing phenomenon of the Internet has also triggered a new threat to judicial security as the prosecution of Web radio talk show host Harold Turner aptly demonstrates. Following the Seventh Circuit Court of Appeals' decision in *National Rifle Association of America, Inc. v. City of Chicago*,¹⁴ rejecting a Second Amendment challenge to the City of Chicago's gun control ordinance, Turner expressed his disapproval of the decision. Turner posted several internet messages stating the judges who authored that opinion deserved to be killed. In one of those posts he provided the names, photos, work addresses and phone numbers of



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¹² Charles Thompson, *Attack Ads Drown out Issues in State Supreme Court Races*, THE PATRIOT NEWS, Oct. 31, 2009, available at http://www.pennlive.com/midstate/index.ssf/2009/10/attacks_drown_out_issues_in_st.html.

¹³ This phenomena can be attributed at least in part to the narrowing of the political question doctrine, a process that began with *Baker v. Carr*, 369 U.S. 186 (1962), and continued in *Powell v. McCormack*, 395 U.S. 486 (1969).

¹⁴ *Nat'l Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009).



When second and third year associates in some of the country's largest law firms are paid more than our federal judges, it is not difficult to understand why more federal judges are leaving the bench for private practice.

the panel that decided the case, writing: “Their blood will replenish the tree of liberty,” and calling the potential murders “a small price to pay to assure freedom for millions.”¹⁵

This type of rhetoric can often lead others to take action, which in turn creates a need for increased court security. Two events in 2005—the murders of the husband and mother of United States District Court Judge Joan Lefkow by a man angered over the dismissal of his legal malpractice case, and a courtroom shooting in Fulton County, Georgia shortly thereafter—highlighted the need for greater security in both our state and federal courts. With increasingly tight budgets, providing adequate security for our judges and other court personnel often comes at the expense of other needed court programs.

The lack of diversity in our judiciary presents another challenge to the perception of our legal system. Unless additional progress is made toward building a more diverse judiciary, the legitimacy of judicial decision making may be questioned by parties who do not share the same cultural or ethnic values as the judges who are hearing their cases.

Budgetary issues are also challenging judicial independence at the federal level. Federal judges haven’t had a salary increase in more than a decade, and have received only sporadic cost of living increases. The goal of an independent federal judiciary through the provision of lifetime tenure is being frustrated by the failure to provide adequate compensation to judges who frequently handle some of the most challenging and constitutionally important cases in our court systems. When second and third year associates in some of the country’s largest law firms are paid more than our federal judges, it is not difficult to understand why more federal judges are leaving the bench for private practice.

¹⁵ See Mark Fass, *7th Circuit Judges Testify in Trial over Blogger’s Web Threats*, N.Y. LAW JOURNAL, Mar. 3, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202445365806>.

Foreword

Following the 2007 publication of *Without Fear or Favor*, members of DRI's Judicial Task Force, including our first Chair, John Trimble, engaged judges, lawyers, and academics from around the country on the issues addressed in that report. Members of the Task Force met with organizations dedicated to judicial independence including Justice at Stake, the Brennan Center for Justice, the American Judicature Society, and the National Center for State Courts. Each interaction provided evidence that the issues and problems addressed in the first edition of *Without Fear or Favor* were not improving, and in fact, were worsening, particularly as the recession wreaked havoc on state court budgets. Then, *Caperton v. A.T. Massey Coal Company* was announced, providing a vivid example of how state judicial elections could be influenced by special interests.

When the Supreme Court subsequently invalidated limits on campaign contributions in *Citizens United v. Federal Election Commission*, the mission of DRI's Task Force came into focus: energize our members and rally state and local defense organizations to take the actions necessary to maintain the independence of the judiciary and to preserve the integrity of our legal system. The first step in that mission was to prepare a new edition of *Without Fear or Favor* to address these rapidly emerging developments. Members of the Task Force rolled up their sleeves and went to work drafting DRI's latest report on these issues: *Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability*.

In addition to collecting new data, members of the Task Force critically examined the impact of the Supreme Court's *Caperton* and *Citizens United* decisions. The Task Force also drafted a survey that was sent to the leaders in our state and local defense organizations (SLDOs) to identify those issues our state defense bar leaders deem most acute in their respective states.

DRI Past Presidents John Martin, Marc Williams and Cary Hiltgen, as well as current President, Matt Cairns, have provided extraordinary support to the Task Force's efforts, as has DRI's Executive Director, John Kouris. Tyler Howes, Deputy Executive Director, and Kelly Tiffany, DRI's Project Manager, helped guide the Task Force throughout this latest drafting process. Mary Massaron Ross, the DRI Board Liaison to the Task Force, was a tremendous advocate for the Task Force's mission, in part because she served as the editor of the original report, *Without Fear or Favor*.

The Judicial Task Force members involved in the research and drafting of this report were Susan H. Briggs and John S. Willardson from North Carolina; David E. Chamberlain, L. Hayes Fuller III, Jackie Robinson and Dan K. Worthington from Texas; Jill D. Jacobson from Virginia; Robert L. Massie from West Virginia; and Steven R. Schwegman from Minnesota. Special thanks go to Steven Gerber of New Jersey, who served as Vice Chair of the Task Force, to Jeffrey G. Frank of Washington State, who served as Chair of the Task Force during the early stages of this report, and to Steven M. Puiszis of Illinois, who served as the Editor of this report, and who became Chair of the Task Force as the report was nearing its final stages of completion.

In this report the reader will see frequent reference to the term "SLDO." SLDO is an acronym utilized by DRI to refer to the 63 independent state and local defense organizations that exist in the United States and Canada.



A Note from the Chairs



Jeffrey G. Frank



Steven M. Puiszis

As we step into a new decade, the need to protect the independence of the judiciary and the fairness of the American legal system has never been greater. Today, challenges to judicial independence have become our legal system's super virus, seemingly immune to any cure and rapidly mutating into new and more dangerous forms. As the chief judge of one state supreme court observed, "the escalating cost of judicial campaigns, and the apparent willingness of special interest groups, campaign contributors and the candidates themselves to turn judicial campaigns into purely partisan political affairs, has the potential to severely erode the principle of judicial independence."¹⁶

The mischief of excessive campaign spending we saw in the last decade has grown to include attack ads seeking the ouster of judges who make unpopular decisions. Judicial elections are quickly turning into referendums on political issues, rather than focusing on the relative abilities of the judicial candidates. Challenges to judicial independence and the fairness of our legal system come in a variety of forms and are hitting our legal system from new and unexpected quarters.

In this report, DRI's Judicial Task Force again highlights these challenges. However, unlike DRI's first report, which identified a number of threats to judicial independence and suggested that state and local defense organizations form committees to study the issues presented in their respective states, this report is a call to arms. The challenges to judicial independence highlighted in our 2007 report have not been solved. Rather, they have gained momentum by events that occurred and by court decisions announced after DRI's first edition of *Without Fear or Favor* was published. Judicial independence is being challenged on two fronts by the paradox of money. More money is flowing into judicial campaigns than ever before, while at the same time court budgets are being slashed during the deepest recession our country has experienced in over 70 years. The limitless campaign spending allowed by the Supreme Court's *Citizens United* decision will inevitably lead to further politicization of the judiciary unless prompt steps are taken to limit the decision's fallout. The organized defense bar, long an advocate of level playing fields and fairness to all parties, must now turn its attention to the growing threats to judicial independence and the fairness of our legal system and take action.

Any good trial attorney knows that in a courtroom, perception becomes reality, and that maxim holds true for our legal system. The public's perception of the fairness of our courts has a direct correlation to its confidence in the American justice system and its respect for our rule of law. If the public's perception of the fairness of our courts is ever lost, immeasurable damage will result to our legal system and the rule of law in our country. The time to act is now.

¹⁶ Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat To Judicial Independence*, 38 WILLAMETTE L. REV. 367, 386 (2002).

The organized defense bar, including our state and local defense organizations, must do more. Defense lawyers are in ideal position to protect our system of justice, but will we take the necessary steps to protect the system's integrity?

- Will we become advocates against unwarranted attacks on the judiciary or just hope that others will respond to the attacks?
- Will we support amendments to judicial codes requiring disqualification when campaign contributions in judicial elections exceed reasonable limits, or will we ignore the issue of judicial campaign contributions until it directly involves a case we are handling?
- Will we advocate for the development of a process to promptly and fairly resolve judicial recusal or disqualification motions in our respective states, or will we allow the public's perception of our legal system's fairness to be shaped by allowing judges to rule on motions seeking their own disqualification?
- Will we seek adequate funding of our court systems or simply take vacations on those days when courthouses around the country can't afford to open their doors?
- Will we protect the right of an independent judiciary to make politically unpopular decisions or stand idly by when special interests seek their ouster?

In short, will we defend our court systems so the judicial branch can continue to independently uphold justice and protect the rule of law which is central to our democracy?

■ ■ ■ ■ ■

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Jeffrey G. Frank

Steven M. Puiszis

Developments in Judicial Selection Methods and Campaign Financing



Controversy Surrounding Methods of Judicial Selection Continues

Since DRI's Judicial Task Force last reported on these issues,¹⁷ the controversy over how state court judges are selected has grown sharper and more publicly divisive. Additionally, challenges to judicial independence have grown in both their number and their complexity. Various studies have documented that campaign spending on state judicial elections has dramatically risen in the interim,¹⁸ which has negatively altered the public's perception of our judicial system. The *Citizens United* decision, which invalidated campaign contribution limits, prompted several current and former Supreme Court Justices to express concern that the decision may potentially lead to further politicization of the judiciary and increase the influence of special interest groups in states that elect their judges.

The tensions between proponents of merit selection and judicial elections also came to the forefront of the 2010 campaign season with ballot initiatives in several states targeting local judicial selection processes, including the original "Missouri Plan." In light of these developments, various states are considering an array of approaches to address the problems of incumbency, the influence of special interests, and the dangers of an increasingly politicized judiciary.

The Rising Tide of Judicial Campaign Contributions

Attempting to pinpoint when campaign contributions in judicial elections first became problematic is elusive. In 1988, *Time* magazine ran an article entitled: *Is Texas Justice for Sale?* That article focused on judicial campaign contributions by trial lawyers in Texas and noted that the governor of Texas had charged the Texas Supreme Court with having "a pro-plaintiff tilt" that encouraged "virtually limitless judgments" which scared business away. A noted plaintiff's attorney was quoted as unabashedly wanting to "try to give back something that promotes the plaintiffs' philosophy."¹⁹

Judicial campaign contributions have more than doubled in the decades since that article was originally published. In the 20 states holding contested supreme court elections between 2000 and 2009, fundraising totaled \$206.4 million, rising from \$83.3 million between 1990 and 1999.²⁰ Twenty of the 22 states that elect their supreme court judges set fundraising records in the 2000–2009 decade.²¹

¹⁷ DRI JUDICIAL TASK FORCE, WITHOUT FEAR OR FAVOR (2007).

¹⁸ JAMES SAMPLE, ET AL., BRENNAN CENTER FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000–2009: DECADE OF CHANGE, 9-23 (Charles Hall ed., 2010) available at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections/.

¹⁹ Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, available at <http://www.time.com/time/magazine/article/0,9171,966426,00.html>.

²⁰ ADAM SKAGGS, BRENNAN CENTER FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS 3 (2010), available at http://www.brennancenter.org/content/resource/buying_justice_the_impact_of_citizens_united_on_judicial_elections/.

²¹ SAMPLE, ET AL., *supra* note 18 at 8.

The motives of those making large-scale campaign contributions are not always entirely altruistic. Frequently, contributors to judicial campaigns are attempting to buy an ideological perspective on a bench or influence on a court. As one former Ohio union official infamously reported: “We found out a long time ago it’s easier to elect seven judges than to elect 132 legislators.”²²

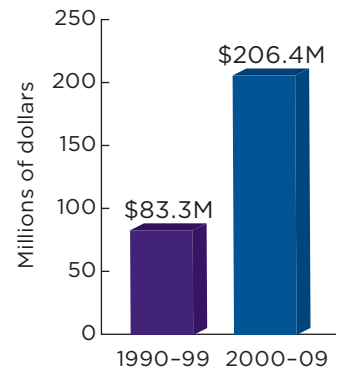
Contributors are not only from one side of the aisle, however. Campaign contribution strategies that have become commonplace in executive and legislative elections are becoming the norm in judicial elections. The business community has joined the fray, in part to attempt to curb the influence of the plaintiffs’ bar. As the *amicus* brief submitted to the Supreme Court in *Caperton* by the Center for Business Ethics Research at the Wharton School observed:

The escalation of judicial campaign spending traps business leaders in a classic ‘prisoner’s dilemma.’ For ethical and financial reasons, most corporations would prefer to avoid spending money on an election that involves candidates for a seat on a court where it has a matter pending.... In today’s election environment, however, a corporation must consider the likelihood that its opponent in high-stakes litigation may actively support one or more of the judges that will hear its case. Increasingly, corporations feel compelled to support their own candidates to guard against an adverse judgment that damages a company and its shareholders.²³

Irrespective of the motives behind judicial campaign contributions, if the rising tide of campaign contributions in judicial elections is not stemmed, the public’s perception of the fairness of our court systems will be lost, leaving judicial independence to hang in the balance.

In the wake of the ever rising tide of judicial fundraising, a 2009 Gallup poll revealed that 89 percent of voters believed that the influence of campaign contributions on judges is a problem and 90 percent believed that a judge should not hear a case involving an individual or group that contributed to the judge’s campaign.²⁴

Similar feelings were shared by business leaders in a 2007 Zogby poll, with 90 percent expressing a concern that: “Campaign contributions and political pressure will make judges account-



Fundraising in the twenty states holding contested supreme court elections.

²² J. Christopher Heagarty, *The Changing Face of Judicial Elections*, Vol. 7 No. 4 N.C.B.J. at 19, 20 (Winter 2002), available at <http://www.ncbar.com/journal/archive/journal%207,4.pdf#3>.

²³ Brennan Center For Justice, *Caperton v. Massey* (Jun. 08, 2009), available at http://www.brennancenter.org/content/resource/caperton_v_massey/ (quoting BRIEF OF THE CENTER FOR POLITICAL ACCOUNTABILITY AND THE CAROL AND LAWRENCE ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS), available at http://brennan.3cdn.net/9953f3077931733a54_28m6bnfv5.PDF.

²⁴ Joan Biskupic, *Supreme Court Case With The Feel Of A Best Seller*, USA TODAY, Feb. 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.



able to politicians and special interest groups instead of the law and the Constitution.”²⁵ In that same poll, 93 percent of business leaders strongly agreed that judges should not rule on a case involving “those who contributed financially to their [judicial] campaigns.”²⁶ These views were further reflected in the amicus brief submitted to the Supreme Court in *Caperton* by The Center for Economic Development, Intel, Lockheed Martin, PepsiCo, and Wal-Mart: “Where outsized contributions by parties create the perception that legal outcomes can be purchased, economic actors will lose confidence in the judicial system, markets will operate less efficiently, and American enterprise will suffer accordingly.”²⁷

Many judges also hold a similar view. Forty-six percent of state-court judges polled in 2002 by Justice at Stake felt that campaign donations have at least “a little influence” on judicial decisions, and 56 percent believe “judges should be prohibited from presiding over and ruling on cases when one of the sides has given money to their campaign.”²⁸

“Independent” Campaign Spending Skyrockets—The Hidden Menace

Spending on television advertising exploded to new heights in 2008 when nearly \$20 million was spent on races for 26 state supreme court seats.²⁹ From 2000 to 2009, an estimated \$93.6 million was spent on television advertising involving judicial elections. The two-year cycle from 2007 to 2008 was the most expensive period for television advertising in the history of supreme court elections with almost \$27 million spent on television ads. Eight states set spending records on television advertising during this time frame, and 2008 saw more television ads aired in supreme court judicial contests than ever before.³⁰ And “for the first time nationally, special interest groups and political parties combined to spend more on TV ads than did the candidates on the ballot.”³¹ Another nearly \$5 million was spent on television advertising in 2009, when only three states had races for supreme court seats. Even before the

²⁵ Zogby International, Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges 5 (2007) available at http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf.

²⁶ *Id.* at 6.

²⁷ SKAGGS, *supra* note 20, at 6.

²⁸ See GREENBERG QUINLAN ROSNER ET AL., JUSTICE AT STAKE STATE JUDGES FREQUENCY QUESTIONNAIRE 5, 11 (2002) available at http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf.

²⁹ Sandra Day O'Connor, Op-Ed., *Take Justice off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9, available at <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html>.

³⁰ SKAGGS, *supra* note 20, at 3.

³¹ SAMPLE, ET AL., *supra* note 18 at 24.

final numbers were tallied, commentators were stating that campaign spending likely reached even greater heights in 2010.³²

Weak or nonexistent campaign finance disclosure laws make it difficult to identify the source of campaign contributions in judicial elections. In one notable example, a law firm in Montgomery, Alabama donated over \$600,000 to a candidate for the Alabama Supreme Court through a series of 30 political-action committees which in turn routed the money to the executive committee of the state Democratic Party.³³ As the National Institute on Money in State Politics has warned, “independent expenditures are the largest loophole contributors use to circumvent state limits on direct campaign contributions.”³⁴

A number of states have enacted reporting requirements for independent campaign expenditures—contributions which are not made to, controlled by or coordinated with a candidate or political committee or agent of the candidate. However, only five states “make such information available in comprehensive and relevant formats to the public... and other interested parties.” This fact, coupled with loopholes in state campaign-finance disclosure laws results in “millions of dollars spent by special interests each year to influence state elections go[ing] essentially unreported to the public.”³⁵

Lack of Information Leads to the Election of Judges for Reasons Other Than Their Qualifications

Increased spending and fundraising activities targeting state judicial elections have been working in tandem with heightened voter apathy and a lack of information about judicial candidates. The confluence of these trends means that states that elect their judges are especially vulnerable to the unique ability of political action committees and ideological groups to influence voters who lack the information necessary to properly evaluate and filter the influx of messages about judges running for election or retention.

Compounding the torrent of money into judicial elections is that voters today are less informed about judicial candidates. According to Justice at Stake, two national surveys revealed:



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³² Justice at Stake Campaign, *Gay Marriage, Tax Fights Spark High-Profile Court Races*, Sept. 23, 2010, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/gay_marriage_tax_fights_spark_highprofile_court_races?show=news&newsID=8857 (noting “spending on retention elections is likely to spike this year, possibly exceeding the national total for the entire 2000–09 decade”).

³³ *Id.* at 46.

³⁴ LINDA KING, *INDECENT DISCLOSURE*, NATIONAL INSTITUTE ON MONEY AND STATE POLITICS, Aug. 1, 2007, 1, 5, available at <http://www.followthemoney.org/press/Reports/200708011.pdf>.

³⁵ *Id.* at 4.



- Only 13 percent of American voters report having a great deal of information about candidates in judicial elections and only 22 percent claim to know a great deal about what courts and judges do in their states.
- The primary reason voters give for not voting in judicial elections is that they do not know enough about the candidates.³⁶

As a result, 90 percent of the voters and 87 percent of judges surveyed report they are concerned that due to the lack of voter information, “judges are often selected for reasons other than their qualifications.”³⁷ Proponents of merit selection point to these statistics as evidence supporting a need for change in the judicial selection process. Supporters of judicial elections, however, recall the words of Thomas Jefferson:

The exemption of the judges from [election] is dangerous enough. I know no safe depository of the ultimate powers of society but the people themselves; if we think them not enlightened enough to exercise their control with wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.³⁸

This is why non-partisan tools such as Judicial Performance Evaluations, which are discussed in a later section of this report, should be used to educate the voting public in those states that elect their judges.

The Changing Face of Judicial Elections

The tone, tenor and manner of judicial campaigns have materially changed as special interest money and advertising have flowed into judicial campaigns.³⁹ As one national newspaper observed: “Judicial races, once staid, low budget affairs, have in the past decade turned into mudslinging, multimillion-dollar brawls that have shaken public confidence in justice.”⁴⁰

³⁶ GREENBERG QUINLAN ROSNER ET AL., JUSTICE AT STAKE CAMPAIGN, NATIONAL SURVEYS OF AMERICAN VOTERS AND STATE JUDGES: EXECUTIVE SUMMARY 3 (2002), available at http://www.gqrr.com/articles/1617/1410_JAS_report.pdf.

³⁷ *Id.* at 2.

³⁸ Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) in XV Writings of Thomas Jefferson, at 278 (Albert Ellery Bergh ed., Washington, D.C.: The Thomas Jefferson Memorial Association, 1904).

³⁹ James Andrew Wynn, Jr., *Judging the Judges*, 86 MARQUETTE L. REV. 753, 761 (2003) (noting most of the money flowing into judicial elections “goes into the tools of the modern political campaign: advertising, media, and consultants schooled in sound bites and attack ads”).

⁴⁰ Editorial, *Mining Case Shows Sooty Side of Big-Money Judicial Elections*, USA TODAY, Mar. 3, 2009, available at http://www.usatoday.com/printedition/news/20090303/editorial03_st.art.htm; see also Justice at Stake Campaign, Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions (Sept. 8, 2010), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_

Notorious examples of misleading television ads in judicial campaigns include the “dramatization” of an Michigan Supreme Court judge supposedly sleeping on the bench.⁴¹ Another ad claimed that a Wisconsin Supreme Court judge worked to release a convicted child rapist from prison who subsequently assaulted another child after his release. In fact, the judge, when he worked as a public defender had sought a new trial for the defendant following his conviction. The conviction was upheld, the defendant served his prison sentence until he was paroled and the judge played no role in obtaining the prisoner’s parole. The Wisconsin Judicial Commission subsequently charged the judge who ran the ad—and won the election—with a violation of the Wisconsin Code of Judicial Conduct for recklessly disregarding the truth. The inquiry ultimately ended with the Wisconsin Supreme Court deadlocked 3–3 on the issue.⁴²

Harsh attack ads targeting the removal of judges based on their vote in controversial cases are also hitting the air waves around the country.⁴³ As a result, judicial elections are quickly evolving into referendums on political causes, rather than a vehicle for selecting the best judicial candidate based on the candidate’s background, experience and temperament.

Attack ads eat away at judicial independence and harm the public’s perception of our judicial system because they focus on the outcome of controversial decisions rather than on the court’s legal analysis in arriving at its holding. This type of “outcome-determinative criticism suggests that judges are free to ignore the law in favor of the perceived will of the majority.”⁴⁴

In the November 2010 election, attack ads primarily sponsored by out-of-state groups targeted the removal of three Iowa Supreme Court justices based on their vote in a controversial same-sex marriage decision. These ads succeeded as all three sitting justices failed to achieve 50 percent of the vote needed to retain their positions.⁴⁵ While some may not agree with the decision of the Iowa Supreme Court on that issue, lawyers must protect the judiciary’s right to



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[campaign_contributions?show=news&newsID=8722](http://www.nytimes.com/2010/09/25/us/politics/25judges.html) (reporting the survey results of voters from both major political parties indicating that 71 percent of the voters surveyed believe campaign contributions have a significant impact on courtroom decisions and that 82 percent of the Republican and 79 percent of Democratic voters surveyed “say a judge should not hear cases involving a campaign supporter who spent \$10,000 toward his or her election”).

⁴¹ SAMPLE, ET AL., *supra* note 18 at 30.

⁴² *Id.* at 32.

⁴³ See A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, Sept. 24, 2010, at A1, available at <http://www.nytimes.com/2010/09/25/us/politics/25judges.html>; Mark Hansen, *Same-Sex Marriage Opponents Launch Campaign to Oust Iowa Judges*, ABA JOURNAL, (Aug. 27, 2010), available at http://www.abajournal.com/news/article/same-sex_marriage_opponents_launch_campaign_to_oust_iowa_judges/.

⁴⁴ De Muniz, *supra* note 16, at 388.

⁴⁵ Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REGISTER, Nov. 3, 2010, available at <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices>.

independently make its decisions free from intimidation and undue influence. The outcome in Iowa will likely embolden further attempts to target judges over politically unpopular decisions. The organized defense bar must work against that movement before the concept of judicial independence is mortally wounded. For our system of justice to remain viable:

Judges must be dedicated to intellectual honesty and must demonstrate the ability to rise above the political moment to enforce the rule of law. Nothing can be more damaging to a society based on the rule of law than if judges fear that they will be removed from their office or that their livelihood will be impacted solely for making a decision that is right legally and factually but unpopular politically.⁴⁶

The *Caperton* Decision and Its Impact on State Selection Processes

During its 2009 term, the Supreme Court decided *Caperton v. A.T. Massey Coal Company*, the first of two recent decisions that profoundly affected judicial selection and independence issues. *Caperton* established the constitutional parameters for judicial disqualification by finding that an individual's financial support of a judicial candidate running for election can create an "intolerable bias" when he is a party to a lawsuit in the same judge's court. The Court recognized that judicial elections create an opportunity for special interests to invest heavily in campaigns in the hope of influencing subsequent decisions.

The impact of *Caperton*, and how courts and practitioners deal with disqualification issues, are discussed in other sections of this report; the purpose here is to review the potential ramifications of *Caperton* on judicial selection processes in those states that elect their judges. A brief discussion of the factual background of *Caperton* is helpful to understanding the scope of the potential problems that can arise when judicial campaign spending is unchecked.

Hugh Caperton, the president of a mining company, filed suit on a variety of contractual claims against A.T. Massey Coal Company. A jury awarded him \$50 million in compensatory and punitive damages. Between the verdict and the appeal, West Virginia held an election for its supreme court of appeals. During that campaign, Don Blankenship, the CEO of A.T. Massey Coal, heavily subsidized the efforts of one of the supreme court candidates, Brent Benjamin. Blankenship donated \$2.5 million to a special interest group that solely supported Benjamin's campaign. That contribution comprised more than two thirds of the funds raised by the group. Blankenship spent an additional \$500,000 on advertising material for the campaign. His expenditures exceeded the combined amount of all other contributions to the Benjamin campaign, and surpassed the total amount spent by the Benjamin campaign.⁴⁷ Benjamin won the judicial seat, creating the potential for conflicting interests when the *Caperton* case came before him on appeal.

⁴⁶ De Muniz, *supra* note 16, at 389.

⁴⁷ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

Based on Blankenship's involvement in Justice Benjamin's campaign, the plaintiff moved to disqualify Justice Benjamin. Justice Benjamin denied the motion, reasoning, "no objective information" suggested a bias.⁴⁸ The West Virginia Supreme Court of Appeals subsequently overturned the jury award. Caperton then appealed to the United States Supreme Court on due process grounds.

The Court in *Caperton* held the conflict so extreme that Justice Benjamin's failure to recuse himself threatened plaintiff's due process rights. It concluded "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case."⁴⁹ The Court then announced a new constitutional disqualification standard:

There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The proper inquiry centers on the contribution's relative size in comparison to the total amount contributed to the campaign, the total amount spent in the election, and the apparent effect of the contribution on the outcome.⁵⁰

Applying the newly announced standard, the Court determined disqualification was constitutionally required because in an election decided by less than 50,000 votes, the amount of Blankenship's contribution had a "significant and disproportionate influence."⁵¹ The majority in *Caperton* concluded the potential for improper influence was "reasonably foreseeable," because Blankenship made the donations while having a "vested stake in the outcome of his appeal."⁵²

Evolving Perspectives on Judicial Elections

Since the *Caperton* decision, debate over preserving judicial independence has splintered current and retired Supreme Court Justices. Justice O'Connor, a vocal advocate of judicial independence, has become increasingly emphatic in her opposition to judicial elections and political influences that encroach upon the independence of the judiciary. Several years ago Justice O'Connor revealed her mistrust of judicial elections in a concurring opinion in *Republican Party of Minnesota v. White*, where she wrote: "[Elected judges] are likely to feel that they have at least some personal stake in the outcome of every publicized case. [They] cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."⁵³



⁴⁸ *Id.*

⁴⁹ *Id.* at 2264.

⁵⁰ *Id.* at 2255.

⁵¹ *Id.*

⁵² *Id.* at 2265.

⁵³ *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002).

Justice O'Connor's opposition to judicial elections has intensified in the interim. In a recent *New York Times* editorial, she worried that the influence of special interest groups might give litigants the impression that a judge was "more accountable to a campaign contributor or an ideological group than to the law.... Courts are supposed to be the one safe place where every citizen can receive a fair hearing."⁵⁴ Justice O'Connor has also warned that excessive spending will poison the American justice system:

If you're a litigant appearing before a judge, it makes sense to invest in that judge's campaign. No state can possibly benefit from having that much money injected into a political judicial campaign. The appearance of bias is high, and it destroys any credibility in the courts. ... These two cases [*Caperton* and *Citizens United*] should be a warning to states that still choose judges by popular elections. ... The time is now for opponents of merit selection to do a little soul searching.⁵⁵

Justice O'Connor's position has gained traction with other Justices. Since announcing his retirement, Justice Stevens has also observed that appointments, rather than elections, protect a judge's independence.⁵⁶ Recently, Justice Ginsburg also expressed her view that states should stop electing judges.⁵⁷ Several other sitting justices, however, support judicial elections. In *Republican Party of Minnesota*, for example, Justice Scalia argued that isolating the judiciary from the electorate is nonsensical when "state-court judges possess the power to 'make' common law, [and] they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular."⁵⁸

⁵⁴ O'Connor, *supra* note 29.

⁵⁵ Charlie Hall, *O'Connor: Contributions 'Can Poison the System,'* GAVEL GRAB (Jan. 26, 2010), available at <http://www.gavelgrab.org/?p=7352>.

⁵⁶ Peter Hardin, *Justice Stevens Questions Choosing Judges by Election*, GAVEL GRAB (May 6, 2010), available at <http://www.gavelgrab.org/?p=10480>.

⁵⁷ Robert Barnes, *Ruth Bader Ginsburg says she would forbid state judicial elections*, WASH. POST, March 12, 2010, at A2, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031105136_pf.html.

⁵⁸ *Republican Party of Minn.*, 536 U.S. at 784 (citation omitted). See also *New York State Bd. of Elections v. Lopez Torres*, 522 U.S. 196, 212 (2008) (Kennedy, J., concurring) (discussing state judicial elections and observing: "In light of this longstanding practice and tradition in the States, the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications. A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all other components of functioning democracy must engage in this process.").

While much scholarly commentary mirrors Justice O'Connor's skepticism about judicial elections, some argue that relying on the electorate is preferable to the pitfalls of appointments. Critics also suggest a judicial selection system that vests too much power in the hands of attorneys is dangerous.⁵⁹

Advocates of merit selection worry that the elective process distracts a judge by diverting substantial energy to campaigning.⁶⁰ The politics of elections can also dissuade candidates from accepting interim nominations. Judges appointed to the bench may see the transition to an elected position as a threat to their judicial independence or prefer avoiding the rigmarole of the election process.⁶¹ Another consideration confronting potential opponents to incumbent judges is the ramification of an unsuccessful campaign. Otherwise qualified individuals may opt not to run for fear of losing to a judge before whom future cases must be tried.⁶²

The ongoing debate over judicial selection methods involve two equally important philosophical concepts, judicial independence and judicial accountability. Proponents of judicial elections frequently cite the greater accountability elections provide, whereas proponents of merit selection argue that judges have greater independence under that selection method. As Professor Charles Geyh explains, “the struggle to balance independence and accountability has played itself out over the course of more than two centuries, [resulting in] distinct methods of selecting judges—each striking the balance in different ways.”⁶³ The two sides of the debate contrast a judiciary theoretically beholden to campaign contributors but accountable for their decisions to the voters against an appointment process that theoretically eliminates the effects of campaigning on judicial independence, but creates an isolated judiciary unmoored from the voters' realities, and results in judges approved through backroom deals.



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Is Public Financing of Judicial Elections Now in Doubt?

The Supreme Court's *Citizens United* decision has also raised a concern over the future of public financing of judicial elections. As discussed in the Judicial Task Force's 2007 report, North Carolina was the first state to adopt a voluntary public financing option for judicial campaigns. The reforms implemented nonpartisan judicial ballots, campaign funding primarily provided by

⁵⁹ Michael R. Dimino, *We Have Met the Special Interests And We Are They*, 74 MO. L. REV. 495, 503 (2009) (“Reform models based on the Missouri Plan often institutionalize the power of interest groups by reserving power on judicial nominating commissions for representatives of various groups—particularly the organized bar.”).

⁶⁰ See Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1998 (1988).

⁶¹ *Id.* at 1997.

⁶² William R. Andersen, *Judicial Selection in Washington—Taking Elections Seriously*, 33 SEATTLE U. L. REV. 605, 611 (2010).

⁶³ Charles G. Geyh, *The Endless Judicial Selection Debate And Why It Matters For Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1261 (2008).



The combined impact of these two decisions has created the conditions for a “perfect storm” in judicial elections. *Citizens United* opened the spigot to allow special interest funds to flow into judicial campaigns, while *Caperton*’s recognition of a limited disqualification standard has not effectively blunted the impact of those funds.

taxpayers, and lowered contribution limits for candidates using private money. In three election cycles, 31 of the 41 candidates for the North Carolina Supreme Court participated, and opt-ins among candidates spanned demographic and partisan lines.⁶⁴ In the 2010 election cycle, all 12 eligible judicial candidates intended to use public financing.⁶⁵ And then came *Citizens United*.

Citizens United v. Federal Election Commission,⁶⁶ was another 5–4 decision, but this time it favored the right to make contributions to political campaigns. In *Citizens United*, the Court held limits on corporate and union funding of independent political broadcasts violate the First Amendment. Since there was no special exception carved out for judicial elections, unlimited funding of judicial campaigns by third parties is entirely permissible, despite the concerns expressed by the majority in *Caperton* about the effects of campaign contributions to judges running for retention or election. The combined impact of these two decisions has created the conditions for a “perfect storm” in judicial elections. *Citizens United* opened the spigot to allow special interest funds to flow into judicial campaigns, while *Caperton*’s recognition of a limited disqualification standard has not effectively blunted the impact of those funds.

Citizens United essentially invalidated the restrictions in 24 states on corporate election spending. Trends in states with no similar restrictions suggest *Citizens United* will trigger an uptick in corporate spending on judicial elections.⁶⁷ Prior to *Citizens United*, in those states that restricted “direct corporate donations to candidates, individual donors provided 48 percent of the money. Just 23 percent came from corporations.... [In contrast], in the six states that permit unlimited corporate donations, corporations provided 41 percent of the money, while individual donors gave just 23 percent.”⁶⁸

Prior to *Citizens United*, North Carolina’s approach to public financing of judicial campaigns had been gaining popularity. Public funding, in some form, was used in 21 states in 2008, with New Mexico implementing a program nearly identical to the programs in North Carolina.⁶⁹ Supporters argue that public financing counters rising campaign costs, limits the effect of special interest money, and frees judicial candidates to spend more time with voters rather than fundraising.⁷⁰ Statistics show an increase in the number of female and minority judicial candidates in states providing public funds. It also reduces the incumbency rate and makes elections

⁶⁴ WITHOUT FEAR OR FAVOR, *supra* note 6, at 33–34.

⁶⁵ *Id.*; see also Jonathan Clayborne, *Movement Seeking More Public Support*, WASH. DAILY NEWS, May 25, 2010, available at <http://www.wdnweb.com/articles/2010/05/25/news/doc4bfb0b96f4234947680386.txt>.

⁶⁶ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

⁶⁷ SKAGGS, *supra* note 20, at 4.

⁶⁸ *Id.* at 11.

⁶⁹ Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1251 (2008).

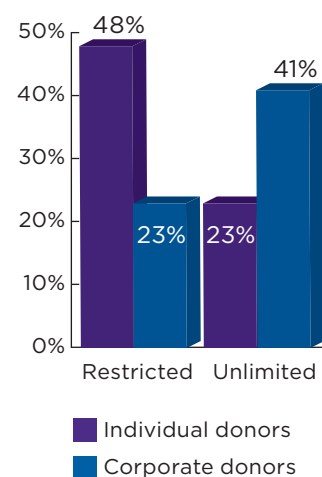
⁷⁰ *Id.*

more competitive.⁷¹ However, as a result of *Citizens United*, public financing programs cannot completely eliminate the effects of special interests that choose to run independent advocacy campaigns attacking judicial candidates who lack access to a similar source of funds.

A recent flurry of lawsuits challenging state public campaign finance laws on First Amendment grounds has resulted in a split in the circuits.⁷² In one of these suits, the Ninth Circuit rejected a constitutional challenge brought by an Arizona gubernatorial candidate who did not participate in the state’s public financing system. That candidate challenged the use of public “matching funds” available to his opponent, incumbent governor Jan Brewer. When the nonparticipating candidate’s campaign expenditures exceeded the threshold set by the Act, Governor Brewer was set to receive over \$1.4 million in matching funds. However, Justice Kennedy vacated the Ninth Circuit’s stay of the district court’s injunction against the matching funds scheme pending resolution of a petition for a writ of *certiorari*.⁷³

While none of these cases involved the use of public matching funds in judicial elections, they threaten the viability of judicial public finance campaign programs. The Supreme Court previously denied *certiorari* from the Fourth Circuit’s decision in *N.C. Right to Life Comm. Fund v. Leake*, which held North Carolina’s judicial public finance system constitutional.⁷⁴ However, the Court will likely address the public campaign finance issue through a challenge involving an executive or legislative election, rather than in the context of a judicial election.

Judicial elections are supposed to be different—apolitical in nature—and public finance laws help to minimize politics in judicial elections. While the Supreme Court has not explicitly recognized this as a basis to distinguish judicial elections from those involving the legislative and



Percentage of donations by individuals and corporations to candidates in states with restrictions, compared with those in states that permit unlimited donations, prior to *Citizens United*.

⁷¹ *Id.* at 1252.

⁷² Compare *McComish v. Bennett*, 611 F.3d 510, 514 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3109 (U.S. Aug. 17, 2010) (No. 10-238) (upholding the “matching funds” provision of Arizona’s Citizens Clean Elections Act), with *Scott v. Roberts*, 612 F.3d 1279, 1281–82 (11th Cir. 2010) (granting a preliminary injunction enjoining the State of Florida’s release of funds available under its “excess spending subsidy” provision of its public finance law) and *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245–46 (2d Cir. 2010) (overturning the excess and independent spending expenditure provisions of Connecticut’s Campaign Finance Reform Act).

⁷³ *McComish v. Bennett*, 130 S. Ct. 3408 (U.S. Jun. 08, 2010) (NO. 09A1163); see also Editorial, *Keeping Politics Safe for the Rich*, N.Y. TIMES, June 9, 2010, at A24, available at <http://www.nytimes.com/2010/06/09/opinion/09wed1.html>. As this report was nearing its final stages of completion, the Supreme Court accepted *certiorari* in the *McComish* appeal from the Ninth Circuit. See 2010 WL 3267529.

⁷⁴ *N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008).



executive branches, the proposition seems implicit in *Caperton*'s holding.⁷⁵ When it comes to judicial elections:

The need to ensure that judges are perceived as neutral and not influenced by any external pressures, however, such as who donated money to their campaign, is far greater than for other elected officials. Unlike other elected officials, judges are not subjected to lobbying. Judges are supposed to decide cases solely based on the record before them and their best judgment as to the law.⁷⁶

As to whether public finance laws meet the test for strict scrutiny, the Supreme Court in *Caperton* reiterated the importance of maintaining the integrity of our courts and the public's perception of their fairness:

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.⁷⁷

Thus, a number of arguments seemingly support the proposition that public financing of judicial campaigns meets constitutional muster. The Supreme Court will hopefully provide guidance on this issue in the future.

Merit Selection Under Attack in Missouri

Missouri boasts the country's first merit selection system for state court judges. Called the "Missouri Plan," it relies on a panel of attorneys and citizens to recommend judicial candidates to the governor, who makes the final selection. In the 2010 election cycle, opponents to

⁷⁵ Roy A. Schotland, *Caperton Capers: Comment on Four of the Articles*, 60 SYRACUSE L. REV. 337, 344 (2010) (observing "*Caperton*'s fundamental holding is that judicial elections are different. One cannot conceive of a court holding that a legislator (or executive) would be barred from acting in X matter because of a campaign supporter was involved. There is no escaping the fact that judicial campaigns need to be different to protect the judges' role, which is fundamentally different from the role of other elective officials: a judge acts alone (or as one of a handful) and has a direct impact on the litigants.").

⁷⁶ Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI-KENT L. REV. 133, 144 (1998). Professor Chemerinsky also notes that in *Cox v. Louisiana*, 379 U.S. 559, 565 (1965), the Court held a "[s]tate may also properly protect the judicial process from being misjudged in the minds of the public."

⁷⁷ *Caperton*, 129 S. Ct. at 2266–67 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)); see also Chemerinsky, *supra* note 76, at 143 ("There is no doubt that ensuring an independent judiciary—and the public perception of one—is a compelling government interest").

the plan mounted a serious campaign for a state constitutional amendment requiring the election of all state court judges.

The group, ShowMe Better Courts, argues the selection process under the Missouri Plan is susceptible to political bias (17 of the last 18 selections for the state supreme court were of the same party), does not always give due consideration to the candidates' qualifications, and lacks transparency.⁷⁸ Professor Eric Posner of the University of Chicago has weighed in, arguing "elected judges are more productive (meaning they produce more opinions), nearly as professionally respected (as measured by citations per opinion), and no less independent (as measured by their willingness to disagree with judges in their own party)."⁷⁹ ShowMe Better Courts received more than \$1.6 million in donations to support its initiative, with two six-figure donations coming from state construction contractors.⁸⁰ Opponents of the amendment argue it will inject more political bias into the process. They fear it will obligate courts to "do the will of the people, to act like legislators in surveying the public's desire... rather than dispassionately interpreting the law."⁸¹

Advocates of merit selection in several other states that currently elect their judges apparently agree, as they push legislation that would adopt "merit selection" plans. After the 2008 election cycle, Nevada ranked eighth in the nation for campaign spending on judicial elections, causing their legislature to call for a bipartisan ballot question in the November 2010 election on whether the Nevada Constitution should be amended to provide for the appointment of supreme and district court judges modeled after the Missouri Plan.⁸² Similar measures are being considered in Pennsylvania, Ohio and Minnesota.

⁷⁸ Chad Flanders & Grant Gaumer, *A Third Way of Selecting Judges*, ST. LOUIS POST-DISPATCH, May 12, 2010, available at http://www.stltoday.com/news/opinion/article_7b041cdf-454a-5dd4-9698-106e768fc3ce.html.

⁷⁹ Eric Posner, *The Case for Electing Judges in Missouri*, NEWSWEEK, May 7, 2010, available at <http://www.newsweek.com/2010/05/07/the-case-for-electing-judges-in-missouri.html#>.

⁸⁰ Editorial Board, *Money, Money, Money fuels Missouri Petition Drives*, KANSAS CITY STAR, May 4, 2010.

⁸¹ Deborah A. Agosti, *My Life and the Law: A Short Overview*, 36 U. TOL. L. REV. 863, 881 (2005) (describing a similar battle over judicial independence in Nevada).

⁸² Peter Hardin, *NV Merit Selection Proposal Readied for Voters*, GAVEL GRAB (May 11, 2010), available at <http://www.gavelgrab.org/?p=10613>. As this report was nearing the final stages of completion, the Nevada Constitutional Amendment was defeated. See [http://www.ballotpedia.org/wiki/index.php/Nevada_Judicial_Appointment_Amendment,_Question_1_\(2010\)](http://www.ballotpedia.org/wiki/index.php/Nevada_Judicial_Appointment_Amendment,_Question_1_(2010)).



Many lawyers and most members of the public tend to think of judicial selection methods with an either/or mentality—identifying states that elect or appoint their judges. The analysis of how states select their judges, however, is far more complex and can vary depending upon if you examine the initial selection method, interim selections, or the method by which judges are retained.

Recommendations to Improve Merit Selection and Judicial Election Approaches

Many lawyers and most members of the public tend to think of judicial selection methods with an either/or mentality—identifying states that elect or appoint their judges. The analysis of how states select their judges, however, is far more complex and can vary depending upon if you examine the initial selection method, interim selections, or the method by which judges are retained. Overall, states that elect their judges and those that appoint them “turn out to be fairly equal in number.”⁸³

Eight states select all of their judges through partisan elections and another 13 use nonpartisan elections to select all of their judges.⁸⁴ Seven states use a combination of methods, typically appointing judges to courts of review and electing their trial court judges. Another seven states that initially select judges at all levels of their justice system through an appointment process require those judges to run in some type of retention election once their initial term of appointment ends. Two states select judges through legislative appointments. Most states that elect their judges typically fill interim judicial vacancies through appointments.⁸⁵ Within this broad outline of state selection methods, a myriad of variations exist.

What any state selection method strives to accomplish, at least in theory, is to find the best person to assume the responsibilities of a judge. Debate over the various selection methods typically focuses on the process because there is little hard data establishing one selection method consistently produces better judges.

Thus, the following recommendations are drawn from some of the leading commentators around the country who have studied judicial selection methods for decades. Many of them explain that improving the judicial selection method used in a particular state does not demand a choice between extremes—a governor’s appointment versus a judiciary chosen exclusively by voters. In some states, changing the judicial selection method requires a constitutional amendment. Nonetheless, improvements in the selection process can still be made.⁸⁶ There is a continuum of options that can improve the selection process regardless of a state’s

⁸³ LARRY C. BERKSON, ET AL., AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE UNITED STATES, A SPECIAL REPORT 2 (2010), available at http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf.

⁸⁴ *Id.*

⁸⁵ The American Judicature Society charts state judicial selection methods. See AMERICAN JUDICATURE SOCIETY, METHODS OF JUDICIAL SELECTION, available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

⁸⁶ Gino L. DiVito, *Judicial Selection in Illinois: A Third Way*, 98 ILL. B.J. 624 (2010). The author is a highly respected former Illinois Appellate Court Judge who is a proponent of merit selection. He holds the view that changing to a merit selection system in Illinois appears impossible because it would require a constitutional amendment. Therefore, he advocates changing to a non-partisan system of electing judges in Illinois.

selection method. Several of these options, which are discussed in later sections of this report, address the concerns of commentators on both sides of the selection aisle:

- Improve the merit system for judicial selection by ensuring the qualifications of a judge through the use of a screening committee for candidates and appointees.
- Avoid a nomination process dominated wholly by insiders with a selection panel composed of non-lawyers whose deliberations are open to the public for comment.⁸⁷
- Improve the judicial evaluation process through the use of neutral benchmarks and process-oriented standards addressing judicial performance issues at all levels of our state court systems.
- Better equip voters through the use of judicial performance evaluations that distribute information to the voting public. Given the presence of special interests in state judicial elections, voters need an unbiased source of information on which they can rely. In a public attitudes study, 75 percent of participants reported that more information about candidates would increase their likelihood of participation in judicial elections.⁸⁸
- Change the judicial election process from partisan to non-partisan elections.⁸⁹
- Lengthen the term of elected judges so that with more time between them, judges will encounter less special interest and fundraising pressure.⁹⁰
- Follow the lead of North Carolina, New Mexico, and Wisconsin and implement publicly financed judicial campaigns, and include consideration of the “independent” support a candidate receives when setting the target or trigger for public support funds.⁹¹



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⁸⁷ O'Connor, *supra* note 29.

⁸⁸ SKAGGS, *supra* note 20, at 7.

⁸⁹ DiVito, *supra* note 86.

⁹⁰ Wynn, *supra* note 39, at 767; *see also* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1100 (2007) (observing “Longer terms also mean fewer elections, less need to campaign, raise funds and grapple with the ever-more-daunting questions about campaign conduct, and less concern about decisions’ vulnerability to distortion.”).

⁹¹ *See* James Sample, *Caperton Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 792 (2010) (noting that in light of the “six- and seven-figure independent expenditures [that] have become the norm in judicial battleground states.... recusal rules—or trigger mechanisms in public financing systems, for that matter—that address only direct contributions and do not take into account substantial independent expenditures are not only likely to be ineffective, but may actually incentivize special interests to operate less and less accurately and transparently than they otherwise would”); Schotland, *supra* note 75, at 343 (explaining “the ‘trigger’ support amount cannot be limited to contributions but must include independent support.... Otherwise, deep-pocket supporters will simply contribute little or nothing and instead take the independent route”).

- Require judges or judicial candidates involved in retention or contested elections to publicly disclose “in an easily searchable format,” all campaign contributions that exceed a specific threshold.⁹²
- Require the automatic disqualification of judges in cases involving parties whose campaign contributions exceed a specific dollar threshold.

Conclusion

The level of activity and commentary on judicial selection methods suggests that momentum may be developing for change designed to protect the independence of our judicial system. America’s court system has been regarded around the world as a model of fairness. While there is no perfect system, preventing any further politicization of the judiciary and limiting the influence of special interests in our courts should be the goals of all stakeholders in our system of justice, including the defense bar.

⁹² Wynn, *supra* note 39, at 767–69 (noting this can require “sorting through thousands of pages of documents” and that timing is the “greatest problem” because states typically do not release the information until after the election).

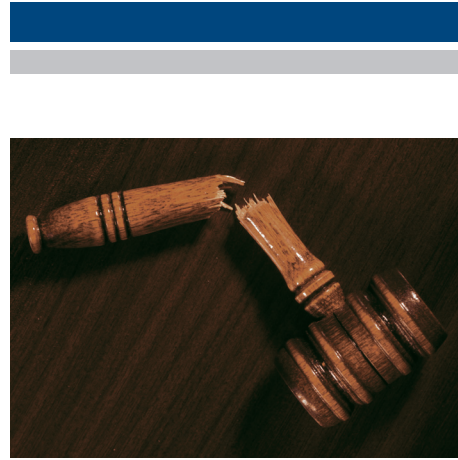
Judicial Disqualification and the *Caperton* Decision

Judicial disqualification, recusal standards and judicial elections are issues of growing concern to all involved in our civil justice system as a result of the Supreme Court's decision in *Caperton v. A.T. Massey Coal Company*.⁹³ While *Caperton* recognized that due process warrants judicial recusal when a monetary contribution to a judicial election campaign creates "a serious, objective risk of actual bias,"⁹⁴ there is also a concern that the inherent vagueness of the constitutional standard announced in *Caperton* will result in a spate of filings seeking judicial disqualification based on a claim that a judge is "probably biased, bringing the judge and the judicial system into disrepute."⁹⁵

Prior to *Caperton*, there were only two scenarios in which due process required judicial disqualification or recusal. The first was "where a judge had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law."⁹⁶ The second arose "where a judge had no pecuniary [or personal] interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding."⁹⁷ Typically, this second scenario involved criminal contempt proceedings. All other questions of judicial recusal or disqualification, including "matters of kinship, personal bias, state policy [or] remoteness of interest" were left to "common law, statute, or the professional standards of the bench and bar."⁹⁸ In other words, due process sets a minimum standard or constitutional floor for judicial qualification and leaves "Congress and the states... free to impose more rigorous standards."⁹⁹

In *Caperton*, the Supreme Court extended the reach of the Due Process Clause to judicial elections and overturned a judge's failure to recuse himself despite the fact that the judge carefully addressed the issue and thoughtfully explained his reasons why recusal was not warranted under the controlling standard. The Court in *Caperton* noted the extraordinary size of the campaign contribution at issue and concluded it triggered a constitutionally impermissible "probability of actual bias." Acknowledging that its decision addressed an extraordinary situation where the constitution required recusal, the Court stated:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or



⁹³ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

⁹⁴ *Id.* at 2265.

⁹⁵ *Id.* at 2272 (Roberts, C.J., dissenting).

⁹⁶ *Id.* at 2259–60.

⁹⁷ *Id.* at 2261.

⁹⁸ *Id.* at 2268 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) and *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)) (Roberts, C.J., dissenting).

⁹⁹ *Caperton*, 129 S. Ct. at 2267.



Judicial disqualification, recusal standards and judicial elections are issues of growing concern to all involved in our civil justice system as a result of the Supreme Court's decision in *Caperton v. A.T. Massey Coal Company*.

imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.¹⁰⁰

Because of the difficulty in demonstrating actual bias, the *Caperton* Court explained its "probability of actual bias" threshold applies an objective standard, which obviates the need for any inquiry into a judge's motives or proof of actual bias.¹⁰¹ According to the Court: "Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average... judge to... lead him not to hold the balance nice, clear and true.'"¹⁰² The Court's objective standard may "require recusal whether or not actual bias exists or can be proved." Consequently, "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'"¹⁰³

On the other hand, the Court in *Caperton* also recognized, "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal."¹⁰⁴ Recusal is constitutionally required only when "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."¹⁰⁵ Accordingly, the Court was careful to emphasize the following:

The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states... remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.¹⁰⁶

¹⁰⁰ *Id.* at 2263–64.

¹⁰¹ *Id.* at 2263. The Court explained its reasoning: "Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding a case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief." *Id.*

¹⁰² *Caperton*, 129 S. Ct. at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

¹⁰³ *Caperton*, 129 S. Ct. at 2265 (quoting *In re Murchinson*, 349 U.S. 133, 136 (1955)).

¹⁰⁴ *Caperton*, 129 S. Ct. at 2263.

¹⁰⁵ *Id.* at 2259.

¹⁰⁶ *Id.* at 2267. In this regard, the decision is quite narrow; the Court went to great lengths to emphasize the extreme nature of the fact pattern presented. See Schotland, *supra* note 75, at 338.

The Importance of State Codes of Judicial Conduct Following *Caperton*

Recognizing the constitutional standard it announced in *Caperton* only addressed the “exceptional” case, the Court acknowledged that state “codes [of judicial conduct] are ‘[t]he principal safeguard against judicial campaign abuse’ that threaten to imperil ‘public confidence in the fairness and integrity of the nation’s elected judges.’”¹⁰⁷ Prior to *Caperton*, virtually every state had adopted some form of general disqualification rule based on the American Bar Association’s (ABA) Model Code of Judicial Conduct which requires recusal “in any proceeding in which the judge’s impartiality might reasonably be questioned.”¹⁰⁸ Additionally, nearly every state holding judicial elections had adopted some type of limit on campaign contributions.

Since 1999, the ABA’s Model Code has included a rule “requiring disqualification when a judge has received campaign contributions above a certain level (which the state is free to establish for itself) from parties or lawyers involved in a case.”¹⁰⁹ This rule was reaffirmed by the ABA House of Delegates in 2007 and was included as Rule 2.11 (A)(4) of the 2007 Model Code. It requires disqualification when:

The judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has with the previous [insert number] year[s] made aggregate contributions to the judge’s campaign in an amount that is greater than \$ [insert amount] for an individual or \$ [insert amount] for an entity [is reasonable and appropriate for an individual or an entity].¹¹⁰

The ABA Model Code adopted in 2007 also contains an amended test for “impropriety,” which was cited with approval by the Court in *Caperton*.¹¹¹ The amended test asks “whether the conduct would create in reasonable minds a perception that the judge violated [the] Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”¹¹² As of November 9, 2010, 42 states had initiated review of their judicial codes in light of the 2007 revisions to the ABA Model Code. Of those jurisdictions, 17 have approved a revised judicial code, 19 have established committees to review their



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¹⁰⁷ *Caperton*, 129 S. Ct. at 2266 (quoting Brief of the Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party at 4, 11, *Caperton v. A.T. Massey Coal Co. Inc.*, 129 S. Ct. 2252 (2009) (No. 08-22)). The Conference of Chief Justices acknowledged in their *Caperton* *Amicus* Brief that “[d]isqualification is perhaps the States’ most reliable weapon for maintaining both the reality and the appearance of a ‘fair hearing in a fair tribunal’ for every litigant.” *Id.* at 16.

¹⁰⁸ MODEL CODE OF JUDICIAL CONDUCT R. 2.11-(A) (2007).

¹⁰⁹ See Brief of the American Bar Association as *Amicus Curiae* in support of Petitioners at 15 n. 29, *Caperton v. A.T. Massey Coal Co. Inc.*, 129 S. Ct. 2252 (2009) (No. 08-22).

¹¹⁰ *Id.* at 14 n. 27.

¹¹¹ *Caperton*, 129 S. Ct. at 2266.

¹¹² MODEL CODE OF JUDICIAL CONDUCT Canon 1 R. 1.2 cmt 5 (2007).



Justice at Stake's recent survey of American voters is instructive. In that survey, 82 percent of Republican and 79 percent of Democratic voters believe "a judge should not hear cases involving a campaign supporter who spent \$10,000" toward a judge's election.

codes, and six have proposed revisions to their Judicial Codes.¹¹³ Additionally, two states, Arizona and Utah have adopted versions of Rule 2.11 (A)(4).¹¹⁴ Mississippi has adopted a rule providing for recusal involving cases where a party or an attorney is a "major donor to the election campaign of a judge" and New York's chief judge has recently proposed a rule requiring the automatic disqualification of a judge "from hearing cases involving any lawyer or party who contributed \$2,500 or more to the judge's campaign in the preceding two years."¹¹⁵

Recommendation Addressing Disqualification Based on Campaign Contributions

DRI's Task Force supports the approach taken by the ABA's Model Code of Judicial Conduct, which allows each state to set its own campaign contribution disqualification benchmark. However, it also believes that Justice at Stake's recent survey of American voters is instructive. In that survey, 82 percent of Republican and 79 percent of Democratic voters believe "a judge should not hear cases involving a campaign supporter who spent \$10,000" toward a judge's election.¹¹⁶

Because the public's perception of the fairness of our legal system is critical to its respect for the rule of law in America, the Task Force recommends that states holding judicial elections adopt Rule 2.11[A][4] of the ABA's 2007 Model Code, and that Justice at Stake's survey results be considered when setting the upper benchmark for when disqualification is required under

¹¹³ AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, STATUS OF STATE REVIEW OF ABA MODEL CODE OF JUDICIAL CONDUCT (2007), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/jud_status_chart.authcheckdam.pdf.

¹¹⁴ ARIZ. CODE OF JUDICIAL CONDUCT Canon 2 R. 2.11 (A)(4) (incorporating "an amount that is greater than the amounts permitted pursuant to A.R.S. §16-905"); UTAH CODE OF JUDICIAL CONDUCT Canon 2. R. 2.11 (A)(4) (requiring disqualification when a judge knows or learns that a party or a lawyer or law firm of the a party has made aggregate contributions to the judge's retention during the prior three years greater than \$50). Alabama has an automatic disqualification rule. See ALA. CODE §§12-24-1.2 (2009) (mandating recusal when a campaign contribution of \$2000 or more is made to a circuit court judge and \$4000 or more to an appellate court judge). However, it never has been enforced, apparently based on *Alabama Advisory Opinion* 99-975, because it was not "pre-cleared by the U.S. Department of Justice under the Voting Rights Act." See AMERICAN JUDICATURE SOCIETY, JUDICIAL DISQUALIFICATION BASED ON COMMITMENT AND CAMPAIGN CONTRIBUTIONS, available at <http://www.ajs.org/ethics/pdfs/Disqualificationcommitmentscontributions.pdf>.

¹¹⁵ MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2) (requiring judicial recusal from lawsuits involving "major donors"); Editorial, *Bold Step for Fair Courts in New York*, N.Y. TIMES, Feb. 15, 2011, available at <http://www.nytimes.com/2011/02/15/opinion/15tue3.html?src=twrhp>.

¹¹⁶ Justice at Stake Campaign, Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions: Independent Survey Caps Decade of Record-Shattering Judicial Elections (Sept. 8, 2010), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722.

that Rule.¹¹⁷ The Task Force recognizes that in those states that have not experienced heavily financed judicial campaigns, a \$10,000 disqualification threshold may be too high.¹¹⁸ While judges in states that have experienced campaign finance wars may view that threshold as too low, the importance of the public's perception of fairness cannot be overstated. Since limits on judicial campaign contributions cannot survive constitutional scrutiny following *Citizens United*, judicial disqualification reform at the state level has taken on greater importance.

Several empirical studies (both pre- and post-*Caperton*) have attempted to address the impact of campaign contributions on judicial decision making.¹¹⁹ While these studies have certain inherent limitations, and are not without their critics,¹²⁰ they do suggest a correlation between campaign contributions and the *risk of bias* in judicial decision making.



Since limits on judicial campaign contributions cannot survive constitutional scrutiny following *Citizens United*, judicial disqualification reform at the state level has taken on greater importance.

¹¹⁷ The Task Force recognizes the difficulties that will be encountered. Texas, Nevada and Montana rejected a bright-line disqualification rule when campaign contributions exceed a specific monetary threshold. See Nathan Koppel, *States Weigh Judicial Recusals; Some Judges, Businesses Oppose Restrictions on Cases Involving Campaign Contributions*, WALL STREET JOURNAL, Jan. 26, 2008, available at <http://online.wsj.com/article/SB10001424052748703822404575019370305029334.html?KEYWORDS=States+Weigh+Judicial+Recusals>; see also Sample, *supra* note 91, at 798–801 (discussing the Wisconsin's Supreme Court's adoption of a rule rejecting a judge's need to recuse based upon receipt of a judicial campaign contribution, no matter how large).

¹¹⁸ Alabama set its judicial disqualification triggers at \$2000 for circuit court judges and \$4000 for appellate court judges. See ALA. CODE §§12-24-1.2 (2009). However, see note 114 regarding its application.

¹¹⁹ See Adam Liptak & Jane Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1, available at <http://www.nytimes.com/2006/10/01/us/01judges.html?scp=1&sq=Campaign%20Cash%20Mirrors%20High%20Court%92s%20Rulings&st=cse> (addressing a 12 year study of voting patterns of the Ohio Supreme Court involving a campaign contributor); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002) (involving a 4 year study of Alabama Supreme Court decisions, finding a “remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds”); Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10 GLOBAL JURIST FRONTIERS 3 (2010), available at http://works.bepress.com/vernon_palmer/7/ (addressing a 14 year study of the voting record of the Louisiana Supreme Court involving cases with at least one campaign contributor and a dissenting opinion).

¹²⁰ Professor Palmer's study was originally published in the Tulane Law Review in 2008. See Vernon V. Palmer & John Levandis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008). Attorneys for the Louisiana Supreme Court wrote a rebuttal article. See Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009) (identifying 44 errors in the original study's database, which contained 11,000 entries). Critics also argued the



The Task Force’s recommendation addressing judicial disqualification in cases when campaign contributions from a party, or a party’s attorney or law firm exceed a specific threshold should help to maintain the public’s confidence in the fairness of our courts.

One 12-year study published in 2006 concluded that judges on the Ohio Supreme Court voted in favor of their contributors approximately 70 percent of the time, and one judge voted in favor of contributors 91 percent of the time.¹²¹ Another 14-year study of the voting patterns of seven judges on the Louisiana Supreme Court reported “the Court as a whole voted for the single donor’s side... in nearly two out of three cases,” and that one judge voted in favor of a single contributor 100 percent of the time. Based on a statistical methodology called logistic regression, that study also concluded that in “tort/negligence cases... each extra \$1000 of net donations increased the odds of a favorable vote by 11 percent.”¹²² The Louisiana study appears to confirm *Caperton*’s rationale. It further suggests “that far smaller contributions may create a risk of actual bias, and that the relative size of a donation, in comparison to overall campaign funds and expenditures, is not a necessary component of the risk.”¹²³

When these studies’ findings are reviewed in light of national opinion surveys addressing the public’s perception of the fairness of our legal system and the influence of campaign contributions on judicial decisions, it becomes clear that there is a need for procedural reforms. As one editorial aptly observed: “There is no perfect way to choose a judge. But to undermine the whole purpose of the court system by allowing special interests to buy judgeships, or at least try to, is the worst system of all.”¹²⁴ The Task Force’s recommendation addressing judicial disqualification in cases when campaign contributions from a party, or a party’s attorney or law firm exceed a specific threshold should help to maintain the public’s confidence in the fairness of our courts.

study proved nothing other than judges have a personal orientation and contributors support judges who hold views similar to their own. Palmer, *supra*, note 119, at 4, 15–16, 30, 34. The Dean of the Tulane Law School subsequently sent a letter of apology to the Louisiana Supreme Court and the law school issued an Erratum regarding the article. See Paul L. Caron, *Tulane Dean Apologizes for Errors in Law Review Article Claiming Donor Influence on Louisiana Supreme Court*, TAXPROF BLOG (Sept. 23, 2008), http://taxprof.typepad.com/taxprof_blog/2008/09/tulane-dean-apo.html. In response, all statistical calculations from the original study were independently reviewed by the Center for Empirical Research in the Law at Washington University in St. Louis. Errors in the original database and other errors not previously identified were corrected. Palmer, *supra* note 119, at 2 n.6. With those corrections made, Professor Palmer indicates the conclusions from the original study “remain essentially unchanged.” Palmer, *supra* note 119 at 4 n.11. He also notes that when both parties contribute to a particular judge, the inclusion of that outcome can skew the statistics, which is why he separately examined cases where only one party contributed to a judge’s campaign. Palmer, *supra* note 119, at 12.

¹²¹ Liptak & Roberts, *supra* note 119.

¹²² Palmer, *supra* note 119 at 8, 9.

¹²³ *Id.* at 3, 42.

¹²⁴ Editorial, *Judicial Politics Run Amok*, N.Y. TIMES, Sept. 19, 2006, available at http://www.nytimes.com/2006/09/19/opinion/19tue3.html?_r=1&oref=slogin.

Justice Roberts' Concerns over *Caperton*'s Fallout

Caperton was a 5–4 decision. Although the dissenting Justices shared “the majority’s sincere concerns about the need to maintain a fair, independent, and impartial judiciary,” they also voiced a concern that the Court’s decision would “undermine rather than promote these values.”¹²⁵ Chief Justice Roberts explained:

Unlike the established grounds for disqualification, a “probability of bias” cannot be defined in any limited way. The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.¹²⁶

He further observed:

It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.¹²⁷

In criticizing the majority’s “probability of bias” standard, Chief Justice Roberts enumerated 40 specific questions which he believes lower courts will have to answer, with little guidance from the Court.¹²⁸ Those questions included the following:

- Is the possible-temptation standard limited to financial support in judicial elections, or does it apply to judicial recusal issues more generally?¹²⁹
- How much money is too much money?



¹²⁵ *Caperton v. A.T. Massey Coal Co. Inc.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting).

¹²⁶ *Id.*

¹²⁷ *Id.* at 2274 (Roberts, C.J., dissenting).

¹²⁸ *Id.* at 2269–72 (Roberts, C.J., dissenting).

¹²⁹ *Id.* at 2269. See also *In re Morgan*, 573 F.3d 615, 623–25 (8th Cir. 2009); *Duprey v. Twelfth Judicial District Court*, No. 08-0756, 2009 WL 2951023 (D.N.M. Jul. 27, 2009); *U.S. Fidelity Insurance & Guaranty Co. v. Michigan Catastrophic Claims Ass’n*, 773 N.W. 2d 243, 484 Mich. 1, 2009 WL 2184822 (Mich. 2009).

- How do we determine whether a given expenditure is “disproportionate”? Disproportionate to what?¹³⁰
- Are independent expenditures treated the same as direct contributions?
- Are contributions to a primary election aggregated with those in a general election?
- Are trial, appellate, and supreme court judges treated the same for recusal purposes?
- Does the probability of bias diminish over time as the election recedes?
- Must the judge’s vote be outcome-determinative?
- Does it matter if a judge has voted against the supporter in other cases?
- Do we presume that judges have “debts of hostility” against political opponents?
- Does the due process standard apply similarly in all states, regardless of their different histories and expectations concerning judicial election funding?
- Is the objective test analyzed through the lens of a reasonable person, reasonable lawyer or reasonable judge?
- Does the availability of independent review of a judge’s recusal decision by a panel of other judges foreclose a due process claim?
- Does the judge get to respond to the allegation of probable bias or is the judge’s reputation solely in the hands of the parties?

Read together, the majority and dissenting opinions in *Caperton* define the philosophical parameters of the current debate concerning judicial disqualification and recusal reform. If Justice Scalia, writing separately in dissent, is correct in his prediction that the principal consequence of *Caperton* will be “to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges,”¹³¹ this debate will only intensify over time as legislatures and other bodies responsible for promulgating professional standards for the bench and bar begin to consider *Caperton*’s impact on cam-

¹³⁰ *Caperton*, 129 S. Ct. at 2273–74 (Roberts, C.J., dissenting). Chief Justice Roberts noted the size of the campaign contribution at issue did not seem disproportionate to other contributions in the election. He explained: “Large independent expenditures were also made in support of Justice Benjamin’s opponent. ‘Consumers for Justice’—an independent group that received large contributions from the plaintiffs’ bar—spent approximately \$2 million in this race.” *Id.* at 2274.

¹³¹ *Id.* at 2274 (Scalia, J., dissenting) (“What above all else is eroding public confidence in the Nation’s judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court’s opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim. The facts relevant to adjudicating it will have to be litigated—and likewise the law governing it, which will be indeterminate for years to come, if not forever.”).

paign laws and codes of conduct intended to eliminate even the appearance of impropriety. In the meantime, it will be up to individual judges to apply *Caperton*'s ambiguous standard and make a good faith determination when the circumstances are extreme enough to give rise to a "probability of actual bias" requiring recusal.

Recommendation Addressing Procedures for Motions to Disqualify

Given the heightened sensitivity to judicial campaign contributions triggered by the Supreme Court's *Citizens United* decision, it should be anticipated that disqualification motions will be increasingly filed. Chief Justice Roberts raised this concern in *Caperton*.¹³² Some disqualification motions may be nothing more than an exercise in forum shopping or brought for tactical reasons in the hope that its filing will prompt the targeted judge to demonstrate his or her fairness to the party bringing the motion through the judge's rulings on other issues. Other motions, while well intentioned, will fall far short of *Caperton*'s standard. In light of Justice Robert's concern that disqualification motions may undeservedly harm a judges' reputation, bring the legal system into disrepute, and to avoid the temptations a judge may feel when his or her ability to be fair is called in question, there are steps that can and should be taken by state and local defense organizations in those states that elect their judges.

State organizations should recommend to their supreme court that a clear procedure, with a well-defined process, be adopted to address this issue. The Task Force recommends that an independent group or panel of judges at each level of the state's court system be designated to hear and decide disqualification motions. As one commentator explained: "The fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of United States disqualification law—and for good reason."¹³³ The independent determination of disqualification motions will obviate this criticism and eliminate what Professor Charles Geyh of Indiana University calls the "judicial disqualification paradox."¹³⁴ The establishment of such panels should



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¹³² *Id.* at 2272 (Roberts, C.J., dissenting) (observing "[c]laims that have little chance of success are nonetheless frequently filed").

¹³³ Sample, *supra* note 91, at 809.

¹³⁴ See *Examining the State of Judicial Recusals after Caperton v. A.T. Massey*; Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. On the Judiciary, 111th Cong. (2009) (testimony of Charles G. Geyh, Prof., Indiana University Maurer Sch. of Law at Bloomington), available at <http://judiciary.house.gov/hearings/pdf/Geyh091210.pdf>. "The problem inherent in judicial disqualification is that judges who are deeply committed to the appearance and reality of impartial justice are called upon to acknowledge in the context of specific cases, that despite their best efforts to preserve their impartiality, they are either partial or appear to be so. That is a hard thing to ask of our judges." *Id.* at 2, 4.

also help to foreclose any claim that a party's due process rights were impaired because of the judge's alleged partiality or bias.¹³⁵

The Task Force recognizes the issues surrounding judicial recusal and disqualification in each state may vary dramatically.¹³⁶ The following are points to consider in crafting specific procedural recommendations for the adoption of a disqualification/recusal process:

- Once a disqualification motion is filed, each party would be permitted to respond, as would the affected judge.
- The panel hearing the motion should have the authority to stay all proceedings before the affected judge until the motion is ruled upon.
- Discovery would not be allowed on the issue since *Caperton* applies an objective standard.
- Parties will be allowed to file any documents, evidentiary materials and legal arguments in support of their respective positions.
- An expedited hearing process should be employed, with rulings to occur within 60 days of the filing of a disqualification motion.
- All disqualification motions, briefs, proceedings, arguments and rulings should be open to the public to ensure a transparent process.
- The procedure would permit any party whose opponent made the potentially disqualifying campaign contribution to waive disqualification.¹³⁷

Such a procedure would alleviate some of Justice Roberts' concerns while affording protection to the movant's due process rights.

¹³⁵ *Parratt v. Taylor*, 451 U.S. 527, 540–44 (1981).

¹³⁶ The procedures employed in resolving judicial disqualification motions also vary widely between the states. For a thorough discussion of these procedures, see RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, 481–572 (Banks & Jordan Law Publishing Co. ed., 2d ed. 2007).

¹³⁷ JAMES SAMPLE, ET AL., BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 30 (2010), available at http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf (explaining such a provision would prevent “gamesmanship that could defeat [the] purpose” of *per se* rules for campaign supporters).

Judicial Campaign Finance Issues Following *Citizens United*

Free Speech for All: The *Citizens United* Decision

Campaign finance and election law issues vaulted into the public's consciousness in 2010. This ordinarily dry subject, usually of interest only to law school professors and beltway consultants, was brought to the forefront of public affairs during President Obama's State of the Union address, in which he harshly criticized the Supreme Court's decision in *Citizens United v. Federal Election Commission*.¹³⁸ The President remarked, "last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections." This pointed criticism drew an immediate reaction from Supreme Court Justice Samuel Alito, who appeared to comment, "not true, not true." Clips of this exchange immediately appeared on YouTube and have collectively drawn nearly half a million views.¹³⁹

The cause for this remarkable primetime drama between the executive and judicial branches was the Supreme Court's landmark *Citizens United* decision, which struck down sections of the Bipartisan Campaign Reform Act of 2002 (BCRA), better known as McCain-Feingold Act. The Court's holding in *Citizens United*—that "political speech does not lose First Amendment protection 'simply because its source is a corporation'"¹⁴⁰—has sparked a firestorm of controversy, which requires this discussion to be more an analysis of the decision in its historical context than a review of the decision's impact on judicial independence and accountability.¹⁴¹

Hillary: The Movie

Citizens United grew out of the promotion of a documentary critical of Senator Hillary Clinton entitled *Hillary: The Movie* (*Hillary*). The film was created by a conservative non-profit corporation, Citizens United (Citizens). Most of Citizens' funding comes from donations by private citizens, but a small percentage of its funds come from for-profit corporations.¹⁴² Citizens planned to release *Hillary* on cable television as a video-on-demand film within 30 days of the 2008 Democratic primary elections. However, it feared that releasing the film in this fashion might subject it to civil penalties and potential criminal prosecution under the BCRA.¹⁴³



¹³⁸ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

¹³⁹ Alito Mouths "Not True" as Obama Criticizes Supreme Court for Opening Floodgates to Special Interests, YOUTUBE, available at <http://www.youtube.com/watch?v=4pB5uR3zgsA> (last visited Nov. 21, 2010); Justice Grimaces as Obama Criticizes Court, YOUTUBE, available at <http://www.youtube.com/watch?v=k92SerxLWtc&feature=fvw> (last visited Nov. 21, 2010).

¹⁴⁰ *Citizens United*, 130 S. Ct. at 900, (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

¹⁴¹ Following quickly on the heels of *Citizens United*, the Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010), held the Federal Election Campaign Act's limitation on an individual's contributions to political committees or independent expenditure groups violated the First Amendment.

¹⁴² *Citizens United*, 130 S. Ct. at 887.

¹⁴³ 2 U.S.C. §441B(b)(2) (2010).



Citizens challenged on First Amendment grounds a BCRA provision prohibiting unions and corporations from using their “general treasury funds” for “electioneering communications.”¹⁴⁴ Unions and corporations however, were permitted to form political action committees or PACs to fund advocacy or electioneering communications through separately designated funds donated for that specific purpose.¹⁴⁵

Citizens brought an action seeking declaratory and injunctive relief against the Federal Election Commission arguing the BCRA’s expenditure ban and campaign disclosure requirements were unconstitutional. The District Court denied Citizens’ Motion for a Preliminary Injunction and granted Commission’s Motion for Summary Judgment.¹⁴⁶

The Opinions

The Court in *Citizens United* held that the BCRA’s prohibition of the use of general union and corporate funds for electioneering communications was facially unconstitutional.¹⁴⁷ However, the Court upheld by an 8–1 majority the BCRA’s campaign finance disclosure requirements.¹⁴⁸

Citizens United was a fractured decision. The lead opinion was written by Justice Kennedy. Different parts of his opinion garnered support from different groups of Justices. The case prompted four additional opinions. One concurring opinion was written by Chief Justice Roberts, in which Justice Alito joined. Justice Scalia filed another concurring opinion in which Justice Alito joined in full and Justice Thomas joined in part. Justice Thomas also filed an opinion in which he concurred with most of Justice Kennedy’s opinion but dissented from that portion addressing the BCRA’s campaign disclosure requirements. A fourth opinion, written by Justice Stevens, joined in by Justices Ginsburg, Breyer and Sotomayor, concurred in the financial disclosure portion of Justice Kennedy’s opinion, but dissented from the remainder.

To reach its conclusion invalidating restrictions on funding electioneering communications, the Court first had to address a case decided two decades earlier, *Austin v. Michigan Chamber of Commerce*.¹⁴⁹ To place *Citizens United* in its proper perspective, it should be noted that the Court in *Austin* previously had acknowledged several points central to the First Amendment issue presented:

¹⁴⁴ 2 U.S.C. §434(f)(3)(A) (2010) (defining an electioneering communication as “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office” made within 30 days of a federal primary election or within 60 days of a general election).

¹⁴⁵ 2 U.S.C. §441B(b)(2) (2010).

¹⁴⁶ *Citizens United v. Fed. Election Comm’n*, 530 F. Supp. 2d 274 (D.D.C. 2008).

¹⁴⁷ *Id.* at 913.

¹⁴⁸ *Id.* at 914.

¹⁴⁹ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

Certainly the use of funds to support a political candidate is “speech”; independent campaign expenditures constitute “political expression ‘at the core of our electoral process and of our First Amendment freedoms.’ [And]... that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.”¹⁵⁰

Where *Austin* and *Citizens United* parted ways was on the issue of whether the laws restricting these First Amendment freedoms were narrowly tailored to serve a compelling state interest. *Austin* concluded the state law under review was narrowly tailored and was supported by a compelling interest in eliminating the “corrosive and distorting effect of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public support for the corporation’s political ideas.”¹⁵¹

Citizens United squarely overruled this aspect of *Austin*, finding it was an aberrational detour from the Court’s prior First Amendment decisions as reflected in *Buckley v. Valeo*,¹⁵² and *First National Bank of Boston v. Bellotti*.¹⁵³ In *Buckley*, the Court concluded “the concept that government may restrict the speech of some elements of our society to enhance the relative voice of others is wholly foreign to the First Amendment.”¹⁵⁴ *Bellotti* subsequently explained: “If a legislature may direct business corporations to “stick to business,” it may also limit other corporations—religious, charitable, or civic—to their respective “business” when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.”¹⁵⁵

Bellotti subsequently struck down restrictions on speech based upon the speaker’s corporate identity, concluding:

We thus find no support in the First... Amendment, or in the decisions of this Court for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. ... [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify commu-

¹⁵⁰ *Austin*, 494 U.S. at 657 (citations omitted).

¹⁵¹ *Id.* at 660.

¹⁵² *Buckley v. Valeo*, 424 U.S. 1 (1976). It should be noted that *Citizens United* did not overturn *Buckley*’s holding that limits on “direct” contributions to political candidates could be constitutionally imposed. The *Citizens United* Court explained that limits on direct contributions, “unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.” *Citizens United*, 130 S. Ct. at 909.

¹⁵³ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

¹⁵⁴ *Buckley*, 424 U.S. at 48–49.

¹⁵⁵ *Bellotti*, 435 U.S. at 785.



“[T]he First Amendment does not ‘belong’ to any definable category of persons or entities: It belongs to all who exercise its freedoms.”

nication. ... In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.¹⁵⁶

In other words, “the First Amendment does not ‘belong’ to any definable category of persons or entities: It belongs to all who exercise its freedoms.”¹⁵⁷

The Court in *Citizens United* rejected the contention that the challenged provisions of the BCRA were narrowly tailored, noting that it “permits the Government to ban the political speech of millions of associations of citizens” most of which “are small corporations without large amounts of wealth.”¹⁵⁸ Equally troubling for the Court was that media corporations were exempt from the expenditures ban. The Court noted there was “no precedent supporting laws that attempt to distinguish between corporations” in this fashion, and that it had repeatedly rejected the proposition that the “institutional press” has greater First Amendment rights than other speakers.¹⁵⁹ Responding to the notion that the restriction was justifiable based on *Austin*’s rationale that “[s]tate law grants corporations special advantages,”¹⁶⁰ the Court explained that a “State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”¹⁶¹

Addressing the notion that the government had a compelling interest in preventing corporations from obtaining an “unfair advantage in the political marketplace” by utilizing “resources amassed in the economic marketplace,”¹⁶² the Court observed “[a]ll speakers, including individuals and the media, use money amassed in the economic marketplace to fund their speech.”¹⁶³ It then contrasted the BCRA’s First Amendment restriction on unions and corporations against the ability of wealthy individuals to use their assets to influence political opinion without restriction, and after noting that most of those affected by the ban were small corporations, ultimately concluded the law was “not even aimed at amassed wealth.”¹⁶⁴ The Court then rejected the concept that political speech can be “limited based on a speaker’s wealth,” explaining that conclusion was “a necessary consequence of the premise that the First Amend-

¹⁵⁶ *Id.* at 784–85.

¹⁵⁷ *Id.* at 802 (Burger, J., concurring).

¹⁵⁸ *Citizens United*, 130 S. Ct. at 907.

¹⁵⁹ *Id.* at 905–06 (noting the media exception was “all but an admission of the invalidity of [*Austin*’s] antidistortion rationale”).

¹⁶⁰ *Austin*, 494 U.S. at 658–59.

¹⁶¹ *Citizens United*, 130 S. Ct. at 905.

¹⁶² *Austin*, 494 U.S. at 659.

¹⁶³ *Citizens United*, 130 S. Ct. at 905.

¹⁶⁴ *Id.* at 906–07.

ment generally prohibits the suppression of political speech based on the speaker's identity."¹⁶⁵ The *Citizens United* Court concluded: "If the anti-distortion rationale were to be accepted, however it would permit the Government to ban political speech simply because the speaker is an association that has taken on the corporate form."¹⁶⁶ *Citizens United* then reiterated:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.¹⁶⁷

Justice Stevens' Dissent

In a lengthy opinion, Justice Stevens argued the majority had misconstrued the Court's prior rulings and ignored the role of *stare decisis*, thereby creating a seismic shift in Court's election law jurisprudence. He disagreed with the notion that corporations are entitled to the same First Amendment protection as individuals, writing: "The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but is also inadequate to justify the Court's disposition of this case."¹⁶⁸

Justice Stevens argued for the retention of *Austin*'s "anti-distortion" rationale writing:

Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information."¹⁶⁹

His concern over the political influence of corporations stemmed from the vast sums of money they potentially are able to contribute to a particular candidate or cause, as well as the special characteristics of their structure, which permits corporations to focus attention and resources on issues that will benefit the corporation in ways that are unique to them and which differentiate them from ordinary groups of citizens.¹⁷⁰ Summing up the argument that campaign finance restrictions on unions and corporations should be upheld, Justice Stevens concluded: "While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."¹⁷¹

¹⁶⁵ *Citizens United*, 130 S. Ct. at 905.

¹⁶⁶ *Id.* at 904.

¹⁶⁷ *Id.* at 908.

¹⁶⁸ *Id.* at 930 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁹ *Id.* at 947 (Stevens, J., concurring in part and dissenting in part (quoting *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 161 n.8 (2003))).

¹⁷⁰ *Citizens United*, 130 S. Ct. at 955–57 (Stevens, J., concurring in part and dissenting in part).

¹⁷¹ *Id.* at 979 (Stevens, J., concurring in part and dissenting in part).

The Reaction

The response to *Citizens United* was swift, and in some instances extreme. Commentators argued that eliminating the restrictions on union and corporate money for political elections will heighten the influence of special interest and advocacy groups to an unprecedented level.¹⁷²

Other commentators were measured in their response. Respected Supreme Court scholar Professor Lawrence Tribe wrote:

I would say only that I share neither the jubilant sense that the First Amendment has scored a major triumph over misbegotten censorship nor the apocalyptic sense that the Court has ushered in an era of corporate dominance that threatens to drown out the voices of all but the best connected and to render representative democracy all but meaningless.¹⁷³

Based on Justice's Stevens' dissent, some critics of *Citizens United* have attempted to frame the debate over the decision as whether, and to what extent, corporations have First Amendment rights. However, years before *Citizens United* was decided the Supreme Court recognized that corporations enjoy the protection of the First Amendment. Therefore, the question is not whether unions and corporations "have" First Amendment rights and, if so, whether they are coextensive with those of individuals. They do, and the protection of those rights also had been extended to political speech years before *Citizens United* was decided. Rather, the proper question is whether the BCRA abridged political expression that the First Amendment was intended to protect. *Citizens United* held that it did, and once placed in its proper context, the decision's analysis is not as remarkable as many critics suggest.

Several commentators have also suggested that *Citizens United* and the resulting flow of additional money into judicial campaigns may prompt a push for merit selection in states that elect their judges help and ultimately help to eliminate judicial elections.¹⁷⁴

¹⁷² See, e.g., Russ Feingold, Op-Ed., *Democracy Hurt by Citizens United Decision*, WASH. POST, Jan. 24, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012203874.html>.

¹⁷³ Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG (Jan. 24, 2010), available at <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united>.

¹⁷⁴ Abbe R. Gluck & Victor A. Kovner, *The Perils of Electing Judges*, ALBANY TIMES UNION, Feb. 4, 2010, at A11, available at <http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=9400202> (explaining: "In the wake of *Citizens United*, all arguments in favor of electing judges, rather than appointing them through a merit process, obviously require serious reconsideration. This is because the Supreme Court held that the First Amendment prevents government from limiting independent corporate and union campaign expenditures, even expenditures focusing on campaigns of elected judges who preside over corporate and labor cases, and whose campaigns are now widely expected to be inundated especially with corporate money.").

The Impact of *Citizens United* on Judicial Independence

The challenges to judicial independence and the perceived fairness of our courts caused by large campaign contributions and the attack ads they fuel existed before *Citizens United* was decided. In the decade before the decision was announced, judicial campaign contributions more than doubled over the previous decade.¹⁷⁵ While *Citizens United* did not involve a judicial election, its rationale would bar limits on judicial campaign contributions. As a result, *Citizens United* has made the challenges posed by attack ads and campaign contributions in judicial elections more difficult to address. Over \$3 million poured into an *uncontested* Illinois Supreme Court retention election in 2010.¹⁷⁶

There are several possible approaches to the problems triggered by campaign contributions in judicial elections, each of which have their opponents and none of which is completely satisfactory. Proponents of merit selection argue that it eliminates the need for judges to fundraise. However, the force of that argument was diminished by the results of the November 2010 elections in Illinois and Iowa, where supreme court judges in each state were targeted for removal by special interest groups.

A number of states that employ merit selection still require their judges to run for retention after the expiration of their original term. Iowa is one of the “merit selection” states that hold retention elections. Illinois on the other hand elects their judges. The targeted supreme court judges in Iowa did not fundraise or attempt to blunt the television ads calling for removal from office. The targeted Illinois supreme court judge, who was running unopposed, turned to the Illinois Democratic party, unions and “trial lawyers” to raise over \$2 million to respond to the ads attacking his record.¹⁷⁷ The Iowa Supreme Court judges who did not fundraise lost the election while the Illinois Supreme Court judge was retained. The outcomes of the 2010 Iowa and Illinois Supreme Court elections suggest that campaigning and fundraising may still be required, even when judges run unopposed in retention elections, irrespective of the manner in which they were initially selected to the bench.

Public financing of judicial elections is another option, but faces two hurdles. First is the pending constitutional challenge before the Supreme Court in *McComish v. Bennett*, discussed earlier in this report. Assuming the Court decides *McComish* in a fashion that does not preclude the use of matching funds in judicial elections, proponents of this option still have to convince state legislators to adopt this approach in the face of declining tax revenues and budget shortfalls. While this may be difficult to sell, it is not impossible, as the recent adoption of public financing for judicial elections in Wisconsin demonstrates.



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¹⁷⁵ SAMPLE, ET AL., *supra* note 18, at 8.

¹⁷⁶ John Gramlich, *Judge Fights In Iowa, Illinois Signal New Era For Retention Elections*, WASH. POST, Dec. 4, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403857.html>.

¹⁷⁷ *Id.*



So what is the best solution to the problems created by third-party attack ads? The answer is staring at you in the mirror. As one state supreme court chief judge remarked, the maintenance of judicial independence requires “the vigilant and able support of the bar.”

The approach the Task Force recommends is to strengthen state judicial disqualification rules, and require the automatic disqualification of a judge who receives campaign contributions above a specific threshold from a party or an attorney appearing before the judge. The recommendation is outlined in the section of this report addressing the Supreme Court’s *Caperton* decision.

Strengthening state disqualification rules, however, does not necessarily answer the problem of independent contributions by third parties who oppose a particular judge or judicial candidate. Enhanced disclosure requirements provide another tool to address independent campaign donations by those who sponsor attack ads. While corporations may want to avoid upsetting their customer base through heavy financial support or opposition of certain judicial candidates,¹⁷⁸ those who run special interest groups, however, do not share that concern. Criticizing “activist judges” is a way to rally supporters to their cause. Laws requiring disclosure of those who fund third-party attack ads will at least let judges, voters and members of the bar know who are behind these ads.

So what is the best solution to the problems created by third-party attack ads? The answer is staring at you in the mirror. As one state supreme court chief judge remarked, the maintenance of judicial independence requires “the vigilant and able support of the bar.”¹⁷⁹ Members of the organized defense bar have to be ready to protect the independence of judges in their state. State and local defense organizations should be prepared to respond to unfair and unwarranted attacks against the judiciary.

¹⁷⁸ Tribe, *supra* note 173. For example, in August 2010, Target’s chief executive officer was forced to apologize after it was discovered that the company had made a major donation to a candidate for governor who opposed gay rights. David G. Savage, *Ad Transparency Not So Clear*, CHICAGO TRIBUNE, Oct. 27, 2010, available at http://business.verizon.net/SMBPortalWeb/appmanager/SMBPortal/smb?_nfpb=true&_pageLabel=SMBPortal_page_newsandresources_headlinedetail&newsId=229243&categoryname=Legal&portletTitle=Legal; see also John Gibeaut, *A Cautionary Tale of Corporate Political Spending Emerges in Minnesota*, ABA JOURNAL (Oct. 22, 2010), available at http://www.abajournal.com/news/article/a_cautionary_tale_target_corporate_political_spending_emerges_in_minnesota.

¹⁷⁹ De Muniz, *supra* note 16, at 379.

Improving Accountability Through Judicial Performance Evaluations

Judicial Performance Evaluations

Although debate continues between those who favor and those who oppose Judicial Performance Evaluations (JPEs), the pendulum appears to have swung in favor of the increased use of JPEs.

JPEs perform two main purposes. First, they help foster self-improvement by individual judges. Second, they provide relevant information to members of the public so they can make informed decisions when voting for judicial candidates running for election or retention.¹⁸⁰ Without relevant information, individuals may either abstain from voting for judicial candidates, base their vote on misinformation obtained through the media or base their vote on the candidate's name, race, gender or ballot position.¹⁸¹

In 1975, Alaska became the first state to implement JPEs. Ten years later, the ABA developed its first guidelines for JPEs. In 2005, the ABA promulgated its "Black Letter Guidelines for the Evaluation of Judicial Performance," which recognized the importance of JPEs and advocated their adoption by court systems as a tool to improve the performance of individual judges, the judiciary as a whole, and to help "those responsible for continuing judges in office to make informed decisions."

JPEs strengthen the independence of the judiciary and concomitantly reduce the politicization of the judicial system. Professor David C. Brody of Washington State University, in a 2002 article entitled: *A Report on the Washington State Judicial-Performance Evaluation Project*, stated:

Proponents of JPE programs contend that sanctioned evaluations of judges actually increase judicial independence. They argue "judicial independence is the independence of judges in their judicial capacity from control by inappropriate external forces, pressures, or threats."... Consequently, providing voters with relevant unbiased information about a judge's performance derived from both attorneys and laypersons defuses negative campaign tactics.¹⁸²

Moreover, voters surveyed in states that use JPE programs to inform the public reported the information given them was helpful when voting in judicial elections. The survey respondents

You have been in a position to observe the functions of the court system. Your opinion of the system is important to the system. Please take a few minutes to complete this survey regarding your observations of Judge [Name].

Did the judge's behavior appear to be free from bias or prejudice?

Did the judge conduct proceedings in a fair and impartial manner?

¹⁸⁰ For states holding contested elections, the challenge with JPEs will be how to evaluate non-incumbent candidates who lack the same track record of judicial evaluations or decisions, and not to allow them potentially to work to the disadvantage of a judge running in a contested election.

¹⁸¹ DiVito, *supra* note 86, at 624 (observing "voters who lack knowledge to make intelligent choices are selecting judges based on bias rooted in gender, race and ethnic identity").

¹⁸² David C. Brody, *A Report on the Washington State Judicial Performance Evaluation Pilot Project*, 56 WASHINGTON STATE BAR NEWS, Sept. 2002, at 30–35, available at <http://www.wsba.org/media/publications/barnews/archives/2002/sep-02-report.htm>.



Well designed, politically neutral JPEs foster judicial independence while promoting both judicial accountability and public awareness.

also reported they would be more likely to vote in a judicial election “because of the information provided.”

Thirty-nine states elect at least some of their judges, and a clear majority of cases in the United States are heard by elective courts.¹⁸³ Thus, it is critically important that judges remain independent and not succumb to political or financial pressures when performing their statutory and constitutional duties. Our legal system can only effectively function when judges are free to reach decisions without succumbing to the vagaries of political pressures. Justice Sandra Day O’Connor has aptly observed:

The legitimacy of the judicial branch rests entirely on its promise to be “fair and impartial” and if the public loses faith in that—if the public believes that judges are “just politicians in robes”—there’s no reason to respect judge’s opinions any more than the ‘opinions of the real politicians representing the electorate.’¹⁸⁴

Well designed, politically neutral JPEs foster judicial independence while promoting both judicial accountability and public awareness. The University of Denver’s Institute for the Advancement of the American Legal System (IAALS) explains:

Measuring judicial accountability by such neutral, process-oriented standards does not impede judicial independence. Rather, it bolsters that independence by focusing the public on the process of judging and away from the occasional controversial outcome. Citizens who are educated about the qualities of a good judge—legal knowledge, patience, fairness, clarity and efficiency—are less likely to be outcome-oriented and more likely to place each decision in the context of the court’s overall role in our system of government.¹⁸⁵

IAALS has further observed: “The public demand for judicial accountability has risen considerably in recent years, and never has it been more important for courts to acknowledge that demand and take ownership of it. Indeed, if courts do not innovate ways to hold themselves accountable, the public will do it for them.”¹⁸⁶

¹⁸³ *State Judicial Elections*, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, available at http://www.brennancenter.org/content/section/category/state_judicial_elections (last visited Nov. 21, 2010).

¹⁸⁴ Adam Skaggs, *Judges and Politics Don’t Mix*, BRENNAN CENTER FOR JUSTICE BLOG (Feb. 12, 2010), available at http://www.brennancenter.org/blog/archives/judges_and_politics_dont_mix/.

¹⁸⁵ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (IAALS), SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (IAALS ed., UNIV. OF DENVER 2006), available at <http://www.du.edu/legalinstitute/pubs/SharedExpectations.pdf>.

¹⁸⁶ IAALS, TRANSPARENT COURTHOUSE, A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION, (IAALS ed., UNIV. OF DENVER 2006), available at <http://www.du.edu/legalinstitute/pubs/TransparentCourthouse.pdf>.

Twenty-one states now employ JPEs.¹⁸⁷ Well drafted, politically neutral JPEs:

- Enable each judge who is evaluated to benefit from feedback and have the opportunity for self-improvement;
- Provide information to voters in states where judges are chosen by election, thereby enabling voters to make informed decisions based upon historical data;
- Educate the public that specific case outcome should not be the determinative factor in judicial election or retention; rather, judges should be evaluated on neutral criteria related to the process of judging.

In an article entitled: *Transparent Courthouse: A Blueprint for Judicial Performance Evaluation*, the IAALS defines the “core principles” of JPEs as:

Transparency—The system should be designed so that all involved—the judges, the evaluation commission, survey respondents, and the public—fully understand and trust the evaluation process.

Fairness—Evaluations should be fair in design and result.

Thoroughness—Evaluations should take into account all relevant information, and be done frequently enough so that the data is meaningful. The data on which the evaluations rely should be as comprehensive as possible.

Shared expectations—Evaluations should teach judges about their strengths and weaknesses on the bench, and promote improved performance. At the same time, evaluations should teach the public about the proper way to evaluate a judge, based on process-oriented measures, not individual case outcomes.¹⁸⁸

Transparency

Fairness

Thoroughness

Shared expectations

Judicial Performance Commissions

Judicial Performance Evaluations are created either by statute, state constitution or court rule. Every state with a current JPE program uses a statewide commission to evaluate judges. In addition, some states also utilize local commissions on the theory that they will have greater familiarity with the judges they evaluate.

The composition of the commissions is important. Commissions should be comprised of both lawyers and non-lawyers and strive for racial, political and gender balance. Commissions must also approach their work in a politically neutral manner.

¹⁸⁷ DAVID ROTTMAN ET AL., U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004: Table 10: Judicial Performance Evaluation (2006), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>. This table includes information of the Judicial Performance Evaluation Commission of the 50 states in 2004.

¹⁸⁸ IAALS, *supra* note 186, at 1.



“Under no circumstances should evaluation results always be kept confidential. Failure to provide evaluation results to the public is a missed opportunity to educate voters about the proper criteria for evaluating judges, as well as a failed occasion to praise excellent judges and hold less-than excellent judges accountable.”

Frequency of Evaluations

The frequency JPEs are performed is important because regular JPEs afford judges the opportunity to receive anonymous feedback from many sources—lawyers, courtroom personnel, witnesses and jurors. Through feedback, judges learn their strengths and weaknesses and can work to improve in areas in which they are perceived to be weak or deficient. Accordingly, even in those states where judges are appointed and do not face retention elections, evaluations should be made at regular intervals.

Frequent JPEs and the publication of their results will also educate the voting public in those states that elect their judges. JPEs promote judicial independence by educating the public on the type of objective professional standards they should employ when evaluating a judge or judicial candidate, rather than focusing on the outcome of any particular case.

Confidentiality/Non-Confidentiality/Dissemination

The IAALS advocates openness and transparency with regard to the dissemination of the results of JPEs, particularly when judges are facing election. IAALS also strongly recommends disseminating the results of JPEs through the use of websites, press coverage and even advertisements. They explain:

Under no circumstances should evaluation results always be kept confidential. Failure to provide evaluation results to the public is a missed opportunity to educate voters about the proper criteria for evaluating judges, as well as a failed occasion to praise excellent judges and hold less-than excellent judges accountable.

On the other hand, confidentiality may be appropriate where the judge is not scheduled to face voters immediately. For example, if an appellate judge with an eight-year term is evaluated every two years, keeping the mid-term evaluations confidential allows the judge to identify—and acknowledge—areas of professional strength and weakness without the accompanying pressure of an election.¹⁸⁹

If full transparency is not practical, the IAALS recommends an amalgamated approach, in which mid-term evaluations are initially shared only with the judge, but during election years all previous mid-term reports and the election year report are publicly disseminated. This approach allows a judge to work toward professional self-improvement out of the public eye, but holds the judge accountable to the voters for whether that improvement was actually achieved.¹⁹⁰ Guideline 3–4 of the ABA’s Black Letter Guidelines for the Evaluation of Judicial

¹⁸⁹ IAALS, *supra* note 186, at 6.

¹⁹⁰ *Id.*

Performance also advocates that the results of JPEs be made “readily available to those responsible for continuation decisions,” when the issue is whether judges will continue in office.¹⁹¹

Evaluation Criteria

Different criteria must be used to evaluate trial and appellate judges. A trial judge “should be evaluated on the basis of case management skills, fairness and demeanor and teamwork,” whereas appellate judges “should be evaluated on the basis of clarity of opinions, adherence to the facts and law of the case and workload management.”¹⁹²

The ABA’s recommended criteria for JPEs are similar but more comprehensive. The ABA’s benchmarks include legal reasoning ability, knowledge of substantive law, knowledge of rules of procedure and evidence, knowledge of current developments in the law, procedure, and evidence, avoiding impropriety and the appearance of impropriety, treating all people with dignity and respect, manifesting neither favor nor disfavor toward anyone, acting fairly, considering both sides of an argument before making a decision, basing decisions on the law and the facts without regard to the identity of the parties or counsel, having an open mind on all issues and being able to make difficult or unpopular decisions.¹⁹³

Confidentiality of Survey Respondents

To be viable, JPEs must assure the confidentiality of the survey participants, particularly in states where JPE forms are signed. Without such assurance, survey participants will be reluctant to participate or might skew their responses to avoid identification. Safeguards must be in place to preserve the total anonymity of all survey respondents.

Conclusion

Judicial performance evaluations strengthen and improve the quality and independence of the judiciary. They can be used to educate the public as to the relevant neutral qualities they should use when evaluating a judge, rather than focusing on the outcome of specific cases. In doing so, they help depoliticize the electoral process.

Our system of justice remains credible and relevant if judges have the independence to decide cases by applying existing laws and processes to assure a fair and reasonable result. Judicial independence is lost when judges fall prey to political or media pressure over correct, but unpopular decisions.¹⁹⁴ Because judicial performance evaluations help to achieve these goals, SLDOs in those states that do not have such a process should consider discussing the adoption



Our system of justice remains credible and relevant if judges have the independence to decide cases by applying existing laws and processes to assure a fair and reasonable result. Judicial independence is lost when judges fall prey to political or media pressure over correct, but unpopular decisions.

¹⁹¹ AMERICAN BAR ASSOCIATION BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, Guideline 3-4 (2005).

¹⁹² IAALS, *supra* note 186, at 7.

¹⁹³ BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE §5 (2005).

¹⁹⁴ IAALS, *supra* note 186, at 6.

of this type of evaluative process with the leaders of your state’s judicial association and with members of your supreme court.

Model judicial evaluation forms from the IAALS article, “Transparent Courthouse, A Blueprint for Judicial Performance Evaluation,” and model judicial self-evaluation forms from the IAALS publication, “Shared Expectations,” are included in [Appendix A](#) (page 90) for possible use by SLDO leadership.

Judicial Diversity and a Comparison of Election vs. Appointment Systems

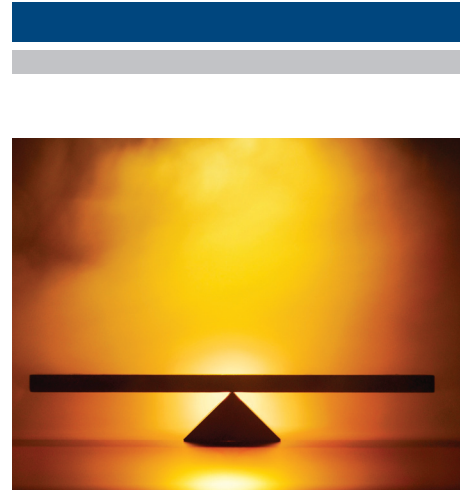
Introduction

Today, 11.6 percent of state judgeships are held by minorities.¹⁹⁵ However, minorities constitute one third of the United States' population.¹⁹⁶ As one recent commentator observed: "The numbers are stark. It is not hyperbole to say that we have a country of white male judges wholly disproportionate to their percentage of the general population."¹⁹⁷ This lack of diversity challenges the legitimacy of judicial decision-making in the eyes of many. DRI's Task Force has reviewed a substantial body of research dedicated to understanding and addressing the lack of diversity in our nation's state court systems. In the following sections, the Task Force highlights that review, and provides recommendations for building a more diverse judiciary.

Why Judicial Diversity Matters

The absence of judicial diversity fosters a perception of bias among various segments of our society. The judiciary's homogeneity heightens the perception that the judicial system is unfair. The American judiciary, and our rule of law, depend upon the public's confidence in and its respect for judicial decrees. When public trust in the judiciary erodes, so does the effectiveness of our court systems. Accordingly, "[i]t is not enough for the courts to be just; they must also be perceived to be just."¹⁹⁸

In 1999, the National Center for State Courts surveyed members of the general public about their perceptions of the judiciary. Among other things, the survey revealed that 32 percent of African Americans, 26 percent of Hispanics, and 19 percent of Whites either somewhat or strongly disagreed that "judges are generally honest and fair in deciding cases."¹⁹⁹ And, when asked how courts treat African Americans, 68 percent of African Americans, 42 percent of Hispanics, and 43 percent of Whites responded that courts treat African Americans either somewhat or far worse than other groups.²⁰⁰ While many factors undoubtedly contribute to these perceptions, the lack of diversity is a contributing factor. Until the courts "represent the rich diversity of our nation, their credibility and legitimacy will be questioned" in vari-



¹⁹⁵ *Judicial Selection in the States: Diversity of the Bench*, AMERICAN JUDICATURE SOCIETY, available at http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state (last visited Nov. 21, 2010).

¹⁹⁶ *Minority Census Participation*, U.S. CENSUS BUREAU, available at <http://2010.census.gov/mediacenter/awareness/minority-census.php> (last visited Nov. 21, 2010).

¹⁹⁷ Steven Zeidman, *Careful What You Wish for: Tough Questions, Honest Answers, and Innovative Approaches to Appointive Judicial Selection*, 34 FORDHAM URB. L.J. 473, 476 (2007).

¹⁹⁸ Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 176 (1996).

¹⁹⁹ NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 30 (1999).

²⁰⁰ *Id.* at 38.



The American judiciary, and our rule of law, depend upon the public's confidence in and its respect for judicial decrees. When public trust in the judiciary erodes, so does the effectiveness of our court systems. Accordingly, "[i]t is not enough for the courts to be just; they must also be perceived to be just."

ous communities because "perceptions of bias will [continue to] persist."²⁰¹ State and local bar associations must combat these perceptions by seeking a more diverse judiciary.

A Diverse Judiciary Provides a Broad Range of Perspectives

A more diverse judiciary will not only improve public perception of American courts, it will enhance the public's confidence in our court systems by ensuring that all segments of our society have a voice in the decision-making process. A diverse judiciary is able to take into account a broad range of views and perspectives that enriches the decision-making process. Although judges seek to fairly interpret and apply the law, each is human, and inevitably influenced by his or her own unique background, experiences, and understanding of human nature. While such humanity is an indispensable judicial attribute, it entails the risk that "the absence of diversity [will] create... a judicial partiality to the values and stories of the groups overrepresented" on the bench.²⁰² But a truly diverse judiciary—one that offers a complete "cross-section of perspectives and values from the community"²⁰³—will help to ensure "that no one perspective dominates legal decision-making."²⁰⁴ A diverse judiciary will bolster the "structural impartiality" of our court systems.²⁰⁵

By the same token, a diverse judiciary will supplement the decision-making process by "introduc[ing] traditionally excluded perspectives and values into judicial decision-making."²⁰⁶ A diverse bench will less likely be hindered by experiential "blind spots" that might prevent a homogenous bench from fully appreciating the nuances of certain facts, the condition of certain parties and the consequences of certain rulings.²⁰⁷

²⁰¹ LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY: A REVIEW OF STATE JUDICIAL SELECTION MODELS AND THEIR IMPACT ON DIVERSITY, 6 (2005), available at http://www.soros.org/initiatives/usprograms/focus/transparency/articles_publications/publications/judges_20050923/answering_20050923.pdf.

²⁰² See James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 781–83 (2004) ("Judges are not born and reared in isolation. Rather, judges, like the rest of us, are the product of historical circumstance, personal experience, and accidents").

²⁰³ Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000).

²⁰⁴ *Id.*; see also Wynn & Mazur, *supra* note 202, at 783 (observing that "[i]n American society, life experience and perception are inextricably bound to race, ethnicity, and gender. For example, a vast array of empirical research demonstrates a racial divide on issues as divergent as discrimination, taxes, and the size of the federal government." (citations omitted)).

²⁰⁵ Ifill, *supra* note 203, at 411.

²⁰⁶ *Id.* at 410.

²⁰⁷ See LINDA MEROLA & JON GOULD, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, IMPROVING DIVERSITY ON THE STATE COURTS: A REPORT FROM THE BENCH 6 (2009), available at <http://www.lawyerscommittee.org/admin/site/documents/files/LCCRUL-JudicialDiversityReport.pdf> ("Judges from different backgrounds and a diversity of experi-

Diversity Begets Diversity

A diverse bench now will help ensure a diverse bench in the future. As our nation's diversity increases, so does the need for a well qualified, demographically representative judiciary. A homogenous judicial branch is self-perpetuating and can be perceived as a signal to aspiring judicial candidates that they need not apply. In contrast, expanding judicial diversity signals to other "minority candidates that they have a fair chance of success; this can encourage more diverse applicants which, in turn, is likely to result in a higher number of actual diverse members on the bench."²⁰⁸ SLDOs and bar associations should work to advance this diversity cycle.

Understanding the Problem, Finding Solutions— The Impact of Judicial Selection Methods

A contributing factor to the lack of judicial diversity is the judicial selection process—or, more precisely, the process each state employs to select its judges. As noted above, some states have appointment systems; others hold partisan or non-partisan judicial elections; many have combination systems, in which commissions appoint judges who are then subject to "retention" elections, or in which selection processes vary by court level.²⁰⁹ Research into which selection method best promotes judicial diversity has revealed no clear winner.²¹⁰ Indeed, one recent study concluded that "particular methods of selection are unrelated to rates of judicial diversity."²¹¹ But one conclusion is clear: neither the appointment nor the election method can by itself adequately promote judicial diversity without a commitment from all involved. Various commentators have recognized "the racial composition of state judiciaries consistently fail[s] to reflect the diversity of each state's population."²¹²

However, research also demonstrates that virtually any selection method can yield diverse results if operated with that goal in mind. Descriptions of the most common obstacles to judicial diversity—and the best practices for overcoming them—under the appointment and election selection systems are outlined below.



**One conclusion is clear:
neither the appointment nor
the election method can by
itself adequately promote
judicial diversity without a
commitment from all involved.**

ences help to guard against the possibility of narrow decisions. Judges can debate with one another, offering divergent perspectives and educating their colleagues about how their decisions will affect various populations.”).

²⁰⁸ *Id.*

²⁰⁹ See LAWYERS’ COMMITTEE, *supra* note 201, at 9–19 (providing an in depth discussion of the different selection models and how each impacts judicial diversity).

²¹⁰ *Id.* at 19 (quoting one commentator’s observation that “the literature on the subject is highly contradictory”).

²¹¹ Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 47 (2008).

²¹² LAWYERS’ COMMITTEE, *supra* note 201, at 22.

Election Methods

In 2009, The Justice at Stake Campaign and the Lawyers' Committee for Civil Rights Under Law cosponsored a ground-breaking publication: *Improving Diversity on the State Courts: A Report from the Bench*. Researchers interviewed a number of minority state judges about the obstacles they faced in seeking their judgeships.²¹³ Among other things, minority judges who were elected reported that "candidates of color... are hampered by relative difficulty in raising sufficient funds to run an effective campaign."²¹⁴ Minority candidates struggle to raise campaign funds because of their relative "lack of access to networks of donors,"²¹⁵ and because "disparities in the distribution of wealth" in the United States make people of color, broadly speaking, less able to make private individual campaign contributions.²¹⁶

State and local bar associations can help minority judicial candidates overcome the problem of campaign fundraising in several ways. They can actively support qualified minority judicial candidates. They can also use their influence with local business interests to provide minority candidates with forums to access those groups and encourage their support of minority candidates. Organizations can offer minority judicial candidates campaign management and fundraising training.²¹⁷ Bar leaders can encourage states to adopt campaign finance reforms, such as public financing of judicial elections, to help level the playing field for all judicial candidates. In 2002, the American Bar Association observed that public financing of judicial elections provides greater "access to judicial office for all candidates, of color or otherwise, who derive their support from less affluent communities that are unlikely to make significant contributions to judicial races."²¹⁸ That is perhaps even more true now, in light of the Supreme Court's *Citizens United* decision,²¹⁹ which limited the government's power to restrict corporate and union election spending.²²⁰ Finally, bar associations can encourage state legislatures to increase judicial salaries, so qualified minority judicial candidates are less deterred by "hav[ing] to raise a significant sum to run for a judicial post with a comparatively low salary."²²¹

²¹³ MEROLA & GOULD, *supra* note 207, at 14–31.

²¹⁴ *Id.* at 33–34.

²¹⁵ *Id.* at 34.

²¹⁶ LAWYERS' COMMITTEE, *supra* note 201, at 15.

²¹⁷ MEROLA & GOULD, *supra* note 207, at 33.

²¹⁸ AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 26 (2002), available at http://www.americanbar.org/content/dam/aba/migrated/judind/pdf/commissionreport4_03.authcheckdam.pdf.

²¹⁹ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

²²⁰ See Justice at Stake Campaign Press Release, Citizens United Called Grave Threat for America's Courts (Jan. 22, 2010), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/citizens_united_called_grave_threat_for_americas_courts?show=news&newsID=6669.

²²¹ MEROLA & GOULD, *supra* note 207, at 34.

Minority judicial candidates in election states also face the obstacle of voter bias. The Lawyers' Committee for Civil Rights Under Law observed that "minority candidates [often] struggle to overcome negative preconceptions and stereotypes when running for office."²²² Some voters misguidedly assume that minority candidates "will be too liberal or soft on crime in their judicial rulings," and "that [minority judges] are unable to make fair decisions in matters that involve the interests of their particular minority group."²²³ An examination of the voting records and expressed views of Supreme Court Justices Thurgood Marshall and Clarence Thomas reveals these types of assumptions about judicial candidates are simply wrong. While such assumptions are becoming less prevalent, voter bias still remains a hurdle to judicial diversity.²²⁴

Although there are no easy answers to the issue of voter bias,²²⁵ bar organizations can take certain actions to counteract its impact. State and local bar associations can seek to "educate the public about the benefits of judicial diversity, and publicize the accomplishments of judges of color."²²⁶ Generally speaking, voters know very little about the judicial candidates they are asked to elect, and often cast their votes with little information beyond the names of the candidates. When that is the case, some voters, perhaps by default, select candidates based on names with which they have "a level of comfort," potentially disadvantaging candidates whose names are unique, foreign, or otherwise suggestive of their minority status.²²⁷ State and local bar associations can combat that voter tendency by increasing the public's knowledge about the background, experience and qualifications of the judicial candidates, and by extolling the benefits of judicial diversity.

Minority judicial candidates seeking election can also increase their chances for success by becoming actively involved in community service and specialty bar associations, especially "those related to particular racial or ethnic communities."²²⁸ Service and leadership in the community and in bar associations will mobilize support from those groups and limit the impact of voter bias.



"[V]oters who lack knowledge to make intelligent choices are selecting judges based on bias rooted in gender, race and ethnic identity..."

²²² LAWYERS' COMMITTEE, *supra* note 201, at 16.

²²³ *Id.*; see also Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 118–19 (1998) (observing that "[t]he appointment or election of [minority] judges is viewed with suspicion and often seen as a response to narrow, parochial interests rather than as benefitting the judicial system as a whole.").

²²⁴ MEROLA & GOULD, *supra* note 207, at 31; see also LAWYERS' COMMITTEE, *supra* note 201, at 16–19 (providing empirical and anecdotal evidence of voter racial bias affecting judicial outcomes in a number of recent elections).

²²⁵ LAWYERS' COMMITTEE, *supra* note 201, at 18.

²²⁶ MEROLA & GOULD, *supra* note 207, at 32.

²²⁷ LAWYERS' COMMITTEE, *supra* note 201, at 17.

²²⁸ MEROLA & GOULD, *supra* note 207, at 25.



Florida requires its “Governor [to] seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered. Such provisions reflect the intuitive fact that “[m]ore diverse Commissions end up nominating more diverse slates of candidates than do homogenous Commissions.”

Appointment Methods

While appointment methods obviate the fundraising and voter bias problems of judicial elections,²²⁹ they present other challenges to judicial diversity. In 2008, the Brennan Center for Justice reported on the obstacles to judicial diversity inherent in appointment systems.²³⁰ The Brennan Center’s report recommended certain “best practices” for overcoming those obstacles which are outlined below.²³¹

Critics denounce appointment systems as mechanisms that preserve the status quo unfavorable to the historically underrepresented.²³² Although recent studies indicate that appointment systems are actually no worse or better than election systems at creating judicial diversity,²³³ it is also true that “historically, nominating Commissions have tended to have mostly white male members, which led to mostly white male appointments.”²³⁴ Because the tendency of Commissions is to under-nominate women and minorities,²³⁵ best practices for producing judicial diversity in appointment states involves combating any implicit bias by alerting decision-makers to its existence, by taking steps to obviate its impact on the appointment process and by developing strategies to enhance minority judicial appointments.

To combat any implicit bias, those responsible for nominating and appointing state judges must be individually and collectively committed to creating a diverse bench. One way to foster that commitment is to diversify the nominating commissions.²³⁶ To accomplish that goal, some states have enacted specific statutory or constitutional requirements that those who select commissioners do so with diversity in mind. Florida for example, requires its “Governor [to] seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered.”²³⁷ Such provisions reflect the intuitive fact that “[m]ore diverse Commissions end up nominating more diverse slates of candidates than do homogenous Commissions.”²³⁸

Although a diverse commission is more likely to appoint a diverse bench, it will do so only peripherally and inconsistently unless it is subject to oversight. Accordingly, the Brennan Cen-

²²⁹ But those challenges also exist where appointed judges must face retention elections.

²³⁰ CIARA TORRES SPELLISCY ET AL., BRENNAN CENTER FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY (2008) available at http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf.

²³¹ *Id.* at 36–42.

²³² WYNN & MAZUR, *supra* note 202, at 786.

²³³ See SPELLISCY, *supra* note 230.

²³⁴ *Id.* at 8.

²³⁵ *Id.* at 11.

²³⁶ *Id.* at 10.

²³⁷ FLA. STAT. §43.291(4) (2009).

²³⁸ See SPELLISCY, *supra* note 230, at 10.

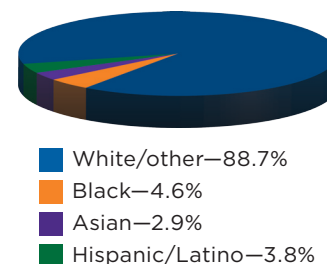
ter recommends that Commissions formally “set out the parameters of when and how diversity can come into play,” with such parameters preferably founded on a “statutory requirement that the Commission... foster a bench which reflects the diversity of the state.”²³⁹ And to create oversight and accountability, the Brennan Center recommends that each Commission appoint a “diversity ombudsman”—that is, “a particular individual responsib[le] for monitoring diversity levels and strategizing about how to maintain or improve the current levels of diversity.”²⁴⁰ Commissions should also establish a transparent and consistent application process to help ensure that each judicial candidate is treated similarly, thereby limiting the opportunities for implicit bias to control outcomes.²⁴¹

But regulations and new positions may not be enough. Many courts remain homogenous despite their states’ commitment to judicial diversity.²⁴² Nominating commissions, local bar associations, and mentors must actively recruit and encourage minority judicial candidates. Formal recruitment and outreach mechanisms—such as minority-group-targeted mailings announcing judicial vacancies, public question-and-answer sessions with nominating commissioners,²⁴³ and judicial recruiting sessions sponsored by specialty bar associations—will “help qualified candidates of color to know that a judicial career is a realistic possibility and that those in the system are serious about recruiting a diverse candidate pool.”²⁴⁴

Improving the Pipeline

Barriers to judicial diversity are exacerbated by the bar’s overall lack of diversity. In 2008, the Bureau of Labor Statistics reported that of the 1,014,000 lawyers in the United States, only 4.6 percent were Black, 2.9 percent were Asian, and 3.8 percent were of Hispanic or Latino ethnicity.²⁴⁵ Measures to increase diversity on the bench will have limited success if the pipeline of minority judicial candidates continues to drip instead of flow. Indeed, “any comprehensive plan to diversify state judiciaries must also incorporate methods to increase the state bar membership of minorities and women.”²⁴⁶ Accordingly, state and local organizations “should

Racial makeup of 1,014,000 lawyers in the United States (2008).



²³⁹ *Id.* at 38.

²⁴⁰ *Id.* at 40.

²⁴¹ *Id.* at 38–39.

²⁴² *Id.* at 16–19 (discussing the absence of judicial diversity in Arizona, Tennessee, Maryland, Florida and New Mexico, each of which has constitutional or statutory provisions related to creating diverse Commissions or benches).

²⁴³ *Id.* at 34.

²⁴⁴ MEROLA & GOULD, *supra* note 207, at 29.

²⁴⁵ U.S. BUREAU OF LABOR STATISTICS, REPORT 1020: LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008 16 (November 2009) available at <http://www.bls.gov/cps/cpsrace2008.pdf>.

²⁴⁶ SPELLISCY, *supra* note 230, at 20.



Measures to increase diversity on the bench will have limited success if the pipeline of minority judicial candidates continues to drip instead of flow. Indeed, “any comprehensive plan to diversify state judiciaries must also incorporate methods to increase the state bar membership of minorities and women.”

promote efforts to increase the enrollment of law students of color” through “increased recruitment, mentoring, and counseling on judicial career opportunities.”²⁴⁷

Recommendations

Building a diverse American judiciary requires awareness and commitment. SLDOs should educate their members and the public about the value of a diverse judicial branch, and should formally commit to building a diverse bench and bar. Specifically, the Task Force recommends that SLDOs consider the following initiatives:

- Providing mentorship and counseling to minority judicial aspirants;
- Assisting minority candidates seeking election or running for retention to overcome the obstacle of fundraising by providing campaign management and finance training;
- Advocating for election reform, including public financing of judicial elections;
- Assisting minority candidates seeking election or running for retention to overcome voter bias by educating the public about the benefits of judicial diversity, by publicizing the accomplishments of minority judges,²⁴⁸ and by helping minority judicial aspirants become leaders in the community and in local organizations;
- Encouraging legislatures in appointment states to adopt explicit statutory provisions requiring nominating commission membership to reflect the diversity of the state;
- Encouraging legislatures in appointment states to adopt explicit statutory provisions requiring nominating commissions to account for judicial diversity when making nominations;
- Encouraging nominating commissions to adopt formal diversity initiatives, to appoint a “diversity ombudsman,” and to establish a transparent and consistent application and interview process;
- Encouraging nominating commissions to actively and strategically recruit qualified minorities to fill judicial vacancies;
- Encouraging state legislatures to increase judicial salaries to attract the most qualified minority candidates;
- Improving the “pipeline” by promoting efforts to increase minority enrollment in law schools, and by actively encouraging qualified minority attorneys to pursue judgeships.

²⁴⁷ LAWYERS’ COMMITTEE, *supra* note 201, at 5, 29.

²⁴⁸ MEROLA & GOULD, *supra* note 207, at 32.

The Recession's Impact on State Court Budgets

State courts are the fundamental cornerstone of the nation's legal system, handling more than 95 percent of all civil and criminal litigation.²⁴⁹ However, the impact of the recession on state court budgets has been dramatic. The country's deep economic downturn has placed so much additional stress on already compromised judicial budgets that Margaret Marshall, Chief Justice of the Massachusetts Supreme Judicial Court, warned that many state court systems stand at "the tipping point of dysfunction" because of budget cuts triggered by the recession.²⁵⁰

Learned Hand once said: "If we are to keep our democracy, there must be one commandment: Thou shall not ration justice." However, the rationing of justice is now occurring in many of our state court systems across the country as a result of state budget cuts brought on by the recession. State courts are implementing numerous and varied cost-cutting measures, including hiring and pay freezes, reduction of court hours, consolidation of courts, and delaying needed technology upgrades.²⁵¹ New Hampshire suspended civil and criminal jury trials in 8 of 10 county courts for one month between December of 2008 and June of 2009.²⁵² California closed its state courthouses on the third Wednesday of every month.²⁵³ Iowa planned to close all state courts for several days prior to the end of its fiscal year.²⁵⁴ Additionally, more than two dozen states have imposed court hiring freezes, and 11 states have placed staff on unpaid furloughs of varying length.²⁵⁵ Despite these cost-cutting measures, during the 2010 fiscal year, 45 state court systems experienced budget deficits.²⁵⁶

Such cost-cutting measures are having a noticeable effect on the core functions of our state court systems. In Georgia, it can take 60 days to hold a hearing in a temporary custody case.²⁵⁷ Courts in Ohio have refused to accept new filings because no finances were available to reor-



²⁴⁹ Editorial, *State Courts at the Tipping Point*, N.Y. TIMES, Nov. 24, 2009, at A30, available at http://www.nytimes.com/2009/11/25/opinion/25weds1.html?_r=1 [hereinafter *State Courts at the Tipping Point*].

²⁵⁰ *Id.*

²⁵¹ National Center for State Courts (NCSC), Budget Resource Center, Cost-saving measures by state, *supra* note 3; see also National Center for State Courts (NCSC), State court budgets: Reduce hours, consolidate courts, improve technology, (July 7, 2009), available at http://www.ncsconline.org/D_Comm/PressRelease/2009/NCSC-COSCASurvey_budgets.html.

²⁵² *State Courts at the Tipping Point*, *supra* note 249.

²⁵³ *Id.*

²⁵⁴ *Id.* See also <http://www.iowacourts.gov/Administration/Budget/> for additional information on the budget cuts imposed on the judicial branch in Iowa.

²⁵⁵ *State Courts at the Tipping Point*, *supra* note 249.

²⁵⁶ National Center for State Courts, *Future Trends in State Courts 2010* 26 (2010), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605> [hereinafter *Future Trends in State Courts*].

²⁵⁷ *Id.*



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der supplies.²⁵⁸ In some states, spending cuts have resulted in a growing backlog of cases because fewer court dates are available for hearings and trials.²⁵⁹ Because priority is given to serious criminal matters, civil suits are frequently “put on the backburner,” which creates a looming threat to the civil justice system, and its ability to vindicate people’s rights in a timely manner.²⁶⁰ The ability of some court systems to provide jury trials for civil suits is being seriously compromised.

The economic downturn has prevented needed judicial growth as well. For instance, West Virginia, whose sole Supreme Court of Appeals allows no automatic right of appeal, will remain under the current judicial structure despite a legislative recommendation for a mid-level appeals court.²⁶¹ The Independent Commission on Judicial Reform estimated a cost of \$8.6 million to create a six-to-nine judge intermediate state court, and \$7.8 million annually to operate it.²⁶² However, West Virginia’s recession-sapped budget is likely to prevent the creation of that appellate court in the current legislative session, leaving criticisms from the State Chamber of Commerce and other state business groups unanswered.²⁶³

Another problem on the horizon is the deteriorating physical condition of our state court-houses. The National Center for State Courts reports “3,200 courthouses around the country are physically eroded, functionally deficient and in need of significant maintenance essential to their safe use and operation.”²⁶⁴ This looming problem must be addressed to keep our state courts vibrant and well functioning.

If that were not enough, the troubled economy has created an additional burden on state court systems through an increase in filings of recession-related lawsuits. New York courts closed 2009 with 4.7 million cases unresolved—the highest tally ever—with tens of thousands involving debt defaults and contract claims, as well as domestic violence actions linked to lost jobs and homes facing foreclosure.²⁶⁵ Florida reported approximately 400,000 foreclosure fil-

²⁵⁸ Dana Wilson, *Paperless Court is Motionless*, COLUMBUS DISPATCH, (Mar. 14, 2009), available at http://www.dispatch.com/live/content/local_news/stories/2009/03/14/morrowct.ART_ART_03-14-09_A1_4HD7RR4.html.

²⁵⁹ State Courts at the Tipping Point, *supra* note 249.

²⁶⁰ *Id.*

²⁶¹ Messina Lawrence, *New Appeals Court Unlikely for State*, HERALD DISPATCH, Feb. 9, 2010, available at <http://www.herald-dispatch.com/news/x1838470226/New-appeals-court-unlikely-for-state>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Future Trends in State Courts, *supra* note 256, at 27.

²⁶⁵ William Glaberson, *The Recession Begins Flooding Into the Courts*, N.Y. TIMES, Dec. 28, 2009, at A1, available at http://www.nytimes.com/2009/12/28/nyregion/28caseload.html?_r=1.

ings for 2009, an increase of 446 percent since 2006.²⁶⁶ In Arizona, officials said eviction cases have tripled in the last year, contract disputes are up 77 percent over the prior two years, and there is a noticeable increase in cases seeking civil commitments for mental health treatment due to stress-related conditions.²⁶⁷

Nationally, court administrators are reporting that budget pressures are forcing them to do more with less.²⁶⁸ This remains true despite the federal government's efforts to pull the country out of the current recession. Seventy-three percent of courts report that the federal stimulus had no significant impact on their operations, with 43 percent reporting that they will continue to make budget cuts.²⁶⁹ Only 27 percent of court systems reported that the federal stimulus package assisted in lessening reductions on state court budgets.²⁷⁰ The economy is wreaking havoc on state court systems and is threatening the timely delivery of justice in many parts of the country.

In 2007, the Judicial Task Force adopted a list of recommendations to address the growing problem of court funding. In addition to incorporating recommendations by the ABA,²⁷¹ the Task Force concluded that state and local defense organizations should bring coalitions of lawyers, laypersons and business groups together to support increased funding of our court systems.²⁷²

Additional Recommendations

One of the chief problems facing the judicial branch is that it lacks a strong independent voice to obtain the funding necessary to maintain the operations of their court systems at historic levels. Contributing to that problem is that the legislative and executive branches in many states are either unwilling to make spending cuts elsewhere to ensure that our court systems are adequately funded or lack the incentive to fully fund another branch of government whose goal is to remain politically independent. And, the sad reality is that the public and many members of the legislative and executive branches lack a true appreciation of the vital role the judicial branch plays for individuals and businesses in our society. In other words, the role of



Another problem on the horizon is the deteriorating physical condition of our state courthouses. The National Center for State Courts reports “3,200 courthouses around the country are physically eroded, functionally deficient and in need of significant maintenance essential to their safe use and operation.” This looming problem must be addressed to keep our state courts vibrant and well functioning.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ CENTER ON BUDGET AND POLICY PRIORITIES, BUDGET SURVEY (June 12, 2009).

²⁷⁰ *Id.*

²⁷¹ WITHOUT FEAR OR FAVOR, *supra* note 6 at 19.

²⁷² *Id.* The Task Force also recommended that such coalitions consider: studying local judicial, facility and security needs in order to become better informed, hosting symposiums or public forums to address this issue, writing letters to the editors of local newspapers to raise the public's awareness of this problem, meeting with lobbyists and legislative bodies to advocate for increased funding, speaking at civic and school functions on the subject, and banding with business, civic, and other bar groups to address local problems. *Id.*



The sad reality is that the public and many members of the legislative and executive branches lack a true appreciation of the vital role the judicial branch plays for individuals and businesses in our society.

the judicial branch is either overlooked or undervalued. Therefore, it should come as no surprise that many of our state court systems are underfunded.

Effective communication with the executive and legislative branches of government is vital for the stability of the judicial branch in today's economy. Despite the broad services provided by our state court systems, they typically receive only one to three percent of a state's budget.²⁷³ Providing the executive and legislative branches with the information reflecting the important work of the judiciary is of primary importance to making vital budget decisions. The delivery of that critical information can occur most effectively through the creation of strong inter-governmental relationships. Judicial invitations to legislative and executive officials to attend court functions will provide a deeper understanding that transcends written reports or lobbying efforts.

State and local defense organizations should organize forums that allow the executive and legislative branches to interact with leaders of the judiciary to discuss specific challenges with the goal of ensuring that our court systems are meeting or exceeding minimum constitutional requirements.

State and local defense organizations should also organize coalitions of lawyers, laypersons and business groups to better educate the public, and their elected representatives concerning the pernicious impact that budget cuts have on access to our courts by all citizens. These coalitions must understand local judicial staffing needs and budgetary concerns in order to knowledgeably communicate deficiencies to the public as well as the executive and legislative branches of government. Coalitions should also support or sponsor symposiums or forums to make the public aware of judicial budget concerns and the direct impact these issues have on the protection of their civil rights. Through cooperation and understanding, judicial budget concerns will be afforded fair consideration and adequate funding will be provided.

²⁷³ See AMERICAN BAR ASSOCIATION COMMISSION ON STATE COURT FUNDING, BRIEFING PAPER: BREAKOUT SESSION ON ADEQUATE FUNDING FOR THE COURTS AND RELATED SERVICES (2009).

Court security, and the potentially deadly consequences of a lapse in court security, remains a critical issue at both the state and federal level. Although steps have been taken to address this issue since DRI's initial report, these efforts have not gone far enough. Moving forward, members of the bench, bar, and the legislature must continue to make court security a priority.

A Growing Problem

2010 began with a sobering reminder that courts remain a target for violence. Upset over a decision that affirmed a reduction in his Social Security benefits, a 66-year-old man opened fire with a shotgun at the federal courthouse in Las Vegas. When his rampage ended, the shooter, along with a security guard, lay dead, and a deputy U.S. Marshal was wounded.²⁷⁴

Unfortunately, this is not the only recent high-profile incident involving threats of violence against judges. After the Seventh Circuit Court of Appeals upheld the dismissal of a lawsuit challenging the City of Chicago's handgun ban, a New Jersey man was arrested after he posted online the names, photos, phone numbers, and work addresses of the three judges who decided the case, as well as pictures of the courthouse with strategic defensive measures highlighted. In those posts, he also suggested that the judges "deserve to be killed."²⁷⁵

Another federal judge in Arizona received hundreds of threatening calls, in addition to having his home address and other personal information posted online, after he ruled that a \$32 million civil rights case filed by illegal immigrants against an Arizona rancher could go forward. As a result, he was forced to have a 24-hour protective detail for over a month.²⁷⁶

Threats against the judiciary are on the rise. In a December 2009 Department of Justice report, the U.S. Marshals Service reported that threats against federal judicial officials have more



²⁷⁴ See Steve Friess, *Two Killed in Las Vegas Courthouse*, N.Y. TIMES, Jan. 5, 2010, at A11, available at <http://www.nytimes.com/2010/01/05/us/05vegas.html>.

²⁷⁵ See Andrew M. Harris, *FBI Arrests Blogger for Allegedly Threatening Judges*, BLOOMBERG.COM, June 24, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOQs96169wJM>.

²⁷⁶ See Robert Anglen, *U.S. Judiciary Facing Rise in Death Threats*, AZ. REPUBLIC, July 9, 2009, at A1, available at <http://www.azcentral.com/news/articles/2009/07/09/20090709threats0709.html>; Jerry Markon, *Threats to Judges, Prosecutors Soaring*, WASH. POST, May 25, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/24/AR2009052402931.html?hpid=topnews>.



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than doubled since 2003.²⁷⁷ Although no statistics are available, many note a similar increase in threats against state court judges as well.²⁷⁸

However, it is not just judges who are being threatened. A reputed neo-Nazi, William White of Roanoke Virginia, was arrested after posting personal information on a web site about the foreman of a jury who found white supremacist Matthew Hale guilty of soliciting the murder of a federal judge in Chicago. The posted information included the foreman's name, date of birth, home address, work and telephone numbers. Other posts on that same web site suggested that anyone involved with Hale's prosecution deserved to be assassinated.

Why Court Security Matters

The safety of all who participate in the judicial process is essential to the integrity of our system of justice. The ability to resolve disputes in courts of law, rather than resorting to violence is a core concept of our rule of law. Threats and attacks against citizens and court officials are attacks on this foundational principle and to the fair and effective administration of justice. Public perception that our courtrooms lack necessary and proper security will only undermine the public's confidence in the American legal system.

Courtroom violence may also deter the use of the legal system generally. If litigants are afraid to go to court to resolve their disputes, they may turn to extra-judicial mechanisms that are less effective, inefficient, or worse, illegal. Courtroom violence may likewise deter qualified individuals from serving as judges. Threats or attacks on sitting judges can affect their decision-making, or, worse, cause them to resign, such as the case of a promising California trial judge who retired from the bench after being stabbed by a litigant during trial.²⁷⁹

Recent Developments

Two events in 2005—the murders of the husband and mother of U.S. District Court Judge Joan Lefkow of Chicago by a man angry over the dismissal of his legal malpractice case, and

²⁷⁷ DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE PROTECTION OF THE JUDICIARY AND THE UNITED STATES ATTORNEYS 1 (2009) available at <http://www.justice.gov/oig/reports/plus/e1002r.pdf> [hereinafter 2009 OIG Report]. “According to SMS Directive 10.3.G.12, *Protective Investigations*, 2007, a threat is any action or communication, explicit or implied, of intent to assault, resist, oppose, impede, intimidate, or interfere with any member of the federal judiciary, or other USMS protectee, including members of their staff or family. *Id.* at i n.1.

²⁷⁸ See MARKON, *supra* note 276.

²⁷⁹ See Scott Smith, *After Trying to Return to the Bench, Judge in Courtroom Attack Decides to Retire*, STOCKTON RECORD (Cal.), Jan. 23, 2010, available at http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100123/A_NEWS/1230327.

the courtroom shootings in Fulton County, Georgia shortly thereafter—highlighted the need for courtroom security in both state and federal courts. In response to these shootings, Congress passed the Courtroom Security Improvement Act of 2007 (CSIA).²⁸⁰

The CSIA increased the maximum penalties for crimes against federal judges or their families and expanded the types of weapons that are illegal to possess on courthouse property.²⁸¹ The CSIA also created a new crime for intentionally releasing personal restricted information with the intent to threaten, intimidate, or incite the commission of a crime of violence.²⁸² It further reinforced the authority and oversight features of the law that governs federal judicial security by calling for \$20 million in additional appropriations each year through 2011 to hire additional marshals for judicial and courtroom security. The CSIA also modified existing grant programs to facilitate increased security for state judges and court systems.²⁸³ Other provisions included a judicial exemption from the REAL ID Act to permit judges to use their office address, rather than their home address, on government-issued identification.²⁸⁴

Little has been published about the CSIA since its passage, but it appears to be having at least some positive impact on courtroom security. According to one recent report, however, the additional appropriations for additional U.S. Marshals have not yet been received.²⁸⁵

Recommendations for the Future

It is essential that courtroom security remains a priority as we move into a new decade of challenges. Although the current economic climate may tempt legislators to make budget cuts in this area, support for appropriations must continue or else the momentum gained in recent years toward improving security will be lost.

Unfortunately, the Court Security Enhancement Act of 2009, after passing the U.S. House of Representatives, died in the Senate. That bill would have increased the penalty from five to 10 years for knowingly disclosing, with harmful intent, restricted personal information, including a federal employee's home address, home phone number, or Social Security number.²⁸⁶

This is another example of how we could help protect the independence of the judiciary. Our members should support any legislation that would enhance the security of our state and federal judges.



²⁸⁰ Pub. L. No. 110-177, 121 Stat. 2534 (2008) (codified in scattered sections of titles 18, 28, 42, and 49).

²⁸¹ *Id.* §§201–209.

²⁸² *Id.* §202 (codified at 18 U.S.C. §119) (2010).

²⁸³ *Id.* §§301–303.

²⁸⁴ *Id.* §508 (codified at 49 U.S.C. §30301).

²⁸⁵ See 2009 OIG Report, *supra* note 277, at 4 n.10 (“[A]ccording to USMS headquarters officials, none of the [CSIA] authorized funding has been appropriated to the USMS.”).

²⁸⁶ See H.R. 2661, 111th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-2661>.



Members of the bar must stay attuned to and support any measures that will improve the security of our courthouses and our judges.

Members of the bar must stay attuned to and support any measures that will improve the security of our courthouses and our judges. State and local defense organizations can assist by joining coalitions to publicly support, lobby and advocate for the judiciary on this issue. Otherwise, judges will be forced to engage in lobbying efforts that can compromise their independence.

The recent high profile threats and acts of violence directed toward state and federal judges aptly demonstrate that court security must remain a priority. However, by remaining focused on the problem and continuing to address it head-on, additional progress can be made in this key aspect of the administration of justice in the United States.

Politicized Judicial Appointments in the Federal Court System

Because the judiciary is increasingly being asked to resolve disputes involving socially significant or politically sensitive issues, judicial decisions are increasingly becoming lightning rods for criticism by political interest groups and politicians sympathetic to the losing side.²⁸⁷ Whether it was the decision to remove the feeding tube in the case of Terry Shiavo, or the criticism of the *Citizens United* decision, which overturned corporate and union contribution limits of federal campaign financing laws,²⁸⁸ today the line between cases and causes is becoming increasingly blurred. This reality has encouraged political parties and interest groups to oppose the appointment of judicial candidates or the retention of judges perceived to be unsympathetic to their cause. This opposition is frequently based on a single issue, rather than on the candidate's overall qualifications or merit.

Nowhere is this conundrum more evident than in the judicial appointment process. As illustrated by recent events, including Justice Sonia Sotomayor's confirmation hearings, the appointment of federal judges remains a highly political affair. The consequences of this partisan divisiveness is reflected in the growing number of unfilled judicial openings in federal district courts across the country. Members of the bar must work to seek solutions to this problem.

Heightened Politicization Surrounding Judicial Appointments

The federal judicial selection process was destined to become a political affair. The Constitution requires federal judges be nominated by the President, and appointed "by and with the advice and consent of the Senate."²⁸⁹ This forced marriage between the President and the Senate creates the potential for conflict, especially when each branch is controlled by a different political party.

Because the federal judiciary plays a key role in resolving disputes which can impact the shaping of American policy, presidents from Adams to Obama have picked judges who are perceived as conforming to their ideal judicial philosophy and ideology. Soon after the nation's birth, President Adams sought to ensure the ideological continuity of his Federalist ideals fol-



²⁸⁷ Some of the most criticized rulings in recent memory include not only *Caperton* and *Citizens United*, but also the Supreme Court's *Twombly/Iqbal* decisions addressing federal pleading requirements in civil matters. See, e.g., Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30, available at <http://www.nytimes.com/2010/01/22/opinion/22fri1.html> ("With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th Century."); Editorial, *Throwing Out Mr. Iqbal's Case*, N.Y. TIMES, May 20, 2009, at A28, available at <http://www.nytimes.com/2009/05/20/opinion/20weds3.html> (stating *Iqbal* represents "[t]he [C]ourt's conservative majority... increasingly using legal technicalities to keep people from getting a fair hearing").

²⁸⁸ Robert Barnes, *Reactions Split on Obama's Remark, Alito's Responses at State of the Union*, WASH. POST, Jan. 29, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html>.

²⁸⁹ U.S. CONST. art. II, §2, cl. 2.



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lowing his party's electoral defeat in 1800 by expanding the federal courts and filling them with judges who shared his political views.²⁹⁰ Even George Washington, viewed as a consummate bipartisan leader, had a nominee for the Supreme Court derailed because of his disagreement with the nominee's political views.²⁹¹ More recently, President Reagan's administration carefully vetted judicial nominees in an attempt to ensure the federal judiciary was stocked with ideological allies.²⁹²

Recent developments demonstrate that politics continues to play a central role in the judicial appointments process. When Congress began its 2010 session, there were over 100 vacancies in federal courts—20 in U.S. Courts of Appeal, and 83 in U.S. District Courts.²⁹³ As of February 2010, however, the Senate had confirmed only 15 (out of 42) of President Obama's nominees for the federal bench.²⁹⁴ Many attribute this delay to partisan maneuvering by Senate Republicans, who invoked Senate rules to delay judicial nominations from proceeding.²⁹⁵

Partisan wrangling over nominees for the federal bench is nothing new. During President George W. Bush's tenure, Senate Democrats, then in the minority, filibustered several nominations, including Miguel Estrada and Priscilla Owen, both of whom received unanimous "well-qualified" ratings from the American Bar Association.²⁹⁶ This led to Republican Senators

²⁹⁰ Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges? Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 465 (2005) (summarizing President Adams' attempt at packing the federal courts with Federalist judges); *see also* Judiciary Act of 1801, ch. 4, 2 Stat. 89, *repealed by* Judiciary Act of 1802, Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

²⁹¹ MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 163 (2000) (noting that John Rutledge's nomination to the Supreme Court was rejected in part because of his opposition to the Jay treaty).

²⁹² Johnsen, *supra* note 290, at 466.

²⁹³ *Archive of Judicial Vacancies as of February 1, 2010*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last visited Nov. 21, 2010).

²⁹⁴ *Archive of Judicial Confirmations as of February 1, 2010*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last visited Nov. 21, 2010) (listing the 15 judicial confirmations).

²⁹⁵ David Ingram, *Senate Republicans Wage Stealth War Over Judges*, NAT'L L.J., Feb. 17, 2010, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202443616628>. Under the Senate's rules, once a nomination arrives at the Senate floor, scheduling a vote requires the unanimous agreement of all senators. *Id.* Thus, a single senator, whose identity is usually kept secret, can hold up the entire process. *Id.* Unless the Senate majority leader pushes the issue, nominations can therefore be repeatedly delayed. *Id.*

²⁹⁶ Sen. John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 182–83 (2003) (summarizing the filibuster of several of President Bush's judicial nominees, including Miguel Estrada and Priscilla Owen).

bemoaning the “rank and unbridled Democratic partisanship.”²⁹⁷ In a leaked memo, Democratic staffers called Estrada “dangerous” because he had “a minimal paper trail, he is Latino and the White House seems to be grooming him for a Supreme Court appointment.”²⁹⁸ Subsequently, President Bush bypassed the Senate completely and made recess appointments for several nominees.²⁹⁹

The politicization of the confirmation process has seemingly intensified with the rise of mass media and the internet. Following President Obama’s nomination of Judge Sotomayor to the Supreme Court, the “blogosphere” erupted with sharply worded attacks from many conservatives, and harsh rebukes of those attacks by many liberals. In one prominent example, during the weeks leading up to Judge Sotomayor’s nomination, an article citing anonymous sources who had supposedly worked with her, questioned her intellect and temperament.³⁰⁰ This prompted retorts that decried the article as a “smear.”³⁰¹

Politicized Judicial Appointments are Harming the Federal Court System

Partisan politics, and the increasing polarization of “liberals” and “conservatives,” have led to increased scrutiny, and at times, unwarranted criticism of judicial nominees, even at the district court level. This in turn has led to delays of the confirmation process and longer judicial vacancies. These vacancies lead to larger workloads for sitting judges, longer time lines for court resources, and in general, an overload of the federal court system.

In 2008, for example, the average number of filings for each federal district court judge was 494.³⁰² However, in the Western District of Texas and the Eastern District of California, both

²⁹⁷ Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sept. 5, 2003, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A24547-2003Sep4¬Found=true> (quoting Senate Majority Leader Bill Frist and House Majority Leader Tom DeLay).

²⁹⁸ Kelley Beaucar Vlahos, *Former Aide in Memo Leak Seeks Probe of Dems*, FOX NEWS.COM, February 12, 2004, 2, available at <http://www.foxnews.com/story/0,2933,111286,00.html>.

²⁹⁹ Neil A. Lewis, *Deal Ends Impasse Over Judicial Nominees*, N.Y. TIMES, May 19, 2004, at A19, available at <http://www.nytimes.com/2004/05/19/us/deal-ends-impasse-over-judicial-nominees.html>.

³⁰⁰ Jeffrey Rosen, *The Case Against Sotomayor*, THE NEW REPUBLIC, May 9, 2009, available at <http://www.tnr.com/article/politics/the-case-against-sotomayor>.

³⁰¹ Glenn Greenwald, *Jeffrey Rosen, TNR, and the Anonymous Smears Against Sonia Sotomayor*, SALON.COM, (May 5, 2009) available at http://www.salon.com/news/opinion/glenn_greenwald/2009/05/05/tnr.

³⁰² Admin. Office of the U.S. Courts, 2009 Annual Report of the Director: Judicial Business of the United States Courts 409 TBL.X-1A (2009) [hereinafter U.S. Courts 2009 Annual Report].



The increased partisan wrangling over judicial appointments also contributes to the perception that the federal judiciary is not an independent branch of government that is “above the fray” of politics. And this perception brings with it skepticism and a lessening of respect for judicial rulings.

with vacancies deemed “judicial emergencies,”³⁰³ the number of filings per judge was 954 and 1,077, respectively.³⁰⁴

The increased partisan wrangling over judicial appointments also contributes to the perception that the federal judiciary is not an independent branch of government that is “above the fray” of politics. And this perception brings with it skepticism and a lessening of respect for judicial rulings. Indeed, one senator attributed the rise in courtroom violence to increased politicization of the judiciary.³⁰⁵

A partisan confirmation process may also deter highly qualified individuals from accepting a nomination to the federal bench. Even the most qualified candidate may be discouraged by the looming specter of a microscopic inquiry into his or her background, and the potential for personal attacks. Further, the rigors of a politically charged confirmation process in the Senate, and needless delays, may wear nominees and their families down, causing them to withdraw their nomination, which occurred with Miguel Estrada’s nomination to the District of Columbia Circuit Court of Appeals.³⁰⁶ Given the desire to ensure that the judiciary is filled with the best and the brightest judges, this type of fallout is particularly troubling.

Recommendations for the Future

The unfortunate reality is that politics will never be completely removed from the process. Depending on the political climate, members of the Senate may have incentives to vigorously oppose even moderate judicial candidates. Additionally, the President can aggravate the process by selecting polarizing nominees.

Despite these challenges, steps can be taken to help minimize the political nature of judicial appointments. One step is to develop a set of objective criteria against which any candidate can be fairly evaluated. These criteria can be developed by a bipartisan committee in order to minimize partisan and personal attacks on nominees.

Although the American Bar Association currently evaluates candidates as “well qualified,” “qualified,” or “not qualified,” its evaluation criteria are subjective, addressing values such as “integrity,” “professional competence,” and “judicial temperament.” While these qualities are undoubtedly important, a more objective framework should be developed, which would

³⁰³ *Judicial Emergencies*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>. (last visited Nov. 21, 2010).

³⁰⁴ U.S. COURTS 2009 ANNUAL REPORT, *supra* note 302, at 405–06 TBL.X-1A.

³⁰⁵ Charles Babington, *Senator Links Violence to “Political” Decisions*, WASH. POST, Apr. 5, 2005, at A7, available at <http://www.washingtonpost.com/wp-dyn/articles/A26236-2005Apr4.html>.

³⁰⁶ Dewar, *supra* note 297.

include clear, definitive experience requirements.³⁰⁷ Such a framework would help to limit an opposing party's ability to claim that an evaluation was tainted by bias.

Additionally, bar associations should join in an effort to educate the public about the judicial selection process, and judicial qualifications, which might help to quell some of the media hype surrounding judicial appointments. Efforts should also be made to ensure that the nomination process remains as transparent as possible.

Federal judicial nominations continue to be held hostage by the political process. Members of the bar should seize the opportunity and support proactive measures to mitigate this difficult, and persistent, problem. Otherwise, judicial vacancies will continue to languish indefinitely and the institutional integrity of the federal court system will be compromised.

³⁰⁷ To some extent, the ABA already incorporates such criteria. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WHAT IT IS AND HOW IT WORKS 3 (2009) ("The Committee believes that a prospective nominee to the federal bench ordinarily should have at least twelve years experience in the practice of law.").

Judicial Salaries and the Threat to Independence in the Federal Court System



The Thin Black Line

Article III, Section 1 of the United States Constitution provides that federal judges “both of the Supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated times, receive for their Services, Compensation, which shall not be diminished during their Continuance in Office.”³⁰⁸ Article III contains two separate but related clauses intended to protect the independence of the federal judiciary, lifetime tenure and a guarantee against reduction in judicial pay.

Article III’s marriage of judicial compensation to lifetime tenure was deliberate. Debates at the Constitutional Convention over Article III make it clear that the purpose of lifetime tenure coupled with a compensation guarantee was to ensure the independence of the judicial branch.³⁰⁹ “A judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.”³¹⁰ It was only through this independence that the Framers believed the federal judiciary could serve as the “thin black line” protecting against governmental encroachment of the Constitution and the rights of Americans.³¹¹

Accordingly, the adequacy of the federal judiciary’s compensation must be viewed from the lens of insuring judicial independence, and the impact that compensation can have on the provision of lifetime tenure. The goal of judicial independence through lifetime tenure can be frustrated by the failure to provide adequate compensation to the federal judiciary. The fiscal control that the other branches of government exercise over the judicial branch stands in tension with the need for judicial independence. Alexander Hamilton, in *The Federalist* No. 79, succinctly explained this point when he wrote: “In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”³¹²

The Compensation Clause

One of the most debated protections of judicial independence is Article III’s Compensation Clause. The notes of James Madison from the Constitutional Convention reveal that initially

³⁰⁸ U.S. CONST. art. III, §1.

³⁰⁹ One of the grounds submitted by Thomas Jefferson in the Declaration of Independence “to dissolve the political bands” with England was the lack of judicial independence under the reign of King George III: “He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.” *THE DECLARATION OF INDEPENDENCE* para. 3 (U.S. 1776).

³¹⁰ *U.S. v. Will*, 449 U.S. 200, 217–18 (1980).

³¹¹ A comprehensive discussion of these principals is outlined in Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 *UCLA L. REV.* 308, 311–318 (1976).

³¹² *THE FEDERALIST* No. 79, at 408 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

Article III included a clause that prohibited Congress from either increasing or decreasing the compensation of federal judges.³¹³ The Framers, however, clearly believed that judicial independence would require periodic increases in the compensation of the federal judiciary.

Addressing a proposed prohibition of pay increases for the federal judiciary at the Constitutional Convention, Governor Morris, a delegate from Pennsylvania³¹⁴ recognized: “[t]he value of money may not only alter but the State of Society may alter.... The Amount of salaries must be always regulated by the manners and the style of living in a Country.”³¹⁵ Benjamin Franklin joined Morris in support of removing the prohibition on judicial increases and added: “Money may not only become plentier, but the business of the department may increase as the Country becomes more populous.”³¹⁶

In addition to the other reasons supporting the allowance of judicial pay increases, the issue of inflation or the “value” of money as it becomes “plentier” was clearly considered. This issue was discussed in the Federalist Papers. In *The Federalist* No. 79, Hamilton wrote: “It will be readily understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today, might in half a century become penurious and inadequate.”³¹⁷ Ultimately, the Morris/Franklin position prevailed and the Compensation Clause in its current form was adopted.

Courts have generally ruled that the failure to provide federal judges with a cost-of-living adjustment (COLA) does not violate the Compensation Clause. However, Congressional attempts to roll back a COLA after it has taken effect would.³¹⁸ Therefore, Congresses’ repeated failure to provide a COLA does not violate Article III. While the failure to maintain the value of federal judicial salaries may not violate Article III’s Compensation Clause, that point does not negate its impact on the maintenance of compensation levels adequate to insure judicial independence. While Article III may only protect “vested” compensation, as explained below, the lack of any pay increases at some point clearly threatens the concept of judicial independence, which Article III was designed to protect.



The goal of judicial independence through lifetime tenure can be frustrated by the failure to provide adequate compensation to the federal judiciary.

³¹³ *Will*, 449 U.S. at 219.

³¹⁴ See Gordon Lloyd, *Introduction to the Constitutional Convention*, TEACHINGAMERICAN-HISTORY.ORG (Nov. 21, 2010), available at <http://teachingamericanhistory.org/convention/intro.html>.

³¹⁵ See Rosenn, *supra* note 311, at 314 n. 23.

³¹⁶ *Id.* at 313.

³¹⁷ THE FEDERALIST NO. 79, at 409 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

³¹⁸ *Will*, 449 U.S. at 229–30; *Williams v. United States*, 240 F.3d 1019, 1029–30 (Fed. Cir. 2001).



Current Levels of Judicial Compensation

2010 Salary Levels for the federal judiciary are:³¹⁹

Supreme Court Justices	\$213,900
Circuit Court Judges	\$184,500
District Court Judges	\$174,000
Bankruptcy & Magistrate Judges	\$160,080

These salaries reflect the failure by Congress to provide a raise in the base pay of federal judges since 1992 or COLA in 1995, 1996, 1997, 1999, 2007.³²⁰ In 1981 Congress enacted a law commonly referred to as “Section 140,” which provides that no judicial COLA can take effect without Congressional authorization.³²¹ Years of inaction by Congress has led to the erosion of judicial pay and is seriously undermining the purpose of lifetime tenure guaranteed by Article III.

If the adequacy of federal judicial compensation was judged solely against the compensation earned by their peers in the private sector, the matter would be quickly resolved. That federal judges are compensated far less than they would earn in the private sector is unquestioned. It is likewise without challenge that the compensation gap between the federal judiciary and their private sector counterparts continues to grow. If the adequacy of federal judicial compensation was measured by acts of Congress authorizing the issuance of a COLA to ensure that judicial compensation kept pace with inflation, the answer would come quickly as well. That Congress routinely fails to provide the federal judiciary with COLAs is a matter of public record. The difficult issue we now face is that given current economic conditions, various members of Congress have no interest in reversing this trend, which is straining the notion of lifetime tenure for many federal judges. When second and third year associates in some of our country’s largest law firms are earning more than many federal judges, it should come as no surprise that more and more federal judges are leaving the bench and turning to employment in the private sector.

³¹⁹ *Independence of the Judiciary: Judicial Salaries*, AMERICAN BAR ASSOCIATION, available at http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_pay.html.

³²⁰ *Id.* A 2.8 percent COLA was awarded for 2009. No COLA was provided to the federal judiciary in 2010. See H.R. Res. 184, 111th Cong. (2009).

³²¹ Section 140 of Public Law 97-92 was originally enacted in 1981 and was reenacted by Congress in 2003. Section 140 reads in part: “Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted.”

Inadequate Compensation, Lifetime Tenure and Judicial Independence

Lifetime tenure cannot serve its intended purpose if economics compromise a judge's ability to remain on the bench. Since 1991, federal judicial compensation rose 39.1 percent while the cost of living rose 51.4 percent.³²² During the same period, approximately 123 federal judges left the bench. This number is striking because it represents more than the entire number of the current judicial vacancies.³²³ Furthermore, the total number of judges who left the bench between 1990 and 2010 is approximately twice the total who left the bench in the prior three decades from 1958–1989.³²⁴ It seems obvious that when faced with ever diminishing pay on the one hand, and increasing compensation in the private sector on the other, federal judges will continue to leave the bench at an increasing rate.

Lifetime tenure was intended to allow the judicial branch to operate independent of political influence or the attraction of “post-judicial” employment. However, as Chief Justice Roberts has warned, “[i]f judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers’ goal of a truly independent judiciary will be placed in serious jeopardy.” He added “if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law even when it is unpopular to do so will be seriously eroded.”³²⁵



Lifetime tenure cannot serve its intended purpose if economics compromise a judge's ability to remain on the bench.

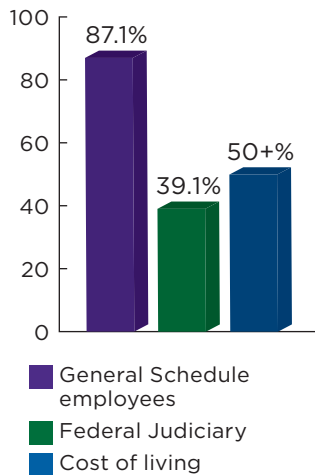
³²² AMERICAN BAR ASSOCIATION, RECOMMENDATIONS ON JUDICIAL COST-OF-LIVING ADJUSTMENTS, 3 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/judicial_pay/10M300.authcheckdam.pdf [hereinafter ABA COLA Recommendations].

³²³ At present there are 103 vacancies in the circuit and district courts. FEDERAL JUDICIAL PAY INCREASE FACT SHEET, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx> (last visited Nov. 21, 2010).

³²⁴ *Id.* Note the bar graph calculating departures by decade.

³²⁵ CHIEF JUSTICE JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2006).

Statistics appear to confirm this concern, and anecdotal stories by departing judges confirm the Chief Justice's concern.³²⁶ The continuing erosion of judicial pay is pushing away those who should be serving on the federal bench.



Increase in compensation vs. cost of living, since 1991.

COLA Reform

Beyond their current levels of compensation, the federal judiciary can boast no confidence that the compensation they are paid today will be protected by Congress tomorrow. This uncertainty was sought to be addressed during the last session of Congress with the introduction of SB 2725 by Senator Feinstein (D-CA). This bill would have repealed Section 140,³²⁷ and allowed the federal judiciary's COLA to be tied to that of General Schedule COLAs given to virtually every other governmental employee as set out in the Ethics Reform Act of 1989.³²⁸ The impact of SB 2725 would have been to remove much of the politics associated with the Congressional award of an annual COLA and would have ensured that COLA adjustments were timely provided.³²⁹ However, like prior unsuccessful attempts to repeal Section 140, this bill languished and eventually died in committee.

Conclusion and Recommendation

Judicial independence forms the "thin black line" that shields the judiciary from the influence of politics and the pressure of public sentiment. The judicial branch shields the constitution from those same intrusions. Lifetime tenure forms the cornerstone of this "thin black line." However lifetime tenure that is coupled to a compensation scheme that has fallen significantly

³²⁶ Carol J. Williams, *Judicial Pay Disparity Drains Talent From Federal Bench*, L.A. TIMES, Sept. 27, 2009, available at <http://articles.latimes.com/2009/sep/27/local/me-judges-pay27>; Joe Mandak, *More Judges Leaving Bench for Better Pay*, ASSOCIATED PRESS, Feb. 6, 2004, available at <http://www.judicialaccountability.org/judgesleavingbench.htm>; *The Last Straw—Why Judges Leave the Bench*, THE THIRD BRANCH NEWSLETTER (Admin. Office of the U.S. Courts, Wash., D.C.), Apr. 2007, at 9, available at http://www.uscourts.gov/news/TheThirdBranch/07-04-01/The_Last_Straw.aspx; *Leaving So Soon: Will Pay Issues Mean Only the Wealthy Can Afford to Serve?* THE THIRD BRANCH NEWSLETTER (Admin. Office of the U.S. Courts, Wash., D.C.), Feb. 2007, at 1, available at http://www.uscourts.gov/news/TheThirdBranch/07-02-01/leaving_So_Soon_Will_Pay_Issues_Mean_Only_the_Wealthy_Can_Afford_to_Serve.aspx; Editorial, *Better Pay for Judges*, N.Y. TIMES, Feb. 24, 2007, available at <http://www.nytimes.com/2007/02/24/opinion/24sat3.html>.

³²⁷ See ABA COLA RECOMMENDATIONS, *supra* note 322, at 1.

³²⁸ Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989).

³²⁹ Since 1991 compensation of General Schedule employees has risen by 87.1 percent while that of the federal judiciary has increased only 39.1 percent. This disparity is highlighted by the fact that the cost of living increased over 50 percent during this time period. See ABA COLA RECOMMENDATIONS, *supra* note 307, at 3.

behind private sector employment and which continues to fall through Congressional inaction, is no longer truly lifetime tenure. The federal judicial branch is slowly being transformed from an independent judiciary into one that is merely a stopover. The harm to continuity is self-evident and, the harm to the perception of independence is becoming problematic.

As the ripples created by inadequate judicial compensation continue to grow, the carefully crafted judicial system so thoughtfully designed by the Constitutional Framers is showing signs of fracture. In monetary terms, the cost to fix this problem, while it can still be fixed, is modest. It has been estimated that the cost to raise the salary of the federal judiciary by 100 percent would not even amount to a rounding error in the entire annual federal budget.³³⁰ Of course, such an increase seems unlikely. However, a step in the right direction would be the repeal of Section 140 so that federal judges can receive the same cost of living adjustments as other federal employees. Anything that can reassure current or future members of the federal judiciary that the compensation they receive will be reasonably maintained and adjusted for inflation would be a good place to start. National as well as state and local defense organizations around the country should join to urge Congress to repeal Section 140.

³³⁰ AMERICAN COLLEGE OF TRIAL LAWYERS, JUDICIAL COMPENSATION: OUR JUDGES MUST BE FAIRLY PAID (Mar. 2007), *available at* <http://www.actl.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=2729>.

Conclusion

The challenges to judicial independence are real. They are growing more complex and hazardous at each election cycle. The fairness of our legal system hangs in the balance. DRI's Judicial Task Force believes that DRI and SLDOs must take the steps necessary to address these problems facing the judicial branch.

Over 200 years ago, Alexander Hamilton quoted the Scottish philosopher David Hume in The Federalist No. 85. What he wrote then applies today with equal force about the need to protect an independent judiciary:

The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments.

The importance of judicial independence cannot be understated and must not be lost.

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Model self-evaluations taken from IAALS, SHARED EXPECTATIONS, (IAALS ed., UNIV OF DENVER 2006), Appendices H and I, *available at* <http://www.du.edu/legalinstitute/pubs/SharedExpectations.pdf>

Model Attorney Survey for Appellate Judge Evaluations

This questionnaire seeks your input on the quality of Judge X's performance on the appellate bench. Your responses will remain anonymous. Please fill out and return this survey if you have appealed a case and Judge X participated in the decision. If you have not had experience with Judge X, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

☐ Judge X has not heard the appeal of any of my cases for the survey period.

1. Which of the following types of cases have you appealed in which Judge X participated in the decision? Select all that apply.

- a. Civil
- b. Criminal
- c. Domestic
- d. Juvenile
- e. Other

2. Please evaluate Judge X's job performance on the issues below, using the following scale:

- 1 Inadequate
- 2 Less than Adequate
- 3 Adequate
- 4 More than Adequate
- 5 Excellent
- NA Cannot Evaluate

If you do not feel you have adequate *first hand knowledge* to evaluate Judge X on a specific question, select NA ("Cannot Evaluate").

- | | | | | | | |
|--|---|---|---|---|---|----|
| a. Behaves in a manner that is free from impropriety or the appearance of impropriety | 1 | 2 | 3 | 4 | 5 | NA |
| b. Treats people equally regardless of race, gender, ethnicity, economic status, or any other factor | 1 | 2 | 3 | 4 | 5 | NA |
| c. Displays fairness and impartiality toward each side of the case | 1 | 2 | 3 | 4 | 5 | NA |
| d. Avoids ex parte communications | 1 | 2 | 3 | 4 | 5 | NA |
| e. Allows parties to present their arguments and answer questions | 1 | 2 | 3 | 4 | 5 | NA |
| f. Maintains the quality of questions and comments during oral argument | 1 | 2 | 3 | 4 | 5 | NA |

g.	Is courteous toward attorneys	1	2	3	4	5	NA
h.	Is courteous toward court staff	1	2	3	4	5	NA
i.	Demonstrates appropriate demeanor on the bench	1	2	3	4	5	NA

3. Did Judge X author or co-author one or more opinions in your case(s)?

4. If you answered Question 3 in the affirmative, please evaluate the judge on the topics below, using the same 1-5 scale as in Question 2:

a.	Opinions are clearly written	1	2	3	4	5	NA
b.	Opinions are issued without unnecessary delay	1	2	3	4	5	NA
c.	Opinions clearly explain the basis of the Court's decision	1	2	3	4	5	NA
d.	Opinions demonstrate scholarly legal analysis	1	2	3	4	5	NA
e.	Opinions demonstrate knowledge of the substantive law	1	2	3	4	5	NA
f.	Opinions reflect sufficient familiarity with relevant facts of the case	1	2	3	4	5	NA
g.	Opinions demonstrate knowledge of the rules of evidence and procedure	1	2	3	4	5	NA
h.	Opinions are rendered without regard for possible public criticism	1	2	3	4	5	NA
i.	Opinions refrain from reaching issues that need not be decided	1	2	3	4	5	NA

5. Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.

6. Your years in practice: 0-5 6-10 11 or more

Model Attorney Survey for Trial Judge Evaluations

This questionnaire seeks your input on the quality of Judge X's performance on the bench. Your responses will remain anonymous. Please fill out and return this survey if you have had courtroom interaction of any sort with Judge X during the survey period, including but not limited to jury trials, bench trials, and motion hearings. If you have not had experience with Judge X during the survey period, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

☐ Judge X has not presided over any of my cases for the survey period.

1. Which of the following types of cases have you had before Judge X? Select all that apply.

- a. Civil
- b. Criminal
- c. Domestic
- d. Juvenile
- e. Other

2. Please evaluate Judge X's job performance on the issues below, using the following scale:

- 1 Inadequate
- 2 Less Than Adequate
- 3 Adequate
- 4 More than Adequate
- 5 Excellent
- NA Cannot Evaluate

If you do not feel you have adequate *first hand knowledge* to evaluate Judge X on a specific question, select NA ("Cannot Evaluate").

- | | | | | | | |
|--|---|---|---|---|---|----|
| a. Behaves in a manner that is free from impropriety or the appearance of impropriety | 1 | 2 | 3 | 4 | 5 | NA |
| b. Treats people equally regardless of race, gender, ethnicity, economic status, or any other factor | 1 | 2 | 3 | 4 | 5 | NA |
| c. Displays fairness and impartiality toward each side of the case | 1 | 2 | 3 | 4 | 5 | NA |
| d. Avoids ex parte communications | 1 | 2 | 3 | 4 | 5 | NA |
| e. Is prepared for hearings and trials | 1 | 2 | 3 | 4 | 5 | NA |

f.	Allows parties latitude to present their arguments	1	2	3	4	5	NA
g.	Allows parties sufficient time to present case	1	2	3	4	5	NA
h.	Is courteous toward attorneys	1	2	3	4	5	NA
i.	Is courteous toward court staff	1	2	3	4	5	NA
j.	Maintains and requires proper order and decorum in the courtroom	1	2	3	4	5	NA
k.	Shows and expects professionalism from everyone in the courtroom	1	2	3	4	5	NA
l.	Demonstrates appropriate demeanor on the bench	1	2	3	4	5	NA
m.	Understands substantive law	1	2	3	4	5	NA
n.	Understands rules of procedure and evidence	1	2	3	4	5	NA
o.	Weighs all evidence fairly and impartially before rendering a decision	1	2	3	4	5	NA
p.	Clearly explains all oral decisions	1	2	3	4	5	NA
q.	Written opinions and orders are clear	1	2	3	4	5	NA
r.	Issues opinions and orders without unnecessary delay	1	2	3	4	5	NA
s.	Starts court on time	1	2	3	4	5	NA
t.	Uses court time efficiently	1	2	3	4	5	NA
u.	Effective as an administrator	1	2	3	4	5	NA
v.	Effectively uses pretrial procedures to narrow and define the issues	1	2	3	4	5	NA
w.	Overall performance	1	2	3	4	5	NA

3. **Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.**

4. **Your years in practice:** 0-5 6-10 11 or more

Model Attorney Survey for Trial Judge Candidate Evaluations in Contested Elections

Candidate X has declared his intent to run for judicial office. This questionnaire seeks your input on the quality of Candidate X's performance as an attorney related to skills he will be expected to use on the bench. Your responses will remain anonymous. Please fill out and return this survey if you have had professional interaction in a litigation setting with Candidate X during the survey period, including but not limited to trials, court hearings, depositions, discovery conferences, settlement conferences, or alternative dispute resolution. If you have not had experience with Candidate X during the last ten years, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

☐ I have not interacted professionally with Candidate X on any litigation matters in the last ten years.

1. In which of the following types of cases have you interacted with Candidate X? Select all that apply.

- a. Civil
- b. Criminal
- c. Domestic
- d. Juvenile
- e. Other

2. In which types of settings you have interacted with Candidate X? Select all that apply.

- | | |
|-------------------------|-------------------------------------|
| a. Jury trial | h. Settlement conference |
| b. Bench trial | i. Mediation |
| c. Motion hearing | j. Arbitration |
| d. Evidentiary hearing | k. Contact by telephone only |
| e. Other hearing | l. Contact my letter or e-mail only |
| f. Deposition | m. Other contact |
| g. Discovery conference | |

3. Did you work on the same litigation team (i.e., representing the same client or clients) as Candidate X in any of the litigation matters listed above? If so, identify which matters:

4. Please evaluate Candidate X on the issues below, using the following scale:

- 1 Inadequate
- 2 Less Than Adequate
- 3 Adequate
- 4 More than Adequate
- 5 Excellent

If you do not feel you have adequate *first hand knowledge* to evaluate Candidate X on a specific question, select NA (“Cannot Evaluate”).

a. Behaves in a manner that is free from impropriety or the appearance of impropriety	1	2	3	4	5	NA
b. Treats people equally regardless of race, gender, ethnicity, economic status, or any other factor	1	2	3	4	5	NA
c. Avoids ex parte communications	1	2	3	4	5	NA
d. Is prepared for hearings, trials, and the like	1	2	3	4	5	NA
e. Is courteous toward other attorneys	1	2	3	4	5	NA
f. Is courteous toward court staff	1	2	3	4	5	NA
g. Maintains proper decorum in the courtroom	1	2	3	4	5	NA
h. Shows professionalism in the courtroom	1	2	3	4	5	NA
i. Demonstrates appropriate demeanor	1	2	3	4	5	NA
j. Understands substantive law	1	2	3	4	5	NA
k. Understands rules of procedure and evidence	1	2	3	4	5	NA
l. Acknowledges weaknesses in argument where appropriate	1	2	3	4	5	NA
m. Briefs and motions are clearly written	1	2	3	4	5	NA
n. Meets court and discovery deadlines without unnecessary delay	1	2	3	4	5	NA
o. Ready for court and depositions on time	1	2	3	4	5	NA
p. Uses court time efficiently	1	2	3	4	5	NA
q. Effectively uses pretrial procedures to narrow and define the issues	1	2	3	4	5	NA
r. Overall performance	1	2	3	4	5	NA

5. Please add any comments about Candidate X relating to any of your responses above. Please use additional pages as necessary.

6. Your years in practice: 0-5 6-10 11 or more

Model Juror Survey for Trial Judge Evaluations

As a juror, you have been in a position to observe the functions of the court system. Your opinion of the system is important to us. Please take a few minutes to complete this survey regarding your observations of Judge X. Your responses will be kept anonymous, and will help maintain a system that runs efficiently and effectively. Thank you for your service.

Please answer the following questions:

- | | | | |
|-----|---|-----|----|
| 1. | Did the judge treat people equally regardless of race, gender, ethnicity, economic status, or any other factor? | Yes | No |
| 2. | Did the judge's behavior appear to be free from bias or prejudice? | Yes | No |
| 3. | Did the judge conduct proceedings in a fair and impartial manner? | Yes | No |
| 4. | Did the judge act in a dignified manner? | Yes | No |
| 5. | Did the judge treat people with courtesy? | Yes | No |
| 6. | Did the judge act with patience and self-control? | Yes | No |
| 7. | Did the judge act with humility and avoid arrogance? | Yes | No |
| 8. | Did the judge pay attention to the proceedings throughout? | Yes | No |
| 9. | Did the judge build your confidence in the judicial system? | Yes | No |
| 10. | Did the judge clearly explain court procedure? | Yes | No |
| 11. | Did the judge clearly explain the responsibility of the jury? | Yes | No |
| 12. | Did the judge clearly explain reasons for any delay? | Yes | No |
| 13. | Did the judge start court on time? | Yes | No |
| 14. | Did the judge maintain control over the courtroom? | Yes | No |
| 15. | Would you be comfortable having your case tried before this judge if you ever had a case in court? | Yes | No |

Model Litigant Survey for Trial Judge Evaluations (Civil Cases)

We are interested in learning about your recent experience with our court system. Please take a few minutes to complete this survey regarding your perceptions of Judge X and the court's handling of your case. Your responses will be kept anonymous, and will help us maintain a system that is efficient, effective, and fair.

Please answer the following questions about your case:

- | | | | | |
|----|---|-----------|-----------|---------|
| 1. | Were you the plaintiff or defendant in your case? | Plaintiff | Defendant | |
| 2. | If a trial was held, how long did it last? | <hr/> | | |
| 3. | Do you win or lose the case, or did it settle out of court? | Won | Lost | Settled |

Please answer the following questions about the judge:

- | | | | |
|----|---|-----|----|
| 1. | Did the judge appear well-prepared for your case? | Yes | No |
| 2. | Did the judge deal with your case promptly? | Yes | No |
| 3. | Was the judge respectful to you? | Yes | No |
| 4. | Was the judge respectful to the other parties? | Yes | No |
| 5. | If there was a trial, did the judge manage it efficiently? | Yes | No |
| 6. | Did the judge manage the entire case efficiently? | Yes | No |
| 7. | Do you feel that the judge listened to your side of the case? | Yes | No |
| 8. | Were the judge's rulings clear? | Yes | No |
| 9. | Do you understand why the judge ruled the way he/she did? | Yes | No |

Please add any other comments you would like to make about the judge or the way your case was handled in court:

Model Court Staff Survey for Trial Judge Evaluations

This questionnaire seeks your input on the quality of Judge X's performance. Your responses will remain anonymous. Please fill out and return this survey. If you have not had experience with Judge X, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

1. Please evaluate Judge X's job performance on the issues below, using the following scale:

- 1 Inadequate
- 2 Less Than Adequate
- 3 Adequate
- 4 More than Adequate
- 5 Excellent
- NA Cannot Evaluate

If you do not feel you have adequate *first hand knowledge* to evaluate Judge X on a specific question, select NA ("Cannot Evaluate").

a. Behaves in a manner that encourages respect for the courts and is free from impropriety or the appearance of impropriety	1	2	3	4	5	NA
b. Displays fairness and impartiality toward each side of the case	1	2	3	4	5	NA
c. Avoids ex parte communications	1	2	3	4	5	NA
d. Allows parties to present their arguments and answers questions	1	2	3	4	5	NA
e. Demonstrates appropriate demeanor on the bench	1	2	3	4	5	NA
f. Is prepared for each day's docket	1	2	3	4	5	NA
g. Is courteous toward attorneys	1	2	3	4	5	NA
h. Offers to assist other judges and is generally a team player	1	2	3	4	5	NA
i. Is courteous toward court staff	1	2	3	4	5	NA
j. Writes rulings/opinions clearly	1	2	3	4	5	NA
k. Issues rulings/opinions promptly	1	2	3	4	5	NA

2. Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.

3. Your years with the court: 0-5 6-10 11 or more

4. Is the judge your supervisor?

Model Self-Evaluation—Appellate Judge

Please complete the following evaluation based on your perception of your performance. Information on this self-evaluation will be used for professional self-improvement purposes only, and will not be publicly released.

Name _____ Date _____

Date appointed to current judicial position _____

Previous judicial position(s) before taking the bench _____

Judicial administration assignments _____

Please evaluate your performance on the following issues. The rating scale is as follows:

	5	Excellent				
	4	More Than Adequate				
	3	Adequate				
	2	Less Than Adequate				
	1	Inadequate				
a. Patience, dignity and courtesy	5	4	3	2	1	
b. Conscientiousness and diligence	5	4	3	2	1	
c. Demonstrating respect for all persons	5	4	3	2	1	
d. Attentiveness at oral argument	5	4	3	2	1	
e. Appropriate interaction with counsel during oral argument	5	4	3	2	1	
f. Relevant questions during oral argument	5	4	3	2	1	
g. Courtesy and dignity on the bench	5	4	3	2	1	
h. Conduct that promotes public confidence in the court	5	4	3	2	1	
i. Fairness, equality, and consistency of treatment	5	4	3	2	1	
j. Freedom from bias or prejudice against any person or group	5	4	3	2	1	

k. Conduct free from impropriety or the appearance of impropriety	5	4	3	2	1
l. Refraining from inappropriate ex parte communications	5	4	3	2	1
m. Showing and expecting professionalism from everyone	5	4	3	2	1
n. Legal reasoning ability	5	4	3	2	1
o. Knowledge of substantive law	5	4	3	2	1
p. Knowledge of rules of evidence and procedure	5	4	3	2	1
q. Knowledge of rules pertaining to sentencing	5	4	3	2	1
r. Abreast of current legal developments	5	4	3	2	1
s. Clearly written opinions	5	4	3	2	1
t. Legally supported opinions	5	4	3	2	1
u. Decisions are based on a review of the record	5	4	3	2	1
v. Decisions are based on the law and the facts	5	4	3	2	1
w. Opinions are issued without unnecessary delay	5	4	3	2	1
x. Working efficiently with other judges and court personnel	5	4	3	2	1
y. Handling ongoing workload	5	4	3	2	1
z. Overall performance	5	4	3	2	1

What are your greatest strengths as a judge?

What are your greatest weaknesses as a judge?

What do you believe your reputation is within the community?

What are your professional goals for the coming term?

Additional comments:

Model Self-Evaluation—Trial Judge

Please complete the following evaluation based on your perception of your performance. Information on this self-evaluation will be used for professional self-improvement purposes only, and will not be publicly released.

Name _____ Date _____

Date appointed to current judicial position _____

Previous judicial position(s) before taking the bench _____

Judicial assignments during evaluation period _____

Please evaluate your performance on the following issues. The rating scale is as follows:

	5	Excellent				
	4	More Than Adequate				
	3	Adequate				
	2	Less Than Adequate				
	1	Inadequate				
a. Patience, dignity and courtesy	5	4	3	2	1	
b. Conscientiousness and diligence	5	4	3	2	1	
c. Demonstrating respect for all persons	5	4	3	2	1	
d. Attentiveness at oral argument	5	4	3	2	1	
e. Appropriate interaction with counsel during oral argument	5	4	3	2	1	
f. Relevant questions during oral argument	5	4	3	2	1	
g. Courtesy and dignity on the bench	5	4	3	2	1	
h. Conduct that promotes public confidence in the court	5	4	3	2	1	
i. Fairness, equality, and consistency of treatment	5	4	3	2	1	
j. Freedom from bias or prejudice against any person or group	5	4	3	2	1	

k. Conduct free from impropriety or the appearance of impropriety	5	4	3	2	1
l. Refraining from inappropriate ex parte communications	5	4	3	2	1
m. Showing and expecting professionalism from everyone	5	4	3	2	1
n. Legal reasoning ability	5	4	3	2	1
o. Knowledge of substantive law	5	4	3	2	1
p. Knowledge of rules of evidence and procedure	5	4	3	2	1
q. Knowledge of rules pertaining to sentencing	5	4	3	2	1
r. Abreast of current legal developments	5	4	3	2	1
s. Clearly written opinions	5	4	3	2	1
t. Legally supported opinions	5	4	3	2	1
u. Decisions are based on a review of the record	5	4	3	2	1
v. Decisions are based on the law and the facts	5	4	3	2	1
w. Opinions are issued without unnecessary delay	5	4	3	2	1
x. Working efficiently with other judges and court personnel	5	4	3	2	1
y. Handling ongoing workload	5	4	3	2	1
z. Overall performance	5	4	3	2	1

Please describe your approach to case management. In doing so, please answer the following questions:

- (1) What happens when a motion is filed in your division?**
- (2) When and under what circumstances are you available for telephone conferences with counsel and the parties?**
- (3) What steps do you take to monitor open case reports and case aging reports?**
- (4) What is your approach to granting continuances?**

What are your greatest strengths as a judge?

What are your greatest weaknesses as a judge?

What do you believe your reputation is within the community?

What are your professional goals for the coming term?

Additional comments:

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