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Judicial Independence: Whether, Why, and How to Defend It

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JUDICIAL INDEPENDENCE:

WHETHER, WHY, AND HOW TO DEFEND IT

A Guide for Lawyer and Campus Chapters

A Tool for Law Students and Professors

An Invitation to Judges

JUDICIAL INDEPENDENCE:

WHETHER, WHY, AND HOW TO DEFEND FAIR AND IMPARTIAL COURTS*

* This guide was prepared by Michael Boucai, a law clerk at the American Constitution Society. It is not intended to be comprehensive; rather, it attempts an overview of major contemporary issues relating to judicial independence. Opinions expressed herein are not necessarily those of ACS. ACS is a non-partisan, non-profit educational organization that does not, as an organization, lobby, litigate, or take positions on specific issues, cases, legislation, or nominations.

"I have always thought … that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."

- Chief Justice John Marshall[1]

I. INTRODUCTION

Judicial Independence and Its Manifestations

Judicial independence. Chief Justice William Rehnquist calls it "one of the crown jewels of our system of government today."[2] Judge John Walker considers it "essential to the national well-being,"[3] Judge Penny White dubs it "the backbone of American democracy,"[4] and for Alfred Carlton, former president of the American Bar Association, it serves as "the most critical barometer of the health of a democratic republic."[5] Scholars have understood judicial independence as the "linchpin" of the judiciary,[6] as "superior to any alternative form for discharging the judicial function,"[7] and, in the global context, as "*the* indispensable link in the machinery for securing individual protection against states' human rights abuses."[8]

A good starting definition of judicial independence comes from the Brennan Center's Fair Courts Project: it is "the freedom we give judges to act as principled decision-makers."[9] This broad characterization is useful because, in its emphasis on the idea of freedom, it encompasses many of the ways in which judicial independence has been more specifically defined. Pamela Karlan, for example, posits the existence of two competing conceptualizations of judicial independence; namely, that judges should be free *from* certain kinds of influences and that they should free *to* realize certain goals.[10] Arguing that the "free to" vision undermines the centrality of law and precedent to judicial decision-making, Karlan comes close to Pasquale Pasquino's belief that judicial independence "has to be conceived of as

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[1] PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, 619 (statement of John Marshall).
[2] William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration* (April 6, 1996), 46 AM. U. L. REV. 263, 273-74 (1996).
[3] John M. Walker, *Current Threats to Judicial Independence and Appropriate Responses*, 12 ST. JOHN'S J. LEGAL COMMENT. 45, 46 (2002).
[4] Penny J. White, *It's a Wonderful Life, or Is It? An America without Judicial Independence*, JUDICATURE, Jan.-Feb. 1997, at 1, 4.
[5] Alfred P. Carlton, *Preserving Judicial Independence: An Exegesis*, 29 FORDHAM URB. L.J. 835, 838 (2002).
[6] Gerald E. Rosen and Kyle W. Harding, *Reflections Upon Judicial Independence As We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution's "Crown Jewel"*, 29 FORDHAM URB. L.J. 791, 791 (2002).
[7] Bruce Fein and Burt Neuborne, *Why Should We Care about Independent and Accountable Judges?,* JUDICATURE, Sept.-Oct. 2002; *available at* www.brennancenter.org/resources/books.html#ji, 10.
[8] Linda Keith Camp, *Judicial Independence and Human Rights Protections around the World*, JUDICATURE, Jan.-Feb. 2002, at 195.
[9] *Questions and Answers about Judicial Independence*, *available at* www.brennancenter.org/resources/resources_jiqanda.html.
[10] Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 536 (1999).

neutrality," or freedom from bias.[11] Freedom is likewise important to the descriptions of judicial independence offered by Judges Shirley Abrahamson and Edward Becker, who distinguish between decisional independence, or a judge's "ability to decide a case solely on the merits free from pressure,"[12] and institutional independence, meaning the freedom the judiciary derives from "relationships between and among [it], the executive, and the legislature" that make it an exclusive and co-equal branch of government.[13]

Attempts to find judicial independence at work are inevitably exercises in defining the concept itself, for "the question of which elements constitute [it] remains an empirical as well as a normative one."[14] In spite of this valuable disclaimer, one can identify at least seven "measures" of judicial independence in a constitutional system, each of which is implicated and perhaps compromised by the trends currently affecting the courts that are outlined in this guide:

1. Guaranteed judicial terms and restricted removal of judges.
2. Finality of judicial decisions.
3. Exclusive judicial authority to definite the courts' competence.
4. Ban against exceptional or military courts for civilians.
5. Fiscal autonomy and adequate resources to pursue the judicial function.
6. Structural independence from the legislative and executive branches.
7. Enumerated qualifications for judicial posts and appointments.[15]

The Constitutional Bases and Practical Limits of Judicial Independence

The idea of judicial independence is firmly grounded in the Constitution, at least insofar as the federal judiciary is concerned. Institutional independence derives primarily from the constitutional mandate of a separation of powers, while decisional independence obtains from the life tenure granted to federal judges and from the guarantee that their salaries will not be reduced so long as they sit on the bench. As Bruce Fein and Burt Neuborne suggest, both kinds of independence are implicated by the mere existence of a Constitution, a Bill of Rights, and courts invested with the task of judicial review.[16]

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[11] Pasquale Pasquino, *Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History*, 1 L. & PRAC. INT'L. CTS. & TRIBUNALS 11.
[12] *Roundtable Discussion: Is There a Threat to Judicial Independence in the United States Today?* 26 FORDHAM URB. L.J. 7, 11 (1998).
[13] Shirley S. Abrahamson, *Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 71 (1996)
[14] Camp, *supra* note 8, at 196.
[15] Camp, *supra* note 8, at 196-99.
[16] Fein and Neuborne, *supra* note 6, at 3.

Like judicial review, judicial independence rests upon the counter-majoritarian premise that popular will must sometimes be checked, a job done best by judges who are not accountable to the public in a traditional, political sense. Because it calls into question the ultimate sovereignty of the people, judicial independence is the site of what Louis Michael Seidman describes as an ambivalent contradiction – we prize judicial independence for precisely the same reasons we fear it; "the very attributes that are treated as 'good' are also treated as an 'evil.'"[17]

While the problem exposed by Seidman is not easily dismissed, we can take comfort from the fact that judicial independence is "subject to more limits than its critics realize."[18] Fein and Neuborne point out that constitutional rulings may be overridden by amendment, that statutory decisions may be reversed by legislative enactment, and that many "political questions," from the decision to go to war to the decision to impeach a President, are off-limits to courts by their own design or by Constitutional mandate.[19]

The counter-majoritarian difficulty of judicial independence is also, to a large extent, answered by actual judicial practice. In the first place, "no one judge decides any important case."[20] The appeals process corrects for judgments that are "too independent" or clearly erroneous in a legal sense. Second, judges may not just make things up. Justice Benjamin Cardozo once stated that a judge is "not wholly free. He is not to innovate at pleasure . . . . He is to draw his inspiration from consecrated principles, … to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life."[21] Indeed, American judges have almost never invented idiosyncratic theories of interpretation. Critics of judicial activism (an epithet presumably meaning judicial over-independence) fail to cite even one Supreme Court opinion in recent decades whose legal interpretation "fell outside the bounds of general acceptance."[22]

Justice Cardozo's observation that judicial decisions derive from prevailing trends in legal culture reflects the reality that judges are not immune to prevailing trends in the culture-at-large. Judges have historically subscribed to what Fein and Neuborne call "a kind of intellectual orthodoxy," meaning that their philosophies of law "derive from and share in the existing intellectual currents of their day."[23] Gerald Rosenberg has further demonstrated that, for better or for worse, the Supreme Court does not usually exercise judicial independence when faced with intense congressional or public opposition.[24]

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[17] Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1572. (1988).
[18] Fein and Neuborne, *supra* note 6, at 7.
[19] *Id.*, at 7.
[20] Barry Friedman, *Attacks on Judges: Why They Fail*, Judicature Jan.-Feb. 98; *available at* www.ajs.org/cji/cji_attacks.asp.
[21] Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).
[22] Friedman, *supra* note 20.
[23] Fein and Neuborne, *supra* note 6, at 8.
[24] Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369 (1990).

Independent or not, judges know that their legitimacy and effectiveness are contingent upon public respect, so they cannot afford to be out of step with their times. As Judge Jan Dubois remarked, our courts "are not independent of public opinion. If the … decisions go one way and the country is going another, … we are going to have a calamity." [25]

Judicial Independence: Why Do We Need It?

The Founders provided for a system in which judicial independence might flourish because they recognized the necessity of a mediator between the sometimes contradictory ideals of democracy and liberty that lie at the heart of our Republic. Former Judge Abner Mikva has explained the tension between these ideals and the corresponding role of the judiciary:

> In a Constitution that … so clearly and carefully ordains a structure for the people to be sovereign, the notion that an unelected judiciary can "trump" the decisions of the elected policymakers is asymmetrical. It is a dangling participle in an otherwise elegant document. And yet, all of those wonderful liberties and rights and privileges, so elegantly set forth in that elegant document would be mere parchment, if there were not a force independent of the majority to uphold them.[26]

When James Madison introduced the Bill of Rights, he explained that "independent tribunals of justice will consider themselves … the guardians of [these] rights, … an impenetrable bulwark against every assumption of power in the legislature or executive." The Madisonian conception of the function and independence of the judiciary is no longer peculiar to this country, though the United States was its first laboratory. The role of courts as "the last lines of defense of the Constitution and individual rights"[27] is now a norm of constitutional democracies and is an explicit expectation of international law as embodied in the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights.[28]

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[25] *Roundtable Discussion, supra* note 12, at 21.
[26] Abner J. Mikva, *The Judges v. the People: Judicial Independence and Democratic Ideals*, 19 CARDOZO L. REV. 1771, 1773 (1998).
[27] Carlton, *supra* note 5, at 838.
[28] Camp, *supra* note 8, at 195.

II. JUDICIAL INDEPENDENCE THREATENED

A Historical Perspective

An independent judiciary fairly applying the rule of law is, as Judge Guido Calabresi is the first to admit, "a pain in the neck to any government that wants to get things done;" therefore it will always be be pressured to "behave less like courts" – that is, to be less independent and be more responsive to majority sentiment.[29] Such pressure has been constant throughout the history of the Republic:

> [It] has been under attack since the inception of the Constitution. Thomas Jefferson sought to impeach and remove Justice Samuel Chase because of Justice Chase's enthusiasm for enforcing the Sedition Act. Congress even suspended the 1802 term of the Supreme Court, hoping to foil the Court's ruling in *Marbury v. Madison*. … The Civil War Congress manipulated the size of the Supreme Court to ensure a favorable ruling on wartime Legal Tender legislation, and took away the Court's jurisdiction in a pending case after the war to avoid a constitutional challenge to Reconstruction legislation.[30]

Barry Friedman is one of the scholars who has traced the centuries-long struggle to maintain judicial independence.[31] His research has uncovered four characteristics of attacks on the judiciary's independence throughout history. First, they are "inevitably political," intended to "express dissatisfaction with the content of particular … decisions." Second, the attacks come from every point on the ideological spectrum. Third, nearly all possible techniques to limit judicial decision-making have been tried or suggested. Finally, drastic attempts to impinge upon judicial independence "almost invariably … fail, because the public does not support them."[32]

The New Wave of Attacks

There's nothing new about popular or Congressional antagonism toward controversial judicial decisions and the independence that permits them. But something has changed in recent years in the nature, the extent, and the assumptions of that antagonism. Friedman observes that, while judges have been attacked often throughout history, "the complaint has not always been (as it is now) that judges are interfering with the proper workings of democracy."[33] Fein and Neuborne suggest that what distinguishes the current "generation of court-bashers" is their belief, or their appearance of believing, that judges are no more than "politicians in black robes" and are for this reason totally undeserving of

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[29] Guido Calabresi, *The Current, Subtle– and Not So Subtle– Rejection of an Independent Judiciary*, 4 U. PA. L. REV. 637, 637. (2002).
[30] Fein and Neuborne, *supra* note 6, at 4.
[31] Friedman, *supra* note 20.
[32] *Id.*
[33] *Id.*

independence.[34] This external politicization of the judiciary resonates with Stephen Burbank's suggestion that today's threats to the independence of judges should be understood within the larger context of political culture today. "In recent years," he writes, "attacks have become more than the expected response of persons who profoundly disagree with [certain] decisions. They have become part of orchestrated strategies of political parties and other groups, empowered by the tools of modern political campaigns."[35]

The story of the contemporary wave of attacks on judicial independence may be said to have begun on January 22, 1996, when Judge Harold Baer deemed inadmissible certain evidence brought in the drug prosecution of a woman named Carol Bayless. The suppressed evidence consisted of almost eighty pounds of illegally seized cocaine and heroin, as well as Bayless's videotaped confession. Judge Baer found that the drugs were illegally seized and that the confession was the illegal fruit of the seizure.[36] His ruling made it impossible for the government to continue its prosecution, and "political hell broke loose" in response to it.[37] Under tremendous pressure from politicians across the country – including New York Mayor Rudolph Giuliani, New York Governor George Pataki, Senators Robert Dole, Orrin Hatch and Patrick Moynihan, and even President Bill Clinton[38] – Baer reconsidered and reversed his decision three months after the original ruling.[39]

Prompted by the Baer controversy, conservatives in Congress issued virulent condemnations of so-called "judicial activism" throughout 1996 and 1997. Their desire to discipline and intimidate judges has remained strong. There have even been calls for a "Judicial Restraint Amendment"[40] that would, according to one academic proponent of the measure, "constrain judicial misconduct … by providing an express written standard which will empower political objections to expansive judicial power."[41]

This year alone has seen remarkable activity among opponents of judicial independence. In July of 2003, fourteen Republican members of the House of Representatives announced their membership in the newly formed House Working Group on Judicial Accountability.[42] The group is co-chaired by Representatives Lamar Smith and Steve Chabot, with Representative Tom DeLay occupying a particularly prominent role. Its mission is to "restore the U.S. Constitution as the North Star of the

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[34] Fein and Neuborne, *supra* note 6, at 4.
[35] Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 315 (1999).
[36] United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996).
[37] John Q. Barrett, *Introduction: The Voices and Groups That Will Preserve (What We Can Preserve Of) Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 1, 1 (1996).
[38] *Id.*, at 3; *Roundtable Discussion, supra* note 12, at 18.
[39] United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996).
[40] Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 U. HAW. L. REV. 603, 607 (1998).
[41] Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171 (2002).
[42] Press Release, Rep. Lamar Smith, "Smith and Chabot Form Judicial Accountability Group" (July 23, 2003), *available at* http://lamarsmith.house.gov/news.asp?FormMode=Detail&ID=278.

American judiciary" by identifying "bad laws that invite judicial activism," by involving the House in the federal court nomination process, and by promoting vigorous House oversight of the federal court system.[43]

The establishment of the judicial accountability working group coincides with efforts by the entire House of Representatives to circumvent the judiciary. The House handily passed two amendments to the 2003 judiciary appropriations bill which would bar the use of federal funds to enforce two unpopular federal court decisions.[44]

From Principled Criticism to Partisan Criticism

According to Chief Justice William Howard Taft,

> Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism. In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.[45]

It is hard to disagree with Taft's claim that healthy criticism of the judiciary is essential to its proper functioning. But those who perceive the current climate as too hot for judicial independence to thrive do not base their reading on an atmosphere of "intelligent scrutiny" or "reasonable demands" by informed critics. Indeed, decisions whose results are disliked by certain groups are excoriated, without much attention paid to the judge's reasoning.[46] As Judge Dubois observes, there has been a shift "from principled criticism to partisan criticism," and though he admits the difficulty of drawing a clear line between the two, he says that today's kind leans more toward "harmful" than "helpful to us in our decision-making."[47]

Victims of Attacks on Judicial Independence

In a speech delivered at the University of Hawaii Law School, Judge Myron Bright highlighted some examples of judges who have been victimized for interpreting the law according to principle rather than politics. Looking primarily to the state courts, where the effects of threats to independence have been most tangible and pronounced, Judge Bright spoke of Justice Penny White of the Tennessee

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[43] "Judiciary Under Attack," THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS, Aug. 2003, *available at* www.uscourts.gov/ttb/aug03ttb/attack.
[44] *Id.*; *see infra* p. 17.
[45] *Quoted in* Fein and Neuborne, *supra* note 6, at 8.
[46] *Id.*, at 1.
[47] *Roundtable Discussion, supra* note 12, at 16.

Supreme Court, whose vote in a death penalty case made her the subject of "false, scurrilous, and misleading advertisements" in a retention election that she ultimately lost. He discussed Justice David Lanphier of the Nebraska Supreme Court, who lost his retention election because he voted that term limits for legislators are unconstitutional.[48] These two stories are representative of an increasingly common phenomenon. To learn more about judges who have met with similar challenges and fates, please refer to "Judges under Fire," a webpage hosted by the American Judicature Society.[49]

[48] Myron Bright, *Judicial Independence*, 20 U. HAW. L. REV. 611, 614 (1998).
[49] "Judges Under Fire," *available at* www.ajs.org/cji/cji_fire.asp.

III. FORCES THAT IMPAIR JUDICIAL INDEPENDENCE

Threats to judicial independence are varied and numerous. Sometimes they are easily recognizable, as when politicians call for the widespread impeachment of "activist" judges. Oftentimes, though, a threat to judicial independence gets subtly submerged under more obvious dangers, as with failures to fill vacancies on the bench or the slow death of the jury trial. Flagrant or faint, most threats to judicial independence are aimed at either decisional independence ("sporadic attacks on individual judges") or institutional independence ("attempts to diminish or regulate the powers of the judiciary as a whole").[50,51] While too great an emphasis on this binary can be overly simplistic (it can be difficult sometimes to determine where one kind of independence ends and another begins), the distinction provides a useful framework for reviewing the contemporary forces that impair judicial independence.

Impediments to Decisional Independence

- ***Litmus Tests***

The Brennan Center's Fair Courts Project defines a litmus test as "a standard that qualifies or disqualifies potential judges on the basis of how they would rule in a particular case or type of case."[52] For example, nominated or campaigning judges are frequently asked how they would rule in cases dealing with particularly contentious issues, with both sides requiring that "candidates pledge allegiance either way."[53] The practice of seeking specific commitments from nominees to the Supreme Court, for example, has been explicitly prevalent since the failed appointment of Judge Robert Bork in 1987.

Using the Bork nomination to show how judicial independence may be at stake in litmus testing, Stephen Burbank contends that such tests go "far beyond an assessment of an individual's general political attitudes and legal philosophy."[54] Burbank ultimately voices support for the aggressive stance taken by Congress when considering Bork, because "the anterior process" was itself like a litmus test, with the President "seeking assurance of conformity with executive branch views on specific legal issues." Under this view, the Senate was justified in determining whether Judge Bork, whose nomination was the product of an excessively skewed selection process, had the capacity for independence.[55] Opposition in the current Senate to several judicial nominations made by President George W. Bush

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[50] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence* 72 S. CAL. L. REV. 353, 360 (1999).
[51] See *infra*, p. 3.
[52] *Questions and Answers about Judicial Independence*, *supra* note 9.
[53] Fein and Neuborne, *supra* note 6, at 3.
[54] Burbank, *supra* note 35, at 338.
[55] *Id.* at 338.

might be, or might be understood as, an effort to thwart an executive attempt to impose a particular, highly political agenda through the courts.

The notion of a fair trial suggests, at the very least, that a judge will approach cases fairly and neutrally, without prior commitments to reach a certain result in a certain species of case. Burbank's analysis of litmus testing, then, reflects what most of us recognize intuitively – the technique is problematic, because it runs counter to our customary expectations of judges.

- ***The Decisional Independence of State Court Judges: Judicial Elections***[56]

Approximately 80% of state judges must stand for some kind of election by popular vote, and even those who are originally appointed to the bench in many states face periodic retention elections. The institution of judicial elections was not in every case the product of "an unthinking wave of enthusiasm for democratic populism."[57] In fact, elections were often intended to enhance judicial independence by eliminating the partisanship of the appointment system.[58]

Using elections to enhance judicial independence today strikes most of us as counterintuitive. In the words of Judge Mikva, "those of us who think that the most important function of a judge is the capacity to swim upstream have a mind-set against the election process."[59] Alexander Hamilton's fear that the election of judges would result in "too great a disposition [among judges] to consult popularity … [rather than] the Constitution and the laws" is a prediction confirmed not only through observation of the increasingly substantive platforms that elected judges produce in vying for the support of voters, but also by analyses of patterns of judicial behavior. Of 645 elected judges who responded to a survey conducted from 1986 to 1990, 60.5% stated that the prospect of a retention election will affect a judge's behavior.[60] Judges who must defend their criminal sentences to the electorate have increasingly chosen

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[56] It bears emphasis that the vast majority of elected state judges successfully strive to maintain their independence in spite of the pressures they face. Not all judges are the alike, and the same is true for states and electorates. Judge Morton Greenberg of New Jersey makes a strong argument that the election of judges in his own state has not given rise to concerns about judicial independence:

> [J]udges [in my state] are all appointed, … half of them from each political party. In fact, my brother who is a Democrat was appointed by a Republican governor in 1972, and the same governor appointed me. I happened to be a Republican in 1973. … It was a seven-year term; and as it happened, when each of our terms ran out, the governor was then a Democrat and he reappointed both of us without even a thought as far as I know. In a state like New Jersey, which has an appointed judiciary which is not partisan at all, it would be silly to say that there is a concern about judicial independence and decision making. As far as the federal court is concerned, I cannot even conceive of making a decision … that would cause me to sit there and be concerned [about retaining my seat]. [I] would make the correct decision.

Roundtable Discussion, *supra* note 12, at 13.

[57] Burbank, *supra* note 35, at 333.

[58] *Id.*

[59] Mikva, *supra* note 26, at 1773.

[60] Larry T. Aspin and William K. Hall, *Retention Elections and Judicial Behavior*, JUDICATURE, May-June 1994, at 306. Judges were asked to cite no more than two specific effects of retention elections. A variety of consequences were recorded:

to override less severe jury punishments in favor of the death penalty,[61] and they are apparently driven to disregard precedent more often than appointed judges.[62] These problems will surely be exacerbated in what Geri Palast, Executive Director of Justice at Stake, calls the "new era" in judicial campaigns marked by the Supreme Court's decision in *Republican Party of Minnesota v. White*, which found a First Amendment violation in a state judicial conduct rule prohibiting candidates for the bench from taking stands on legal and political issues.[63] Justice O'Connor's concurrence in *White* suggested that the real problem presented by the case was not campaign conduct, but the very existence of campaigns: "Minnesota has chosen to select its judges through contested popular elections. If the state has a problem with judicial impartiality, it is … one the state brought upon itself by continuing [that] practice."[64]

Many commentators on the problems of an elected judiciary find judicial campaigns, in their practice and financing, to be the "most troubling threat" to judicial independence.[65] Like politicians, judges facing election have no choice but to raise money in order to mount a viable campaign. A 2002 report commissioned by the American Bar Association showed a breathtaking growth in spending on judicial campaigns.[66] To cover rapidly mounting costs, judges often accept funds from lawyers, litigants, and others interested in the outcomes of cases before them."[67] As Erwin Chemerinsky writes, such entanglement risks "both the reality of undue influence and the appearance of impropriety."[68] A survey of almost 2500 state judges found that 46% think campaign contributions have some degree of influence on judicial decisions, and nearly three-quarters feel concern over a situation where, in some states, nearly half of all Supreme Court cases involve a party who has made contributions to one or more of the judges hearing the case.[69]

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elected judges are more sensitive to public opinion (27.6%); they are more accommodating to lawyers, jurors, and litigants (16.8%); they avoid controversial cases and rulings (15.4%); they engage in defensive behavior in and out of court (9.8%); they are nicer to lawyers before polls are taken (8.9%); they are prompted to sentence harshly (5.1%).

[61] Gerald F. Uelman, *The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion*, 13 CRIM. JUST. 4 (1998).

[62] Bradley A. Smith, *Symposium on Judicial Elections: Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437 (2002).

[63] Republican Party of Minnesota v. White, 536 U.S. 765 (2002); *A Year Later: New Rules for Judicial Candidates*, EYES ON JUSTICE: THE JUSTICE AT STAKE NEWSLETTER 3, 8 Sept. 2002.

[64] *Republican Party of Minnesota*, 536 U.S. at 792.

[65] Carlton, *supra* note 5, at 843; *see also* Erwin Chemerinsky, *Preserving an Independent Judiciary: the Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-KENT L. REV. 133 (1998).

[66] American Bar Association Commission on Judicial Independence, Commission on Public Financing of Judicial Campaigns (2001), *available at* www.abanet.org/judind/report072001.pdf.

[67] Chemerinsky, *supra* note 65, at 135-42.

[68] *Id.*, at 134.

[69] Greenberg, Quinlan, Rosner Research Inc., State Judges Frequency Questionnaire, conducted for Justice at Stake, 5 Nov. 2001–2 Jan. 2002 (on file with author).

- ***Impeachment for Political Reasons***

Judges are not immune from impeachment. The Constitution states that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."[70] The meaning of "good Behaviour" is illuminated by the constitutional provision on impeachment: "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[71] Former Wisconsin Congressman Robert Kastenmaier explained the appropriate role of impeachment as it applies to federal judges: "[They] should not and cannot be impeached for judicial decision making, even if a decision is … erroneous . . . . If this [were] otherwise, the impeachment remedy would become merely another avenue for judicial review."[72] Given the limited and extraordinary nature of impeachable offenses, it should come as no surprise that only 13 federal judges have been impeached since the Constitution was ratified. Of those 13 judges, only seven were convicted.

Recent years have seen a concerted effort on the part of many conservatives, particularly members of Congress, to lower or ignore the constitutional bar for judicial impeachment. The current trend began in 1996 with pervasive calls for Judge Harold Baer to resign or be impeached after his controversial ruling in a drug trafficking case.[73] In March of the following year, House Majority Whip Tom DeLay announced that congressional Republicans would try to impeach federal judges as part of "conservative efforts against judicial activism."[74] The appearance in the law reviews of "constitutional" defenses of extensive impeachment has lent a veneer of legitimacy to the rhetoric of politicians. Steven Fitschen, for example, contends that such tactics are an appropriate response to judges' "bad decisions," because the Constitution permits impeachment when they issue "unconstitutional opinions" or "introduce arbitrary power."[75] Fitschen recommends impeaching, among others, the six Justices who struck down Colorado's antigay Amendment II in *Romer v. Evans*.[76]

What could more certainly undermine a judge's ability to make an unpopular decision, when law and conscience dictate that result, than fear of retributive dismissal from the bench? Fein and Neuborne write that "nothing could be more damaging to the rule of law."[77] Judge Guido Calabresi warns that "when politicians suggest impeachment or forced retirement, then we all have to take up arms, …

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[70] U.S. CONST. art. III, § 1.
[71] U.S. CONST. art II, § 4.
[72] N. Lee Cooper, *What Would the Founding Fathers Say?*, CHRISTIAN SCI. MONITOR, Apr. 4, 1997.
[73] Barrett, *supra* note 37, at 10; for background on the Baer controversy, *see infra*, p. 7.
[74] *Id.*, fn. 6
[75] Steven W. Fitschen, *Impeaching Federal Judges: A Covenental and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 117 (1998).
[76] *Id.*, at 121-122.
[77] Fein and Neuborne, *supra* note 6, at 9.

because this danger is of a different order of magnitude."[78] Judge Calabresi, like many commentators, recognizes that actual removal of judges is not, at least presently, the real problem when it comes to the threat of judicial impeachment; he agrees with Judge Edward Becker that the threats amount to political "posturing" whose aim, in the words of Judge William Walls, is "to intimidate."[79] Nevertheless, Calabresi insists that "threats of impeachment for 'bad' decisions have to be knocked down, … since what is rare posturing can become common posturing, and common posturing can become habitual, and, after sufficient time has passed, … what was just "show" can become all too real."[80]

- ***Judicial Ambition***

If impeachment lies at one end of the judicial career spectrum, promotion rests at the other. And according to Judge Calabresi, the latter is just as potent a menace: "If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up."[81] District court judges who want to go to Courts of Appeals care how they are perceived and might tailor their rulings so as not to offend those most able to help or hinder their ascendance on the judicial ladder.[82] Calabresi observes that even an appellate judge who has "no chance whatsoever to go to the Supreme Court [starts] to act funny when some idiot journalist" suggests he or she might make a fine Justice." Likening the desire of judges to sit on ever more illustrious benches to what is called "scarlet fever" in the Catholic Church (priests hoping to become bishops, then aching to be named cardinals), Calabresi concludes that, "in the end, [this] is something that somehow the judges have to handle themselves."[83]

Impediments to Institutional Independence

- ***Manipulation of Jurisdiction***

Edwin Meese, who served as Attorney General for part of the Reagan Administration, believes that the Supreme Court and the rest of the federal judiciary have consistently usurped executive and legislative power throughout the last half-century. Writing with Rhett DeHart, Meese has pointed to a series of landmark rulings, from *Mapp v. Ohio* and *Miranda v. Arizona* to *Roe v. Wade* and *Romer v. Evans*, as examples of judicial over-independence.[84] To prevent similar abuses in the future, Meese recommends

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[78] *Roundtable Discussion, supra* note 12, at 25.
[79] *Id.*, at 17.
[80] *Id.,* at 25.
[81] *Id.*
[82] *Id.*
[83] Calabresi, *supra* note 29, at 644.
[84] Edwin Meese and Rhett DeHart, *Reining in the Judiciary*, JUDICATURE, Jan.-Feb. 1997, at 178.

that Congress limit federal jurisdiction, especially over controversial questions like school vouchers, judicial taxation, use of special masters, and same-sex marriage.

The desire to prohibit the judiciary from touching particular issues is made despite, and perhaps because of, the fact that they raise important constitutional questions. The tactic Meese recommends, itself only arguably constitutional, may be seen as an end-run around the Constitution.[85] The American Judicature Society notes that when Congress uses its power to determine jurisdiction, "it is often attempting to change constitutional law" without following the intentionally difficult and lengthy procedure for amending the Constitution.[86] In 1981, at a time when threats of jurisdiction curtailment ran high, Lawrence Sager warned that this kind of talk, "a dangerous and tawdry precedent," was "one of the most serious threats ever directed toward the independent authority of the federal judiciary."[87]

Justice Potter Stewart, upon retirement from the Supreme Court in 1981, voiced concerns similar to Professor Sager's. "I hope," he said, that "this Court will never have to wrestle with … questions [of jurisdiction manipulation] because I hope that no such legislation will be enacted."[88] Unfortunately, the Justice's wish has not come true. In 1996 alone, Congress passed two jurisdiction-stripping measures. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) allows the Immigration and Naturalization Service to decide an individual asylum case without any possibility of review of that decision by a federal court,[89] and the Antiterrorism and Effective Death Penalty Act (AEDPA) "drastically limits" the right of state prisoners to seek federal habeas corpus to challenge the constitutionality of their convictions.[90]

The practice of jurisdiction stripping thrives today. Witness the laws enacted since September 11, 2001, that dramatically curtail longstanding traditions and expectations of judicial review. The PATRIOT Act is rife with provisions that expand executive power to accuse, investigate, detain, and convict individuals without traditional forms of judicial oversight that many consider fundamental components of due process of law.[91] In December 2003, the Second Circuit Court of Appeals ruled in

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[85] For a sound argument that, "while Congress does enjoy great discretion in molding federal jurisdiction, serious [constitutional] restrictions nevertheless limit congressional authority to enact legislation of the sort presently under consideration," *see* Lawrence G. Sager, *Constitutional Limits on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981).

[86] "Curtailment of Jurisdiction," *available at* www.ajs.org/cji/cji_jurisdiction.asp.

[87] Sager, *supra* note 85, at 17.

[88] Remarks of Justice Potter Stewart on the Occasion of His Retirement (June 19, 1981). *Quoted in id.*, at 17.

[89] "Curtailment of Jurisdiction," *supra* note 85.

[90] Anthony Lewis, *An Independent Judiciary*, 43 ST. LOUIS U. PUB. L.J. 285, 291(1999).

[91] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT), Pub. L. No. 107-56. Some of the Act's jurisdictcion-limiting measures that the American Civil Liberties Unions has identified include:

- "Making it easier for the government to initiate surveillance and wiretapping of U.S. citizens under the authority of the shadowy, top-secret Foreign Intelligence Surveillance Court. (Sections 101, 102 and 107)

the case of José Padilla, a United States citizen deemed an "enemy combatant," that the Bush Administration has no constitutional power to sidestep the minimal procedures required to imprison a citizen seized on American soil.[92] Anthony Lewis, who has been a prominent critic of the PATRIOT Act, predicted the possibility of such legislation. Speaking in 1999 about IIRIRA and AEDPA, Lewis observed:

> [These are] examples of [measures that have] closed the doors of the courts. You will perhaps have noticed that those left outside the door are prisoners and aliens, people with a notable lack of political influence. The rest of us may comfort ourselves by saying that only the marginal are affected, and anyway many of the claims they made were worthless. But the practice of court-stripping will not necessarily stop there. But … no one can be confident that it will now go quietly away.[93]

- ***Vanishing Discretion in Criminal Cases***

Related to the threat of jurisdiction curtailment is the curtailment of judicial discretion in criminal sentencing. Few would argue that disparities in the sentencing of criminal defendants created substantial room for improvement. A 1974 study conducted by the Court of Appeals for the Second Circuit asked 50 district court judges how they would sentence a group of 20 offenders; the resulting range of sentences was dramatically broad, with, for example, one defendant punished by one judge with three years in prison and by another with twenty years.[94] In 1984, Congress passed two laws relevant to

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- "Permitting the government, under certain circumstances, to bypass the Foreign Intelligence Surveillance Court altogether and conduct warrantless wiretaps and searches. (Sections 103 and 104)
- "Sheltering federal agents engaged in illegal surveillance without a court order from criminal prosecution if they are following orders of high Executive Branch officials. (Section 106)
- "Expanding nationwide search warrants so they do not have to meet even the broad definition of terrorism in the USA PATRIOT Act. (Section 125)
- "Giving the government secret access to credit reports without consent and without judicial process. (Section 126)
- "Enhancing the government's ability to obtain sensitive information without prior judicial approval by creating administrative subpoenas and providing new penalties for failure to comply with written demands for records. (Sections 128 and 129)
- "Allowing for the sampling and cataloguing of innocent Americans' genetic information without court order and without consent. (Sections 301-306)
- "Terminating court-approved limits on police spying, which were initially put in place to prevent McCarthy-style law enforcement persecution based on political or religious affiliation. (Section 312)
- "Harming fair trial rights for American citizens and other defendants by limiting defense attorneys from challenging the use of secret evidence in criminal cases. (Section 204)
- "Providing for summary deportations without evidence of crime, criminal intent or terrorism, even of lawful permanent residents, whom the Attorney General says are a threat to national security. (Section 503)
- "Completely abolishing fair hearings for lawful permanent residents convicted of even minor criminal offenses through a retroactive "expedited removal" procedure, and preventing any court from questioning the government's unlawful actions by explicitly exempting these cases from habeas corpus review. Congress has not exempted any person from habeas corpus -- a protection guaranteed by the Constitution -- since the Civil War. (Section 504)" *available at* www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206

[92] Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003).

[93] Lewis., *supra* note 90, at 291 (citations omitted).

[94] Stephen Breyer, *Federal Sentencing Guidelines Revisited,* 14 CRIM. JUST. 28 (1999).

the problem of criminal sentencing: the Comprehensive Crime Control Act, which imposes mandatory minimum sentences for drug and firearm offenses, and the Sentencing Reform Act, which authorized the creation of sentencing guidelines. Justice Stephen Breyer, who worked extensively on the creation of the Federal Sentencing Guidelines as an original member of the United States Sentencing Commission, described them as an attempt to ensure "greater fairness and honesty in sentencing."[95] The Guidelines took effect in November 1987; they eliminated parole, substantially restricted provisions for reducing sentences for "good time," and produced a sentencing structure that balances the seriousness of the criminal conduct at issue against the defendant's criminal record. The Guidelines permit a judge, in certain specific circumstances, where there are "mitigating circumstances" to deviate above or below the prescribed sentencing range through what is called a "departure." The Feeney Amendment, passed just this year, bars downward departures in child-related and sex-offense cases.

Both the sentencing guidelines and the mandatory minimums have given rise to what many observers perceive as unintended consequences. The harshness of penalties for low-level and first-time drug offenders, the racial disparities that result from the rules' implementation, and the severely limited discretion of judges to depart from the minimums and guidelines have come under fire, and by no less prominent voices than Justice Breyer, Justice Anthony Kennedy, and Chief Justice William Rehnquist.[96]

Judge Guido Calabresi describes the threat to judicial independence, and therefore to justice, that has resulted from these well-intentioned laws:

> What has been the effect of the guidelines? Do we have equality in sentencing, or have we simply turned over discretion, formerly the province of judges, to prosecutors? Prosecutors have always had great power in deciding how to charge somebody, but before the guidelines, if judges figured that prosecutors had erred, the judges could use their enormous discretion in sentencing to remedy that error. Judges would ultimately decide – perhaps unequally, perhaps unfairly, but independently – what the result would be. With sentencing guidelines, judges no longer have that power, but we have done nothing – nor perhaps can we do anything – to curb the analogous discretion in people who instead are subject to political pressures.[97]

- ***Legislative Funding of the Judiciary***

It is inevitable that federal and state judiciaries will rely on legislatures for funding. This reality only becomes problematic when lawmakers use their power of the purse to punish and intimidate judges. Two measures approved this year in the House of Representatives highlight how judicial independence

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[95] *Id.*
[96] *Id.*; *Hearing before a Subcommittee of the House Committee on Appropriations*, 103d Cong. 29 (Mar. 9, 1994) (statement of Anthony Kennedy); William Rehnquist, Remarks, *Nat'l Symposium on Drugs and Violence in America*, June 18, 1993, at 10.
[97] Calabresi, *supra* note 29, at 639.

and the rule of law may be jeopardized in this way. By large majorities, the House passed two amendments to the judiciary appropriations bill to bar the use of federal monies to enforce the rulings in *Newdow v. U.S*, where the Ninth Circuit found that that the phrase "under God" in the Pledge of Allegiance violates the Establishment Clause, and *Glassroth v. Moore*, where a district court held that the posting of the Ten Commandments in an Alabama courthouse is unconstitutional under the Establishment Clause. Justifying this interference with judicial sovereignty, Representative John Hostettler explained, "when the legislative branch … believes the judicial branch to be in error, [it] may refuse to fund actions to enforce the court's judgment."

Legislatures' budgetary and oversight authority can be used in other ways to limit judicial independence. Politicians have been known to make punitive budget cuts when courts issue rulings that are offensive to them.[98] To reduce its caseload or workload, courts must ask legislatures to make the necessary adjustments and improvements.[99] Circuit Judge John Walker has warned that judicial independence is compromised when "judges, who regularly review the constitutionality and legality of executive and legislative acts, [must] come to those branches as supplicants seeking preservation of their own salaries."[100]

The judiciary itself may be partially responsible for its vulnerability to legislative munificence. Justice Hugo Black told one of his clerks in 1958, "Beware of people who under the guise of helping judges make judges financially dependent."[101] That clerk became Judge Guido Calabresi, who today discerns precisely the trend feared by Justice Black. According to Judge Calabresi, the judiciary is "less independent than it used to be," partly because "we have come to be too dependent on the Administrative Office of the Courts on fancy offices, on elegant Court houses, on too many law clerks, on a whole lot of bureaucracy that Congress can take away by not allocating the money needed to support it."[102] Calabresi warns that this is "very dangerous" and urges judges to guard against becoming "dependent in this subtle but pernicious way."[103]

- ***Failure to Fill Vacancies***

Both the Clinton and Bush administrations have complained that a Senate controlled by the

[98] Robert M. Kaufman, *Threats to Judicial Independence: An Appeal from American Judicature Past President Robert Kaufman*, *available at* www.ajs.org/cji/cji_threats.asp.
[99] "Underfunding and Workload," *available at* www.ajs.org/cji/cji_workload.asp
[100] *Quoted in* Barrett, *supra* note 37, at 15-16.
[101] Calabresi, *supra* note 29, at 644.
[102] *Roundtable Discussion, supra* note 12, at 27.
[103] *Id.*

other party was slow in filling federal court vacancies with individuals nominated by the president. Stall tactics jeopardize judicial independence in at least two ways. First, as Judge Myron Bright contends, "an independent judiciary requires efficiency, … [and] the failure to fill vacancies is crippling the efficiency of the federal courts." Second, as Judge William Walls writes, "the great stall, the great refusal, the conscious refusal by a partisan majority Senate to confirm judicial nominations [is] a concrete danger to the integrity of the judiciary . . . . [I]t is a danger to judicial independence because [it is meant] to intimidate us."[104]

- ***Decline of the Jury Trial***

In July 2000, *Federal Lawyer* published an open letter from U.S. District Judge William Young to his colleagues on the federal bench.[105] Judge Young's subject was the decline of the jury trial in this country; his worry, the resulting threat to our judiciary and, ultimately, to American democracy itself. The letter was an impassioned plea to judges to confront this "most profound change in our jurisprudence in the history of the Republic."[106]

On first blush, it would seem that the slow demise of trial by jury enhances judicial independence by giving judges more power, not less. Judge Williams suggests why this initial impression may be wrong. Positing that "only because juries may decide most cases is it tolerable that judges decide some," he argues that the increasingly large percentage of decisions made by lone judges weakens judicial credibility in the eyes of the people.[107] This, in turn, fuels the impression that judges must be constrained, that judicial independence should be limited because judges are out of touch with the people they serve. Ultimately, Williams asks whether "the greatest threat to America's vaunted judicial independence comes not from any external force but internally, from the judiciary's willingness to let the jury system melt away."[108]

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[104] *Id.*, at 9.
[105] William G. Young, *An Open Letter to U.S. District Judges*, 50-JUL FED. LAW. 30.
[106] *Id.*
[107] *Id.*
[108] *Id.*

IV. PRESERVING JUDICIAL INDEPENDENCE

What's at Stake?

Justice Ruth Bader Ginsburg, noting threats from all sides to judicial independence, has cautioned that "the independence of the … judiciary is essential to its proper functioning and must be retained."[109] Why is it essential? What is at stake?

There are any number of answers to these questions, some of which have been given or suggested in the preceding pages. Judges and scholars who have addressed the issue have argued that judicial independence is essential because:

- If judges were "mere mouthpieces of popular sentiment, cherished constitutional values would largely perish."[110]
- An independent judiciary fosters stability; it can check the power of the legislative and executive branches, making truly extreme measures less likely to succeed.[111]
- Judicial independence is a guarantee of due process, whereby litigants are assured a neutral adjudicator who is not subject to "partisan affiliations, campaign contributions, and … political ramifications."[112]
- A court decision is respected "as the result of a principled process that includes principled decision-making by judges."[113] Should the public perceive those decisions are based on factors "other than the evidence, the laws, and the Constitution, it will lose its respect for the law. And when the public loses its respect for the law, we lose the centripetal force that binds us to our nationhood."[114]

A Role for Politicians

Politicians, who have done so much to threaten judicial independence, have a vital part to play in preserving it. The Brennan Center's Fair Courts Project asks politicians to refrain from asking judicial nominees how they would decide particular cases and to cease political attempts to limit jurisdiction.[115] Commentators have also urged politicians to maintain an appropriate tone in their criticism of judges

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[109] Ginsburg, *supra* note 40, at 604.
[110] Fein and Neuborne, *supra* note 6, at 6.
[111] Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, 134 (Steven Burbank & Barry Friedman eds., 2002).
[112] Scott D. Weiner, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187 (1996).
[113] Fein and Neuborne, *supra* note 6, at 4.
[114] Carlton, *supra* note 5, at 839.
[115] *Questions and Answers about Judicial Independence*, *supra* note 9.

and their decisions, with former ABA President Alfred Carlton advising that criticism "be limited to questions of integrity, competence, or knowledge of the law."[116] John Barrett says politicians should take care not to comment on particular decisions unless "well-versed in the relevant law." No one, of course, suggests that judges should not be criticized at all; responsible criticism may be a honey that catches more flies than the vinegar of harsh rhetoric and intimidation.

At the state level, many commentators have suggested judicial campaign reform. Erwin Chemerinsky describes in detail why "judicial independence requires strict limitations on both campaign contributions and campaign expenditures," and how constitutionally viable regulations may be imposed.[117] Others have recommended public financing as a potential cure. A "breakthrough" in this area was North Carolina's decision in 2002 to become the first state in the country to adopt a system whereby participating candidates agree to spending limits in exchange for full public financing of their campaigns; the Illinois and Wisconsin legislatures are considering similar measures.[118] In states where public financing may not be politically feasible, "better disclosure laws … can help."[119] And in a few particularly brave legislatures, serious consideration is being given to wholesale reform of the judicial election approach; Pennsylvania, for example, is contemplating a system in which judges appointed through merit-based selection will face periodic retention elections.[120]

A Role for Judges

Justice Ginsburg laments that many people "do not understand" the extent to which most judges, regardless of who appointed them, "take [seriously] their obligation to construe and develop the law reasonably and sensibly, with due restraint and fidelity to precedent, and to administer justice impartially."[121] No doubt, the most important task for judges in preserving their own independence is to continue the effort described by Justice Ginsburg. But the responsibility of judges need not end there. Alfred Carlton cites a 1999 survey showing that only a quarter of the American public is "highly knowledgeable" about the justice system. Three-quarters of the respondents, when asked how they would prefer to become more informed, said they wanted to learn directly from judges. Carlton asks, "What clearer mandate could we have been given?"[122] Frances Kemans likewise writes of the great need for judges to communicate with the public about what they do, how they do it, and why. She suggests that the "judicial lockjaw" exhibited by many judges, often attributable to codes of conduct, makes them

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[116] Carlton, *supra* note 5, at 841.
[117] Chemerinsky, *supra* note 65, at 134.
[118] Geri Palast, *Keeping Our Courts Fair and Impartial: What Comes Next?*, THE NATIONAL VOTER 5, May/June 2003.
[119] *Id.*
[120] *Id.*
[121] Ginsburg, *supra* note 40, at 604.
[122] Carlton, *supra* note 5, at 842.

appear elitist and aloof, which hurts them when it comes time to render an unpopular opinion.[123] Zemans advocates that judges recognize their opinions as "a powerful mode of communication," which should be written in language that can be easily understood by nonlawyers.[124]

Finally, it may behoove judges to come to the rescue of colleagues who come under fire for legitimate exercises of judicial independence. When calls for the impeachment of Judge Harold Baer were rampant in 1996, all members of the court of appeals for his circuit (the Second) wrote a letter urging that the attacks cease "because of the disservice they do to the Constitution and the danger they create of seriously misleading the American people as to the proper functioning of the federal judiciary."[125] A unanimous and authoritative statement like this one can be a needed reassurance to embattled judges and a necessary explanation to a public struggling to understand.

A Role for the Public

When informed about the importance of judicial independence, the public does not support incursions into it.[126] This is why the American Judicature Society has launched a Center for Judicial Independence in order to help people become more knowledgeable about the issue. Motivated by a belief that "a united citizenry that fights for judicial independence will have a strong impact," the AJS encourages citizens to communicate with their representatives and other officials to express concern whenever new threats surface.[127] The League of Women Voters' Judicial Independence Project has launched an effort to educate citizens in a number of states through well-publicized panels, press conferences, educational forums, and television programs.[128] Such grassroots efforts are fervently supported by former Tennessee Supreme Court Justice Penny White, who recommends the involvement of non-lawyer spokespeople in the fight for judicial independence.[129] She contends that the voices of people outside the legal profession are perceived as more objective and would give additional credibility to the defense of judicial independence.

A Role for Lawyers

It is not a novel idea that that lawyers, acting collectively, have a place at the front lines in the defense of judicial independence. When the American Bar Association was founded in 1878, it began

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[123] Frances Kahn Kemens, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. Cal. L. Rev. 625, 636 (1999).
[124] *Id.* at 642.
[125] *Quoted in* Barrett, *supra* note 37, at 11.
[126] Friedman, *supra* note 20.
[127] Kaufman, *supra* note 98.
[128] *Educating Citizens to Protect Their Courts*, EYES ON JUSTICE: THE JUSTICE AT STAKE NEWSLETTER 4-5, 3 Oct. 2003.
[129] Panel, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 162 (1999).

with three fundamental purposes that continue to be at the heart of its efforts, one of which was "to protect, maintain, and insure the independence and quality of the American judiciary."[130] And, as threats to judicial independence have mounted, legal associations have had to rise to the occasion in ways that could not have been imagined in 1878. For example, recognizing that there is a limit to judges' ability to respond to critics, the ABA decided in 1998 to perform some of that work for them via a Standing Committee on Judicial Independence. Focusing on state and local judiciaries, the Committee promotes public awareness about the values of an independent judiciary and assists in responding to unwarranted criticism; it has cosponsored a model plan on how to respond to judicial criticism, distributed to bar associations nationwide, that provides information on when it is appropriate to respond to unwarranted criticism of a judge, and that offers a plan as to how that response should be handled.[131] According to one of the ABA's former presidents, "no one has a greater stake in the integrity and dignity of the courts, so it is reasonable that attorneys should defend them."[132]

Individual lawyers can also work to preserve judicial independence. John Barrett writes that, "if there is room for additional useful action, it may be at the level of the individual lawyer. We each should speak out about judicial independence."[133] And to whom might a lawyer speak out? To his community, to her clients and colleagues, and to the press. Kirsten Tinglum, onetime President of the Alaska Bar Association, wrote to a letter to the lawyers of her state asking them to refrain from irresponsible attacks on judges who rule against them in court. She asks attorneys to distinguish between those whom they dislike and those who have acted unethically, and she predicts that the first set may contain many judges while the second will probably contain none.[134] On a similar note, Gerald Uelman exhorts lawyers to think of more than their own self-interest when criticizing or supporting judges.[135]

Finally, Judge Penny White, herself the victim of a successful attack on her independence as a judge, emphasizes the reliance of judicial independence on the intellectual and professional courage of lawyers:

> I have realized something only recently that is as important as our recognition of courageous judges. … It is, in most cases, the courageous advocate that empowers the judge to be courageous. …
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> **In almost every case that comes to mind when you think about courageous, independent judges, there is a courageous advocate standing on the other side of the bench.[136]**

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[130] Carlton, *supra* note 5, 842.
[131] "American Bar Association," *available at* http://www.justiceatstake.org/partnerViewer.asp?breadCrumb=9,134.
[132] Carlton., *supra* note 5, at 843.
[133] Barrett, *supra* note 37, at 13.
[134] Kirsten Tinglum, *President's Column: Judicial Independence and Our Responsibility*, 24 ALASKA BAR RAG 2, 2 (2000).
[135] Uelman, *supra* note 61.
[136] White, *supra* note 4, at 8 (emphasis added).