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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Report	American Bar Association Commission on the 21st Century Judiciary Draft Report [121 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	121	03/14/2003	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

ABA (American Bar Association) - A National Colloquium on the 21st Century Judiciary, 03/14/2003

FRC ID:

9701

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material **SUPERSEDED**

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To better
For your
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any

Document Originally
Attached to
Following Page

THE AMERICAN BAR ASSOCIATION PRESENTS

A National Colloquium
on the 21st Century Judiciary

North Carolina Bar Center
March 14, 2003



AMERICAN BAR ASSOCIATION

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March 12, 2003

The Honorable Alberto Gonzales
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Judge Gonzales:

Enclosed, as mentioned in the March 7 letter from Alfred P. Carlton, Jr., is the American Bar Association's Commission on the 21st Century Judiciary draft report.

I look forward to hearing from you regarding the April 12, 2003 reception and dinner at the Supreme Court. I can be reached at 312.988.5134.

Sincerely,



Katy Englehart
ABA Office of the President

We declined the
4-12 dinner →
you'll be returning
from Denver
draft response?

Are you
interested?

You will return
from Denver
earlier that
afternoon.

No plane declines -
declined. any

EXEC. OFC. PRESIDENT
COUNSEL TO THE PRESIDENT

2003 MAR 19 AM 10:30

AMERICAN BAR ASSOCIATION



Alfred P. Carlton, Jr.
President

750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

March 7, 2003

The Honorable Alberto Gonzales
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Judge Gonzales:

Justice Ruth Bader Ginsburg has graciously agreed to host the American Bar Association Commission on the 21st Century Judiciary for a reception and dinner at the Supreme Court on Saturday, April 12, 2003. It is my honor to invite you to join the Commission and invited guests in the East and West Conference Rooms. The reception will begin at 6:30 p.m. followed by dinner at 7:30 p.m.

The Commission, which will have its final meeting in Washington earlier in the day on April 12, has been undertaking a critical examination of the judicial system, with special attention to the state judiciaries. During four hearings held across the country last fall, the Commission heard testimony from experts on judicial selection, tenure, and compensation; judicial ethics, diversity and education; and the criminal, civil and juvenile justice systems. At a time when judicial independence is threatened in many ways, the Commission is looking at innovative ways to protect the third branch. A copy of the Commission's draft report will be sent to you under separate cover. The Commission is chaired by Edward W. Madeira, Jr. of Philadelphia and is co-chaired by the Honorable William S. Sessions and the Honorable Abner J. Mikva.

Please have a member of your staff contact Katy Englehart in the ABA Office of the President, 312.988.5134, to let us know if you will be able to attend.

Best regards and all good wishes.

Sincerely,

Alfred P. Carlton, Jr.
President, American Bar Association

*Look forward to
seeing you in
Boca at ACTL!*

***The American Bar Association
Presents***

**A National Colloquium on the
21st Century Judiciary**

**North Carolina Bar Center
8000 Weston Parkway
Cary, NC**

March 14, 2003

Convened by:

**Alfred P. Carlton, Jr.,
President, American Bar Association**

**American Bar Association
Commission on the 21st Century Judiciary**



**Defending Liberty
Pursuing Justice**

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American Bar Association
A National Colloquium on the
21st Century Judiciary

North Carolina Bar Center
March 14, 2003

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Judiciary
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- V. Draft Report and Recommendations of the
ABA Commission on the 21st Century Judiciary



SECTION I

AMERICAN BAR ASSOCIATION

750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000
FAX: (312) 988-6281

March 14, 2003

Welcome to Raleigh, the epicenter of state judicial reform. It is fitting that we convene this colloquium in this beautiful city.

Last fall, the ABA Commission on the 21st Century Judiciary embarked on a comprehensive review of state judiciaries at the beginning of a new century. The commission held four hearings across the country to gather information on a range of threats to the ability of the judiciary to decide cases "without fear or favor" and with adequate resources to provide all citizens with access to justice. The commission has studied the changing character of state judicial elections, the demographic and other trends affecting the courts, and the evolving role of judges in our society, among other issues. The commission is especially concerned with the increasing partisanship that is affecting the judiciary – whether in the context of judicial election campaigns or in relationships between state judiciaries and legislatures and executive branches. The corrosive effect of partisanship and interest group politics on the public's trust and confidence in the judiciary concerns us all.

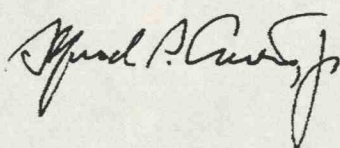
Today, you will join national leaders of the bench, the bar, the business community and civic organizations to analyze the Commission's preliminary findings and recommendations. Further changes to the Commission's report will be made based on the vigorous give-and-take that will occur during the colloquium, and final recommendations will be presented to the ABA House of Delegates at the ABA Annual Meeting in August 2003.

We would like to thank the North Carolina Bar Association for allowing us to use this exceptional facility and we invite everyone to join us for some North Carolina hospitality immediately following the colloquium. If you have never experienced a pig-pickin,' you are in for a treat.

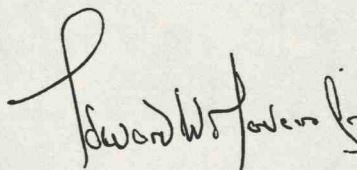
Special thanks go to LEXIS-NEXIS for generously supporting the production of printed materials for the colloquium. We also would like to thank the Joyce Foundation, the Open Society Institute, and the Z. Smith Reynolds Foundation for their support of the Commission's work.

Thank you for being here today and for taking an interest in an issue of profound importance to our nation's system of justice.

Sincerely,



Alfred P. Carlton, Jr.
President, American Bar Association



Edward W. Madeira, Jr.
Chair, Commission on the 21st Century
Judiciary

SECTION II

**A National Colloquium on the 21st Century Judiciary
North Carolina Bar Center
March 14, 2003**

AGENDA

Overview: The primary purpose of the National Colloquium on Judicial Independence is to discuss the proposed recommendations of the American Bar Association's Commission on the 21st Century Judiciary. The Commission seeks comments on its recommendations from all colloquium participants.

7:30 – 11:00 a.m. **Registration**

7:45 – 8:30 a.m. **Continental breakfast**

8:30 – 9:10 a.m. **Introductory and Welcoming Remarks**

Edward W. Madeira, Jr., Chair, ABA Commission on the 21st Century Judiciary

Alfred P. Carlton, Jr., President, American Bar Association

Ann Reed, Past President, North Carolina State Bar

J. Norfleet Pruden III, President, North Carolina Bar Association

The Honorable I. Beverly Lake, Chief Justice, Supreme Court of North Carolina

9:10 – 10:10 a.m. **Plenary One**
Improving the Judicial System – The North Carolina
Experience

ABA President Alfred P. Carlton, Jr. moderates a discussion of the successful effort to adopt the Judicial Campaign Reform Act and how North Carolina might serve as a model for other states seeking to improve their judicial elections.

Introductory Remarks by the Honorable Robert Morgan, former United States Senator and Chair of the North Carolina Center for Voter Education.

Panelists:

Alfred P. Carlton, Jr., moderator

Honorable Wanda Bryant, Judge, North Carolina Court of Appeals

Honorable G. Wayne Goodwin, North Carolina House of Representatives

Chris Heagarty, Executive Director, North Carolina Center for Voter Education

Honorable Robert F. Orr, Justice, Supreme Court of North Carolina

Honorable Allen Wellons, former member of North Carolina Senate

The remainder of the Colloquium will be a series of plenary sessions during which the Commission's draft recommendations for new and updated ABA policy regarding the judiciary will be presented and discussed by the full assemblage. For each session, Commission Reporter Charlie Geyh will give a brief overview of the recommendations and describe the Commission's process of formulating them. Following the overview, a faculty member will comment on the recommendations. Commission members will then lead a large group discussion of the recommendations, soliciting the viewpoints of all participants in attendance.

10:10 – 10:25 a.m. **Break**

10:25 – 11:15 a.m. **Plenary Two**
 Judicial Selection Methods

Overview: **Professor Charlie Geyh**

Commentary: **Charles E.M. Kolb**, President, Committee for Economic Development

Discussion leaders: **Ric Duques, Honorable Thomas R. Phillips, Honorable William S. Sessions**

The following draft recommendations will be considered during Plenary Two:

1. **The Commission recommends that states develop judicial evaluation programs to assess the performance of all sitting judges.**
2. **The Preferred System of Judicial Selection**
The Commission believes that the preferred system of state court judicial selection is a commission-based appointive system, with the following components:
 - a. **The Commission recommends that the governor nominate judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by an independent, deliberative body or commission.**
 - b. **The Commission recommends that states consider conditioning the appointment of judicial aspirants nominated by the governor upon confirmation by the state legislature or some subset thereof.**
 - c. **The Commission recommends that judicial appointees serve a single, lengthy term, or until a specified age, and not be subject to a reselection process.**

3. **Alternative recommendations on systems of judicial selection:**
- a. For states that will not abandon judicial elections altogether, the Commission recommends that elections be employed only at the point of initial selection.
 - b. For states that retain judicial elections as a means of reselection, the Commission recommends that judges stand for retention election, rather than run in contested elections.
 - c. For states that retain judicial elections as a means to select or reselect judges, the Commission recommends that all such elections be conducted in a non-partisan manner.
 - d. For states that continue to employ judicial elections as a means of judicial reselection, the Commission recommends that judicial terms be as long as possible.
 - e. In states that use elections to select or reselect judges, the Commission recommends that states provide the electorate with voter guides on the candidate(s).
 - f. In states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities initiate a dialogue between the business community and the trial bar, in an effort to deescalate the contributions arms race in judicial campaigns.
 - g. In states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities reach out to candidates and affected interests, in an effort to establish voluntary guidelines on judicial campaign conduct.
 - h. For states that do not abandon contested elections at the point of initial selection or reselection, the Commission recommends that states create systems of public financing for appellate courts.

11:15 – 12:00 p.m. **Plenary Three**
 Judicial Ethics and Discipline

Overview: **Professor Charlie Geyh**

Commentary: **Dean Gene Nichol**, University of North Carolina School of Law

Discussion leaders: **Honorable Thomas R. Phillips, Stephen N. Zack**

The following draft recommendations will be considered during Plenary Three:

- 4. The Commission recommends that the ABA undertake a comprehensive review of the Model Code of Judicial Conduct.
- 5. The Commission recommends that the Code of Judicial Conduct be actively enforced.

12:00 – 1:00 p.m. **Lunch**
 Served in Atrium

1:00 – 1:45 p.m. **Plenary Four**
 Diversification of the Justice System

Overview: **Professor Charlie Geyh**

Commentary: **Deborah Goldberg**, Acting Director, Democracy Program,
Brennan Center for Justice

Discussion leaders: **Honorable Barbara Roberts, Julius Chambers**

The following draft recommendations will be considered during Plenary Four:

6. **The Commission recommends expanding the use of mentoring and outreach by members of the legal profession.**
7. **The Commission recommends that states with commissions to evaluate the qualifications of judicial aspirants strive to diversify those commissions.**
8. **The Commission recommends active promotion of a representative work force and diverse court appointments.**
9. **The Commission recommends that courts act aggressively to ensure that language barriers do not limit access to the justice system.**
10. **The Commission recommends that courts have in place formal policies and processes for handling allegations of bias.**
11. **The Commission encourages sharing of information regarding diversity among the courts in a state and among the states.**
12. **The Commission recommends that measures be adopted to improve jury pool representation.**

1:45 – 2:30 p.m. **Plenary Five**
 Qualifications and Pre-judicial Training

Overview: **Professor Charlie Geyh**

Commentary: **Dean Joseph Tomain**, University of Cincinnati College of Law

Discussion leaders: **George Frazza, Honorable Abner Mikva**

The following draft recommendations will be considered during Plenary Five:

13. **The Commission recommends that states explore and experiment with pre-judicial training programs.**
14. **The Commission recommends that states establish credible, neutral, non-partisan deliberative bodies to assess the qualifications of all judicial aspirants.**

2:30 – 3:15 p.m.

Plenary Six

The Evolving Nature of the Judicial Function

Overview: **Professor Charlie Geyh**

Commentary: **Roger Warren**, President, National Center for State Courts

Discussion leaders: **Honorable Margaret Marshall, Thomas W. Ross, Sr.**

The following draft recommendations will be considered during Plenary Six:

15. The Commission recommends that state appropriations be sufficient to provide adequate funding for judicial education.
16. The Commission recommends that Congress fully fund the State Justice Institute to ensure that judicial education needs are met.
17. The Commission recommends that courts take steps to promote public understanding of and confidence in the courts among jurors, witnesses and litigants.
18. The Commission recommends that courts reach out to the communities of which they are a part, by hosting trips to courthouses and by judges and court administrators speaking in schools and other community settings.
19. The Commission encourages the proliferation of problem-solving courts as a means to promote public confidence in the courts.

3:15 – 3:30 p.m.

Break

3:30 – 4:15 p.m.

Plenary Seven

Court Funding and Interbranch Relations

Overview: **Professor Charlie Geyh**

Commentary: **Dr. Frances K. Zemans**, Justice System Consultant, former Executive Vice-President and Director, American Judicature Society

Discussion leaders: **Honorable Pete Gallego, Honorable Margaret Marshall**

The following draft recommendations will be considered during Plenary Seven:

20. The Commission recommends that states establish standards for minimum funding of judicial systems.
21. The Commission recommends that the judiciary's budget be segregated from that of the political branches, and that it be presented to the legislature for approval with a minimum of line-itemization.
22. The Commission recommends that states create independent commissions to establish judicial salaries.

- 23. The Commission recommends that states host regular summits of representatives from all three branches of government to promote inter-branch communication as a means to avoid unnecessary confrontations on such issues as court funding, judicial salaries, and structural reform of courts.**

4:15 – 5:15 p.m. Roundtable Discussion

A panel of academics studying the administration of justice will react to the Commission's draft recommendations.

Introduction by Alfred P. Carlton, Jr.

Panelists:

Cynthia Canary, Moderator, Director, Illinois Campaign for Political Reform

Paul Carrington, Duke University School of Law

Judith B. Moran, Consultant, Center for Families, Children and the Courts, University of Baltimore School of Law

G. Alan Tarr, Center for State Constitutional Studies, Rutgers University - Camden

Carl Tobias, UNLV School of Law

Emily Field Van Tassel, Historian and Legal Scholar

5:15 – 5:30 p.m. Concluding Remarks

Edward W. Madeira, Jr.

Alfred P. Carlton, Jr.

5:30 – 8:30 p.m. Refreshments and Pig-pickin'
North Carolina Bar Center



SECTION III

Commission on the 21st Century Judiciary
Alfred P. Carlton, Jr., ABA President

Edward W. Madeira, Jr., **Chair**
Pepper Hamilton, LLP
Philadelphia, Pennsylvania
Email: madeirae@pepperlaw.com

Honorable William S. Sessions,
Honorary Co-Chair
Holland & Knight, LLP
Washington, DC

Abner J. Mikva, **Honorary Co-Chair**
University of Chicago Law School
Chicago, Illinois

MEMBERS:

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Ferguson, Stein Chambers
Charlotte, North Carolina

Henry C. (Ric) Duques
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First Data Corporation
Sarasota, Florida

George S. Frazza
Patterson Belknap et al
Former General Counsel,
Johnson & Johnson
New York, New York

Representative Peter Gallego
Texas House of Representatives
Alpine, Texas

Patricia M. Hynes
Milberg Weiss et al
New York, New York

Honorable Margaret Marshall
Chief Justice
Supreme Judicial Court of
Massachusetts
Boston, Massachusetts

Honorable Thomas R. Phillips
Chief Justice
Supreme Court of Texas
Austin, Texas

Honorable Barbara Roberts
Former Governor, State of Oregon
Portland, Oregon

Thomas W. Ross, Sr.
Executive Director
Z. Smith Reynolds Foundation
Winston-Salem, North Carolina

Stephen N. Zack
Boies Schiller
Miami, Florida

Charlie G. Geyh, **Reporter**
Indiana University School of Law
Bloomington, Indiana

**Liaison from the ABA Board of
Governors:**

Jose C. Feliciano
Baker & Hostetler, LLP
Cleveland, Ohio

ABA Staff:

Luke Bierman, Director
Justice Center

Katy Englehart
Staff Operations/Special Projects
Office of the President

Seth Andersen, Project Manager
Standing Committee on Judicial
Independence

Eileen Gallagher, Staff Director
Standing Committee on Federal Judicial
Improvements

Marcia Kladder, Associate Director
Justice Center

**American Bar Association
Commission on 21st Century Judiciary
Special Advisory Committee**

ABA Judicial Division:

Honorable David Horowitz (ret.)
Studio City, California

ABA Section of Legal Education:

Dean Gene R. Nichol, Jr.
University of North Carolina
Chapel Hill, North Carolina

**ABA Tort Trial and Insurance
Practice Section:**

Michael E. Mone
Esdaile, Barrett, & Esdaile
Boston, Massachusetts

**American College of Trial
Lawyers:**

Benjamin H. Hill, III
Hill Ward & Henderson PA
Tampa, Florida

Corporate Counsel:

Louis L. Hoynes, Jr.
Wyeth Law Department
Madison, New Jersey

**Association of Trial Lawyers of
America:**

Robert S. Peck
Center for Constitutional Litigation
Washington, DC

Defense Research Institute:

Richard T. Boyette
Cranfill, Sumner & Hartzog
Raleigh, North Carolina

**Hispanic National Bar
Association:**

Duard D. Bradshaw
Roderick Linton LLP
Akron, Ohio

**League of Women Voters of the
United States:**

Pat Brady
Springfield, Virginia

ABA Section Officers Conference:

Bernard F. Ashe
Delmar, New York

ABA Section of Litigation:

Michael J. Henke
Vinson & Elkins
Washington, DC

**U.S. Chamber of Commerce,
Institute for Legal Reform:**

James Wootton
Washington, DC

**ABA Standing Committee on
Strategic Communications:**

Allan J. Tanenbaum
AFC Enterprises, Inc.
Atlanta, Georgia

**American Bar Association
Commission on the 21st Century Judiciary**

Roster of Witnesses, Commission Hearings

The ABA Commission on the 21st Century Judiciary held four national hearings between August and November 2002. A wide variety of national experts on the judiciary, including scholars, lawyers, state chief justices, and public leaders, testified before the commission on a number of topics. Hearings were held at Wayne State University Law School in Detroit, Michigan; James A. Byrne US Courthouse in Philadelphia, Pennsylvania; Portland State University College of Urban and Public Affairs in Portland, Oregon; and the Old Supreme Court Chambers of the Texas State Capitol in Austin, Texas. The four hearings generated a total of 1032 pages of testimony.

The following people testified before the Commission:

Hon. Gerry Alexander, Chief Justice, Supreme Court of Washington
Hon. Dennis Archer, President-Elect, American Bar Association
Hon. Phyllis Beck, Pennsylvania Superior Court
Greg Berman, Director, Center for Court Innovation
James Bopp, Jr., Bopp, Coleson & Bostrom
Mark Brewer, Chair, Michigan Democratic Party
Stephen Bright, Director, Southern Center for Human Rights
Dr. Bill Burges, President, Burges & Burges
Lisa Chang, President, National Asian Pacific American Bar Association
Allan Gordon, Chancellor, Philadelphia Bar Association
Thomas Gottschalk, General Counsel, General Motors Corporation
Cliff Haines, Pennsylvanians for Modern Courts
Hon. Brenda Harbin-Forte, Alameda County Superior Court, former Dean, B.E. Witkin Judicial College of California (provided written testimony)
Guy Harrison, President, State Bar of Texas
Dr. Roger Hartley, University of Arizona School of Public Administration and Policy
J. Barlow Herget
Hon. Dale Koch, Presiding Judge, Multnomah County Courts, member, Board of Trustees, National Council of Juvenile and Family Court Judges
Angel Lopez, President, Oregon Bar Association
Hon. Frederica Massiah-Jackson, President Judge, Philadelphia Court of Common Pleas
Hon. Thomas Moyer, Chief Justice, Supreme Court of Ohio
Robert Newell, President, Multnomah County Bar Association
Hon. Morris Overstreet, former Justice, Texas Court of Criminal Appeals
Margaret Reaves, Executive Director, Texas State Commission on Judicial Conduct
Malcolm Robinson, President, National Bar Association
Hon. Patricio Serna, Chief Justice, Supreme Court of New Mexico, President, National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts
Bryan Stevenson, Executive Director, Equal Justice Initiative of Alabama
David Tevelin, State Justice Institute

Joseph Tomain, Dean, University of Cincinnati College of Law
Suzanne Townsend, President, National Native American Bar Association
Reginald Turner, President, Michigan Bar Association
Andru Volinsky, Stein, Volinsky & Callaghan, PA

In addition, the Commission sought written testimony from any interested party. The Commission received written statements from the following organizations, totaling 64 pages of testimony:

Campaign for Media and Legal Center
ABA Death Penalty Moratorium Implementation Project
ABA Section of Individual Rights and Responsibilities, Death Penalty Committee
State Bar of Wisconsin Committee on Politics and the Wisconsin Judiciary
Center for American Politics and Citizenship at the University of Maryland
Hennepin County (MN) Bar Association



SECTION IV

JEANNINE BELL

A.B., 1991, Harvard College; M.A., 1995, J.D., 1999, Ph.D., 2000, University of Michigan. An associate professor at the School of Law at Indiana University-Bloomington since 1999, Jeannine Bell is also an adjunct professor in Indiana University's Department of Political Science. Professor Bell is author of the book, *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime* (New York University Press, 2002) an ethnographic study which examines the treatment of hate crimes by the police. She is also co-author of another book, *Gaining Access to Research Sites* (2003).

**JUDGE WANDA G. BRYANT
NORTH CAROLINA COURT OF APPEALS**

Judge Wanda G. Bryant was born in Brunswick County, N.C., on 26 June 1956 to Christerbelle Randall Bryant and the late Dolphus Bryant. She has been interested in law since she was a child and has an extensive background in the legal profession.

Judge Bryant graduated from Duke University in 1977 with a degree in History and Comparative Area Studies. She also attended Oxford University in England. In 1982, she earned her law degree at North Carolina Central University.

In 1983, Judge Bryant made history when then District Attorney Mike Easley appointed her the first African-American prosecutor for the 13th Prosecutorial District. As an Assistant District Attorney, she served the coastal counties of Bladen, Brunswick, and Columbus. Her experience as an Assistant District Attorney in her own hometown helped shape her unbiased approach to the justice system and develop a strong sense of fairness and justice.

Judge Bryant later served as an Assistant United States Attorney for the District of Columbia where she focused on the prosecution of child and adult sexual assault cases. Judge Bryant returned to North Carolina to head then Attorney General Easley's newly created Citizens Rights Division. Under her leadership, the Division worked with citizens and communities to address consumer protection issues, child abuse, elder abuse, hate crimes, and safe neighborhood initiatives.

In February 2001, she was appointed by Governor Easley as a Judge on the North Carolina Court of Appeals. Despite an unsuccessful statewide race to retain her seat, Judge Bryant was reappointed to the Court of Appeals by Governor Easley in December 2003 upon the retirement of Judge K. Edward Greene.

Judge Bryant and her husband Ronald Steven Douglas, Assistant Dean of North Carolina Central University School of Law, have two children: Edward Matthew Douglas and Alicia Rose Douglas. Judge Bryant is a member of Cedar Grove Missionary Baptist Church in Supply, N.C., and attends St. Paul AME Church in Raleigh, N.C.

Professional Memberships

US Supreme Court Bar
District of Columbia Bar
10th Judicial District Bar
Wake County Bar Association
Brunswick County Bar Association
North Carolina Bar Association
American Bar Association
NC Association of Women Attorneys
NC Association of Black Lawyers
Capital City Lawyers Association
Alpha Kappa Alpha Sorority, Inc.
The National Black Prosecutors Association
The United States Attorneys Association
The North Carolina District Attorneys Association

Honors and Awards

Distinguished Service (Alumni) Award, NCCU Law School (1996)
Black History Month Appreciation Award, Elizabeth City State University (1996)
Special Achievement Award, U.S. Department of Justice (1991)
Judicial Nominee for District Court Judge, Thirteenth Prosecutorial District (1986)
Outstanding Citizen's Award, The Links
Outstanding Community Service Award (1987)
American Jurisprudence Book Award
Carol B. Warren Property Law Scholarship
National Sea Grant Scholarship
Who's Who Among American Law Students

Boards and Commissions

NC Judicial Council, Judicial Resolutions Committee (2001-present)
NC Bar Association, Administration of Justice Task Force (2001-present)
Wake County Bar Association, Board of Directors (2001-present)
Chairperson, Attorney General's Environmental Crimes Task Force (1993-2001)
Governor's Juvenile Justice and Delinquency Prevention Committee (1993-1999)
Chairperson, Governor's Crime Commission, Violence Against Women Act Committee (1995-1998)
Governor's Task Force on Youth Violence and School Safety (Co-Chair 1999)
Governor's Task Force on Domestic Violence (Committee Co-Chair 1998-1999)
COPLink Advisory Board (1998-2000)
Minority Sensitivity Training Guidelines Committee (1999-2000)
National Association of Attorneys General VAWA Committee (1998-2001)

Governor's Task Force on Racial and Religious Violence and Intimidation
USDOJ Hate Crimes Working Group(Western District) (1998-2001)

ALFRED P. CARLTON JR.

PRESIDENT, AMERICAN BAR ASSOCIATION

Alfred P. Carlton Jr. of North Carolina, a partner with Kilpatrick Stockton LLP, a full-service international law firm with more than 500 attorneys, is President of the American Bar Association. His one-year term began at the Annual Meeting in Washington, D.C., in August 2002.

Carlton is focusing on helping Americans understand the importance of the rule of law and lawyers in American society by advocating on behalf of the association and the legal profession. During his presidential year he also is focusing on improvements in state judicial systems because of the importance of a fair and impartial judiciary in America.

He has a long career in general corporate law with an emphasis on regulated industries, corporate and public finance and financial and nonprofit institutions.

Carlton's most recent post in the ABA is as chair of the Standing Committee on Judicial Independence, where he worked to promote awareness of the need for an independent judiciary and reform of judicial elections.

Carlton received his Bachelor of Science degree in Business Administration from the University of North Carolina at Chapel Hill in 1969, and went on to earn a Masters of Public Administration from the University of Dayton in 1973 and a Juris Doctor from the University of North Carolina School of Law in 1975.

An active member of the ABA, Carlton has served in a number of posts, including as chair of the policy-making House of Delegates, the association's second-highest office, from 1996-1998. He was first elected a member of the House in 1982, and chaired the House Committee on Rules and Calendar, the Select Committee of the House and the Standing Committee on Continuing Education of the Bar.

He has been active in several ABA entities, including the Section of Legal Education and Admissions to the Bar, the General Practice Section, and the Young Lawyers Division Continuing Legal Education Board.

Within the North Carolina Bar, Carlton has served on the Board of Governors, the Foundation Development Committee, and as chair of the Young Lawyers Division and the Law Student Activities Committee.

Carlton served as secretary and general counsel to Bancshares of North Carolina from 1979 to when Bank of America acquired it in 1982, and as counsel to the North Carolina Bankers Association from 1976-1979. He was an officer in the U.S. Air Force Medical Service Corps from 1970-1973, and spent two years as a solo practitioner from

1975-1977.

Carlton is a member of the Board of Trustees of the University of North Carolina, Wilmington, and formerly was adjunct professor of law at the Campbell University School of Law.

He is a member of the American Law Institute and the National Association of Bond Lawyers, as well as a fellow of the American Bar Foundation. He is a former member of the Chief Justice of North Carolina's Professionalism Commission and is founding chairman of State Law Resources, Inc., a national association of independent state capital law firms.

Carlton has been greatly involved in his community. He is a charter member and past president of the Crabtree (Raleigh) Rotary Club and is a Paul Harris fellow. He is also a former officer and executive committee member of the Boy Scouts of America (Occoneechee Council), and is a member of the Boards of Directors of various other civic, church and community organizations. Carlton was a member of the North Carolina Legislative Research Commission Study Committee on Municipal Finance (1985-87) and is a former member of the City of Raleigh Historic Properties and Historic Districts Commission

Carlton is married to Blair Creech Carlton, a North Carolina native and Raleigh residential real estate broker. He is listed in *Who's Who in American Law*, as well as *Who's Who in America*.

PAUL D. CARRINGTON

Paul D. Carrington is a professor of law at Duke University. In the 1960s, he directed the American Bar Foundation study of the business of the United States Court of Appeals. In the 1970s, he was active with Federal Judicial Center's Advisory Council on Appellate Justice. in that connection, he was program chair for the 1975 National Conference on Appellate Justice, and the co-author (with Meador and Rosenberg) of Justice on Appeal. In 1985-1993, he served as Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States. In recent years, he was among those instrumental in securing some public financing of statewide judicial campaigns in North Carolina.

JULIUS L. CHAMBERS

Born in 1936 and reared in a small, rural community east of Charlotte, Julius L. Chambers learned about racial discrimination growing up in North Carolina. He graduated from high school in May 1954, the very month of the United States Supreme Court's landmark ruling in Brown v. Board of Education and entered North Carolina Central University (then North Carolina College) in the fall of that year.

In his senior year, Mr. Chambers served as President of the student body, graduating summa cum laude with a degree in history. He then earned a master's degree in history at the University of Michigan. In 1959, he was admitted to the Law School at the University of North Carolina at Chapel Hill, which had just begun to admit African-Americans under the pressure of litigation. Mr. Chambers was chosen Editor-in-Chief of the Law Review, thus becoming the first African-American to hold this title at any historically white law school in the South. Ranking first in his class of 100 at graduation in 1962, he entered and taught at Columbia University Law School while earning a masters of law degree.

In 1963, Mr. Chambers was the first Intern in an exciting new program of the NAACP Legal Defense and Educational Fund, Inc. (LDF). This program provided promising African-American law graduates with 12 months of training in civil rights litigation and then sent them home where they would commence law practice specializing in civil rights law as "LDF cooperating attorneys." The LDF provided some initial capital and a small monthly stipend to keep these fledgling law practices afloat in their infancy.

In June 1964, Mr. Chambers opened his law practice in a cold-water walkup on East Trade Street in Charlotte. This one person law practice eventually became the first integrated law firm in North Carolina history. In its first decade, this law firm did more to influence evolving federal civil rights law than any other private law practice in the United States. Mr. Chambers and his founding partners, James E. Ferguson, II, and Adam Stein, working with lawyers of the LDF, successfully litigated civil rights cases and helped shape the contours of civil rights law by winning landmark United States Supreme Court rulings in such cases as Swann v. Charlotte-Mecklenburg Board of Education (1971), (the famous school busing decision) and Griggs v. Duke Power Co. (1971) and Albemarle Paper Co. v. Moody (1974) (two of the Supreme Court's most significant Title VII employment discrimination decisions).

Considering the South's racial attitude at the time, Swann was not a popular case: Mr. Chambers saw his life threatened, his office torched and his car firebombed. Yet, he fought the case all the way to the Supreme Court and convinced the Court that busing was an acceptable tool for desegregating schools.

In 1984, Mr. Chambers left the law firm to become Director-Counsel of the NAACP Legal Defense and Educational Fund in New York City. He was the third Director-Counsel of the LDF, following Thurgood Marshall and Jack Greenberg. At the LDF, he became the field marshal for 24 staff attorneys and approximately 400 cooperating attorneys around the nation. LDF has offices in New York City, Washington, D.C. and Los Angeles and maintains an active caseload of more than 1,000 cases, covering such areas as education, voting rights, capital punishment, employment, housing and prisons. Under Mr. Chambers' leadership, the LDF became the first line of defense against the political assault on civil rights legislation and affirmative action programs that began in the 1970s and 1980s. He returned to North Carolina in 1993 to become Chancellor of North Carolina Central University, his alma mater. Under his leadership, the University launched a \$50 million capital fundraising campaign and established its first ten endowed chairs, including the one million dollar Charles Hamilton Houston Chair at the School of Law.

In 1995, Mr. Chambers was one of three lawyers who argued Shaw v. Hunt (argued December 5, 1995), the landmark legislative redistricting case before the Supreme Court. This case forced the Court to decide the constitutionality of two North Carolina congressional districts that were redrawn after the 1990 census according to provisions in the 1965 Voting Rights Act to ensure equitable minority representation. In the most recent ruling in this case (Hunt v. Cromartie), the Supreme Court sustained two congressional districts which have enabled North Carolina to elect its first Congressional representatives since reconstruction.

Mr. Chambers retired from his position as Chancellor of North Carolina Central University on June 30, 2001 and reentered private law practice with the firm he started in 1967 (now Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., 741 Kenilworth Avenue, Suite 300, Charlotte, North Carolina).

Ric Duques
Chairman
First Data Corporation

Ric Duques is chairman of First Data Corporation, guiding the company as it expands its offering of electronic commerce and payment services to achieve its overall strategic objective: to process every electronic payment worldwide from the point of occurrence to the point of settlement. He served as First Data's chief executive officer from 1992 until 2002.

Duques also serves as chairman of the board of eONE Global, a company formed in October 2000 by First Data and iFormation Group to meet the growing demand for emerging payment technologies. eONE Global, LP identifies, develops, and operates Internet and wireless payment technologies spanning the business-to-business (B2B), business-to-consumer (B2C), business-to-government (B2G) and person-to-person (P2P) markets.

Duques joined American Express in 1987 as president and chief executive officer of the Data Based Services Group, which was then a unit of American Express Travel Related Services, Inc. He was also a member of the American Express Planning & Policy Committee from 1987 to 1992.

In 1989, American Express Information Services Corporation (ISC) was formed from the Data Based Services Group and Duques became ISC's first chief executive officer. In February 1992, ISC was renamed First Data Corporation in anticipation of an initial public offering that was subsequently completed in April, 1992, and Duques was named chairman & chief executive officer.

Prior to joining American Express, Duques had been group president - financial services and a member of the Board of Directors of Automatic Data Processing Inc. (ADP) since 1984. From 1973, he held a series of increasingly senior management positions within ADP.

Duques holds a Bachelor of Business Administration in accounting and an MBA in accounting and finance, both received from The George Washington University in Washington D.C. Duques serves on the Board of Directors of CheckFree Corporation, SunGard Corporation, Unisys Corporation and NYCE Corporation. He also serves on the Board of Trustees for The George Washington University. He previously served on the Global Board of Directors of MasterCard International. He serves on the Advisory Council of Boys Hope/Girls Hope.

First Data Corp. (NYSE: FDC), with global headquarters in Denver, powers the global economy. As the leader in electronic commerce and payment services, First Data serves approximately 2.8 million merchant locations, 1,400 card issuers and millions of consumers, making it easier, faster and more secure for people and businesses to buy goods and services using virtually any form of payment. With 29,000 employees worldwide, the company provides credit, debit, smart card and stored-value card issuing and merchant transaction processing services; Internet commerce solutions; Western Union® money transfers and money orders; and check processing and verification services throughout the United States, United Kingdom, Australia, Canada, Mexico, Spain and Germany. Its money transfer agent network includes approximately 124,000 locations in more than 185 countries and territories. For more information, please visit the company's Web site at www.firstdata.com.

GEORGE S. FRAZZA

George Frazza joined Patterson, Belknap, Webb & Tyler LLP in February 1997 as Counsel after more than 30 years with Johnson & Johnson where he held the positions of Corporate Secretary (1975-1978), Vice President and General Counsel (1979-1997) and member of Johnson & Johnson's Executive Committee (1987-1996). In 1982, he was a key member of the five-person committee that guided the company through the crises arising out of the Tylenol poisoning, with responsibility for the company's relationships with the FBI, FDA and the media.

Mr. Frazza was admitted to the New York Bar in 1959. In 1997, he completed a term as Chairman of the 53,000-member Business Law Section of the American Bar Association. He now serves as a member of the ABA House of Delegates, the ABA Standing Committee on the Federal Judiciary, and the Fund for Justice and Education. He is a past co-chair of the American Arbitration Association's large Complex Case Program and has been serving since 1997 as an arbitrator in a number of commercial disputes conducted under AAA and CPR rules. He is a past president of the Association of General Counsel (an organization comprised of the chief legal officers of Fortune 100 companies), and a former editor of *The Business Lawyer*. Mr. Frazza has served as a member of the New York Stock Exchange's Legal Advisory Committee. He is a Trustee of the Robert Wood Johnson Foundation and a Director of Impath Inc., the Foundation for American Communications, and Atlantic Legal Foundation.

PETE P. GALLEGO

Pete P. Gallego, 41, is a seventh term member of the Texas House of Representatives from District 74, which includes Brewster, Culberson, Edwards, Hudspeth, Jeff Davis, Loving, Pecos, Presidio, Reeves, Terrell, Uvalde, Val Verde, and Ward counties. The 74th House district is the largest House district and the largest Texas U.S.-Mexico border district as it stretches nearly 39,000 square miles and includes over half of the Texas/Mexico border.

Elected in 1990, Representative Gallego is the first Hispanic to represent this vast border district. In 1991, he became the first freshman member and the first ethnic minority member ever elected as chair of the House Democratic Caucus, a post he held until January of 2001.

In January of 2001, Representative Gallego was unanimously elected by his colleagues to serve as chair of the Mexican-American Legislative Caucus. The Caucus is a group of 41 House members who are of Mexican-American descent or who serve a significant Mexican-American constituency. At approximately the same time, former Speaker of the House, Pete Laney, selected Representative Gallego to serve on the Select Committee on Teachers Health Insurance for the 77th Legislature.

Presently, Representative Gallego is in his seventh term. His distinguished career has included a chairmanship of the General Investigating Committee, membership on the Committees on Elections and Appropriations. He is currently Vice Chair of the Committee on Government Reform, member of the Insurance Committee, member of the Texas Sunset Advisory Commission and one of seven State Representatives chosen by the Speaker of the House, Tom Craddick, to serve on the House Select Committee on Ethics for the 2003 Legislative session.

An Alpine native, Gallego graduated from Sul Ross State University in 1982 with a bachelor's degree in political science. In 1985, he earned a Doctor of Jurisprudence from The University of Texas School of Law. Representative Gallego is a member of the Sul Ross State University Hall of Fame as an outstanding booster, and has been named a Distinguished Alumnus by the SRSU Ex-Student Association.

In the Legislature, Representative Gallego is known as an expert on appropriations, law enforcement, criminal justice, campaign finance reform and victims' rights. He has served on the joint House/Senate conference committee on the state budget for each of the past 5 legislative sessions. He has received numerous awards, including the "Advocate for Justice" award from a coalition of Texas victims' groups and the "Star of Texas" public service award by Common Cause of Texas. Following the 1999 session, he was selected as one of Texas Monthly's "Ten Best" legislators.

At home, Representative Gallego has also been recognized by the Department of Public Safety's Division of Emergency Management as an Honorary Emergency

Manager for his service during the massive flooding in Val Verde County in 1998 and by the Heart of Texas Regional Advisory Council for his efforts to improve emergency response systems both at home and across the state.

A supporter of both public and higher education, Representative Gallego was honored by the Eagle Pass Independent School District in 2000 with the naming and dedication of the Pete Gallego Elementary School. He has also been honored by the Texas State University System, The University of Texas System, and the Independent Colleges and Universities of Texas in appreciation for his support of higher education.

The National Council of State Governments awarded Representative Gallego a prestigious Henry Toll Fellowship, recognizing him as one of the outstanding young leaders in the nation. He also serves on the Board of Directors of the Texas Equal Access to Justice Foundation. Representative Gallego is also the immediate past chair of the Texas Lyceum Association, an organization comprised of individuals under the age of 45 who have demonstrated leadership abilities throughout the State.

Representative Gallego still lives in Alpine, where he was born and raised. He now heads the southwest Texas law office of Davis & Wilkerson, P.C. His law practice is concentrated in the areas of medical malpractice and insurance defense.

CHARLES G. GEYH

Charles G. Geyh is a Professor of law and Harry T. Ice Faculty Fellow at the Indiana University School of Law in Bloomington. He has served as Director of the American Judicature Society's Center for Judicial Independence; Reporter to the American Bar Association Commissions on Separation of Powers and Judicial Independence and (more recently) Public Financing of Judicial Campaigns; Task Force Reporter to the Constitution Project's Citizens for Independent Courts initiative; Consultant to the Parliamentary Development Project on Judicial Independence and Administration for the Supreme Rada of Ukraine; Assistant special counsel to the Pennsylvania House of Representatives on the impeachment and removal of Pennsylvania Supreme Court Justice Rolf Larsen; Consultant to the National Commission on Judicial Discipline & Removal; and legislative liaison to the Federal Courts Study Committee. After graduating from law school at the University of Wisconsin in 1983, he clerked for the Honorable Thomas A. Clark on the United States Court of Appeals for the Eleventh Circuit, worked as an associate at the Washington D.C. law firm of Covington & Burling, and served as counsel to the United States House of Representatives Committee on the Judiciary, before beginning his teaching career in 1991. His work on judicial independence and accountability has appeared in book chapters, reports, and articles published by the New York University Law Review, the University of Pennsylvania Law Review, the Georgetown Law Journal, and other law reviews.

DEBORAH GOLDBERG

As Deputy Director of the Brennan Center's Democracy Program, Ms. Goldberg serves double duty, acting as lead counsel in many of the Center's campaign finance reform cases, and also directing the Judicial Independence Project. In *Nixon v. Shrink Missouri Government PAC*, Ms. Goldberg led the Brennan Center's representation of Missouri state representative Joan Bray and helped take the case all the way to the Supreme Court; the result was the single most important campaign finance victory of the decade.

Ms. Goldberg coordinates the Brennan Center's 50-state outreach program on campaign finance reform and assists grassroots organizations in drafting and defending campaign finance laws. She is the editor of the Center's *Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws*.

Ms. Goldberg organized the Center's conference: "Money and the Politics of Inclusion: The Impact of Campaign Finance Reform on the Representation of Women and People of Color."

Prior to joining the Brennan Center, Ms. Goldberg clerked for then-Judge Stephen G. Breyer of the U.S. Court of Appeals for the First Circuit and for Judge Constance Baker Motley of the U.S. District Court for the Southern District of New York. Later, she entered private practice.

Ms. Goldberg received a B.A. from Washington University (1976), and an M.A. (1978) and Ph.D. (1980) in philosophy from Johns Hopkins University. Upon receiving her doctorate, she joined Columbia University as an Assistant Professor of Philosophy, teaching ethics and political philosophy for three years (1980-83). She then enrolled in Harvard Law School and received her J.D. (1986).

WAYNE GOODWIN

State Representative Wayne Goodwin, a native of Hamlet, North Carolina, is in his 4th term in the NC General Assembly. He is chairman of the Occupational Health and Safety committee, Vice Chairman of the Judiciary II committee and also serves on the Appropriations, Education, and Ways and Means committees and the Appropriations Subcommittee on Justice and Public Safety and the Education Subcommittee on Community Colleges. He and his wife, Melanie, reside in Rockingham with their daughter, Madison, and share a law practice in Hamlet.

CHRISTOPHER HEAGARTY

J. Christopher Heagarty is the executive director of the North Carolina Center for Voter Education (www.ncvoterred.com), a Raleigh based non-partisan not for profit organization formed in 2000 and dedicated to improving the quality and responsiveness of our election system. Under his leadership, the Center has conducted extensive public opinion research and has published numerous print and broadcast materials on campaign reform.

Prior to his role at the Center, Mr. Heagarty worked first hand in North Carolina government and politics, as a campaign consultant and representing a trade association representing of the state's non-profit electric cooperative. He was recognized by the NC Center for Public Policy Research as one of the twenty most effective lobbyists during the 1999-2000 session of the state legislature. He has worked for the Hewlett-Packard Corporation and was a founding partner of a computer software company.

Mr. Heagarty is a magna cum laude graduate of North Carolina State University, and has completed additional post-graduate course work in business law and web-page design. He is a Fellow of the NC Institute of Political Leadership and serves on the Institute's board of directors.

Mr. Heagarty is active in a number of civic organizations in his community and a volunteer for charitable causes. He attends Church of the Nativity (Episcopalian) and lives in Raleigh, North Carolina. He is a frequent commentator on state government and politics.

CHARLES KOLB

Charles Kolb is President of the Committee for Economic Development (CED) with offices in New York City and Washington, D.C. Founded in 1942, CED is an independent, nonpartisan research and policy organization of 250 business and education leaders dedicated to economic and social policy research and the implementation of its recommendations by the public and private sectors. In recent years, CED's work has addressed issues ranging from education, immigration, and e-commerce to basic research, international trade, and campaign finance reform. Mr. Kolb has held this position since September 1997.

Prior to joining CED, Kolb served as General Counsel and Secretary of United Way of America (UWA) from 1992 to 1997, where he played a major role in turning around that organization in the wake of a serious national scandal involving UWA's prior management.

During nearly ten years of U.S. government service, Kolb held several senior-level positions. At the White House he served as Deputy Assistant to the President for Domestic Policy from 1990 to 1992 and handled several domestic issues involving economic, education, legal, and regulatory matters. From 1983 to 1990, he held three other government positions: Assistant General Counsel, Office of Management and Budget (1983-1986); Deputy General Counsel for Regulations and Legislation, U.S. Department of Education (1986-1988); and Deputy Under Secretary for Planning, Budget and Evaluation, U.S. Department of Education (1988-1990).

Prior to government service, Mr. Kolb practiced law at two Washington, D.C., law firms: Covington & Burling and Foreman & Dyess. He also was a law clerk to U.S. District Court Judge Joseph H. Young in Baltimore, Maryland.

Kolb received his undergraduate degree at Princeton University and did graduate study at Balliol College, Oxford University, from which he received a Master's Degree in Philosophy, Politics and Economics. He holds a law degree from the University of Virginia School of Law where he was Editor-in-Chief of the *Virginia Journal of International Law*. He is also the author of a book on White House policymaking and more than 20 law review and op-ed articles.

Kolb has regularly appeared in the media, including *The Today Show*, *ABC News with Peter Jennings*, *The CBS Evening News*, *NBC Evening News*, MSNBC's *Hardball*, *The News Hour with Jim Lehrer*, CNNfn, CNN's *Inside Politics*, and National Public Radio. In connection with CED's work on campaign finance reform, he was featured in a *New York Times* "Money and Business"

profile and has been interviewed dozens of times by news organizations around the country.

Kolb is a member of the Council on Foreign Relations, the Council for Excellence in Government, and serves on the boards of the Ethics Resource Center, the National Center for Nonprofit Law, and Street Law, Inc. He lives in Alexandria, Virginia, with his wife Ingrid and their daughter, Charlotte Amanda. His principal hobby is oil painting.

I. BEVERLY LAKE, JR.
Chief Justice, North Carolina Supreme Court

Early Years

Born in Raleigh, N.C., January 30, 1934 to I. Beverly Lake Sr. and Gertrude M. Bell (both deceased). Grew up in Wake Forest, North Carolina.

Personal Information

Married to the former Susan Deichmann Smith of New Bern, N.C., four children: Lynn Elizabeth, Guy, Laura Ann and I. Beverly Lake III; eight grandchildren. Member, Ridge Road Baptist Church, Raleigh.

Educational Background

Graduated from Wake Forest High School in 1950. Graduated in 1955 from Wake Forest College with a B.S. degree in history and from Wake Forest University School of Law in 1960. Attended the National Judicial College, Reno, Nevada, in 1987, completing a comprehensive course of study for judges nationwide.

Professional Background

Chief Justice, N.C. Supreme Court, Jan. 2001-present. Associate Justice of the N.C. Supreme Court, Jan. 1995- Dec. 2000, Feb. 1992- Jan. 1993. Special Superior Court judge, Nov. 1985-Dec. 1990, holding criminal and civil court in 63 of the 100 counties in the state. Legislative liaison, Office of the Governor, Jan. 1985-Nov. 1985. Assistant and deputy Attorney General for the Dept. of Justice March 1969 to April 1976, representing the N.C. Dept. of Revenue and serving as the director of the Public Utilities Division of the Attorney General's office, representing the state and public in all utility rate cases. Law partner, Lake & Nelson, April 1976-Jan. 1985. Law partner, Boyce, Lake & Burns, Aug. 1965-March 1969. Law partner, Lake, Boyce & Lake, Sept. 1960 - Aug. 1965.

Professional Organizations

North Carolina State Bar; the North Carolina Bar Association; Wake County Bar Association, vice chair of the Executive Committee. Association of Interstate Commerce Practitioners; North Carolina Academy of Trial Lawyers; the Raleigh Junior Chamber of Commerce; the Raleigh Executives Club; the Weswyn Club of Raleigh, president;

Raleigh Chamber of Commerce; Scabbard and Blade, a National Honorary Military Association. Mason; York Rite Masonic Order. State Judicial Council.

Boards And Commissions

Advisory boards of the Occoneechee Council, Boy Scouts of America; the School of Law, Wake Forest University; and the Southeastern Baptist Theological Seminary.

Honors And Awards

Eagle Scout; N. C. Consumer Council commendation; Honorary Doctor of Laws Degree, Campbell University.

Political Activities

Member, N.C. Senate, 1976-1980, representing Wake, Harnett and Lee Counties. Ranked one of the ten most effective senators in the N.C. General Assembly in 1979 by the Center for Public Policy Research. Chairman, the Senate Judiciary II Committee, and the Public Utilities and Energy Committee. Nominee of the Republican Party for Governor of North Carolina in 1980 and was a delegate to the Republican National Convention in that year. Appointed by the governor to Supreme Court of North Carolina in 1992 and was elected to full term on the court in 1994. Elected chief justice of the Supreme Court in the November, 2000 election.

Military Service

Intelligence Staff Officer (captain) in the United States Army from 1956-1958; U. S. Army Reserve, 1958-1968. N.C. State Militia, State staff judge advocate, 1989-1992.

EDWARD W. MADEIRA, JR.

Edward W. Madeira, Jr. is Chair Emeritus and a partner with Pepper Hamilton LLP, having been with the firm since 1953. He served as chair of the firm's Litigation Department from 1982-92, vice chair of the firm from 1989-92, and co-chair of the firm from 1992-94.

Mr. Madeira's practice, concentrated in civil litigation, includes civil antitrust defense, products liability defense of major pharmaceutical companies, automobile manufacturers, asbestos mining companies and major equipment and consumer product manufacturers, as well as defense of mass tort and environmental catastrophe litigation. He has addressed various conferences and seminars on products liability and defense management of mass tort litigation.

Mr. Madeira graduated from the University of Pennsylvania Law School in 1952. He served as a law clerk for Justice John C. Bell, Jr. of the Pennsylvania Supreme Court before joining the Pepper firm in December 1953.

Mr. Madeira is a:

- Member, American Law Institute
- Fellow, American College of Trial Lawyers
- Fellow, The International Academy of Trial Lawyers
- Fellow, International Society of Barristers
- Member, International Association of Defense Counsel
- Member, Council for the Future of the National Judicial College
- Member, Product Liability Advisory Council
- Permanent Member, Judicial Conference for the Third Circuit
- Judge Pro Tem in the First Judicial District of Pennsylvania.

His activities in the American Bar Association have included:

- Chair, Commission on 21st Century Judiciary
 - Member, House of Delegates (1989-1993)
 - Chair, Commission on Separation of Powers and Judicial Independence (1996-1997)
 - Chair, Commission on State Judicial Selection Standards (1999-2000)
 - Chair, Standing Commission on Federal Judicial Improvements (1993-1996)
 - Life Member, Fellows of the American Bar Foundation
 - Former Member, Standing Committee on Judicial Independence (1999-2002)
- Recipient - Meador Rosenberg Award for contributions to the administration of justice (2002)

Mr. Madeira is also:

- Associate Trustee, University of Pennsylvania
- Member, Board of Directors, Defender Association of Philadelphia (Public Defender).

Mr. Madeira's past affiliations include:

- President, Board of Directors, Defender Association of Philadelphia (Public Defender) (1974-1999)
- Lecturer in Law, Villanova University School of Law (1992-1999)
- Member, Board of Governors, Philadelphia Bar Association
- Chair, Philadelphia Bar Association's Commission on Judicial Retention
- Member, House of Delegates, Pennsylvania Bar Association
- Past President, Travelers Aid Society of Philadelphia
- Past Chair, Board of Trustees, Agnes Irwin School

MARGARET H. MARSHALL

Margaret H. Marshall is Chief Justice of the Supreme Judicial Court. First appointed a Justice of the Court in November, 1996, she was named Chief Justice in September, 1999, and began her term on October 14, following her confirmation by the Governor's Council. She will serve as Chief Justice until 2014. Established in 1692, the Supreme Judicial Court is the oldest court in continuous service in the United States, operating under the oldest, still functioning written constitution anywhere. Chief Justice Marshall is the second woman to serve on the Supreme Judicial Court in its 310 year history, and the first woman to serve as Chief Justice.

Prior to her appointment, Chief Justice Marshall was Vice President and General Counsel of Harvard University, responsible for all legal and regulatory affairs of Harvard and all of its affiliated institutions. She served as a member of the President's Academic Council.

Chief Justice Marshall obtained her law degree from Yale Law School in 1976, having been a student at both Yale (1973-1975) and Harvard (1975-1976) Law Schools. Prior to that, she received a master's degree from Harvard University (1969). Chief Justice Marshall, who was born and educated in South Africa, obtained her undergraduate degree at the Witwatersrand University, Johannesburg. While she was an undergraduate, she served in several leadership positions in student organizations, and worked actively against apartheid. In 1966, she was elected as President of the National Union of South African Students. She served in that capacity until 1968 when she came to the United States to pursue her graduate studies at Harvard University.

After her admission to the bar, she became a United States citizen in 1978. Prior to her appointment at Harvard, Chief Justice Marshall was a senior partner in the Boston law firm Choate, Hall & Stewart, where her practice concentrated in intellectual property litigation.

Chief Justice Marshall has been active in bar association and community activities. She was elected as a member of the Boston Bar Association Council and after serving in a number of leadership positions, was elected President of the Boston Bar Association in 1991. She served on the Lawyers' Committee for Civil Rights Under Law, both in Massachusetts and nationally. In the United States she continued to participate in anti-apartheid activities. She served as a Trustee of The African Fund of the American Committee on Africa, the senior anti-apartheid organization in the United States; and as a member of the boards of Africa News, and the Southern Africa Legal Services and Legal Education, Inc. She has served on numerous civic and charitable boards.

ABNER J. MIKVA

Abner J. Mikva served as White House Counsel for President Clinton from 1994-1995. Prior to his appointment, he served as Chief Judge on the United States Court of Appeals for the District of Columbia Circuit. He was appointed to the bench in 1979, and became Chief Judge in January, 1991. Prior to the bench, he was elected to Congress for five terms, representing portions of Chicago and its suburbs. Judge Mikva served on both the Ways and Means Committee and the Judiciary Committee while in Congress. He started his political career in 1956 in the Illinois House of Representatives, where he served five terms. While there, he served as Chairman of the House Judiciary Committee and helped enact a new criminal code for Illinois, as well as a new mental health code.

Judge Mikva received his law degree from the University of Chicago in 1951, graduating cum laude. He was the editor-in-chief of the Law Review and a member of the Order of the Coif, the national legal honor society. He is a member of Phi Beta Kappa and was a law clerk to United States Supreme Court Justice Sherman Minton. He then returned to Chicago, practicing law as a partner of the late Justice Arthur Goldberg. His practice included extensive litigation and appellate work. He presented several constitutional issues to the U.S. Supreme Court.

He has taught courses at Northwestern University, Georgetown University, the University of Pennsylvania, Duke University, American University and the University of Illinois. Judge Mikva is the co-author of a political science textbook, entitled "The American Congress: The First Branch" and has co-authored law school textbooks on the legislative process. He is the recipient of numerous honorary degrees. He was given the Paul H. Douglas Ethics in Government Award from the University of Illinois and the Alumni Medal of the University of Chicago.

Judge Mikva currently is a Visiting Professor at the University of Chicago, where he has taught on other occasions. He also engages in arbitration and mediation work with JAMS, a national dispute resolution firm.

Judge Mikva's wife, Zoe, after retirement as Director of Development for a Washington think tank, does extensive volunteer work for the Chicago public schools. She is a former public school teacher. The Mikvas have three daughters – two lawyers and a rabbi – and seven grandchildren.

Among the honors that she has received, in 1994, Chief Justice Marshall was awarded the American Bar Association's Margaret Brent Women Lawyers of Achievement Award, a national award that honors "outstanding women lawyers throughout the country who have achieved professional excellence within their area of specialty and have actively paved the way to success for other women lawyers." In 1998, she was the first recipient of the Harvard College Women's Professional Achievement Award given to an individual "who has demonstrated exceptional leadership in her professional field and has used that leadership to benefit the community." In 2001, she was elected a Fellow of the American Academy of Arts and Sciences. She is the recipient of several honorary degrees, including from her alma mater the University of the Witwatersrand in 2000.

JUDITH D. MORAN

Judith D. Moran received a Bachelor of Science in Nursing from Georgetown University, a Master of Arts in Counseling from the University of North Florida and a Juris Doctor from the University of Baltimore School of Law.

During her career as an attorney, she has focused on family court reform. She served as the first coordinator of the Family Division of the Circuit Court for Baltimore City. The division began as a pilot project to test the efficacy of using the unified family court model to restructure Maryland's court system to better serve families and children. In her capacity as director of the pilot project, she was involved in the family court reform initiative at both the state and local levels.

Ms. Moran has also worked on court reform initiatives in New York, where she was a Senior Planner at the Center for Court Innovation and an Assistant Director of the Office of Public Policy at the Children's Aid Society. In addition, Ms. Moran has published several articles devoted to various aspects of unified family courts and how the model can be applied to specific aspects of family law adjudication. She has also made presentations on the subject at national and local conferences focusing on family court reform. Currently, Ms. Moran is a consultant for the University of Baltimore School of Law's Center for Families, Children and the Courts.

ROBERT B. MORGAN

Robert B. Morgan, is chairman of the North Carolina Center for Voter Education.

He was born in Lillington, in Harnett County, N.C, and practiced law there from 1950, the year he was admitted to the North Carolina Bar, until his recent retirement. He served as the clerk of the superior court in Harnett County, N.C. before being elected to the State Senate for five terms, including one term as President Pro Tempore. He was elected Attorney General of North Carolina in 1968 and then United States Senator in 1974. Following his one term in the US Senate, Mr. Morgan was named director of the State Bureau of Investigation and served in that role for six years. In addition to his law practice, Mr. Morgan has served as an adjunct professor at the Norman A. Wiggins School of Law at Campbell University in Buies Creek, North Carolina.

Mr. Morgan served in United States Navy 1944-1946, was recalled during Korean Conflict 1952-1955; remained in the Navy Reserve through 1971 at the rank of lieutenant commander; and served in United States Air Force Reserve 1971-1973, at the rank of lieutenant colonel.

He has been the Chairman of the NC Center for Voter Education since its incorporation in 1999.

GENE NICHOL

Gene Nichol is Dean and Burton Craige Professor at the University of North Carolina Law School--teaching courses in constitutional law and civil rights. Prior to coming to Carolina, he was dean of the law school at the University of Colorado in Boulder. From 1984-1988, Nichol was the Cutler Professor of Constitutional Law at the College of William and Mary and Director of the Institute of Bill of Rights Law. He has also taught at Oxford, Exeter and West Virginia.

Nichol is the author (with Martin Redish) of *FEDERAL COURTS* (2d ed. West Publishing) and has published articles and essays on civil liberties and federal judicial power in a wide variety of journals - including the *Harvard Law Review*, the *Yale Law Journal*, the *University of Chicago Law Review*, the *Michigan Law Review*, the *University of Pennsylvania Law Review*, the *California Law Review* and the *Virginia Law Review*. He has testified frequently on constitutional matters before committees of the United States Congress and various state legislatures. From 1995-96, he was host of the public affairs program, "Culture Wars," for KBDI-TV, Channel 12 in Denver, Colorado. From 1998-1999, Nichol was a columnist for the *Rocky Mountain News* and the *Colorado Daily*. Since 1999, he has been a regular op-ed writer for the *Raleigh News and Observer*. In 2003, Nichol won the American Bar Association's Edward R. Finch Award for delivering the nation's best Law Day Address, "The Commands of Equal Justice" [Mecklenburg County Bar Association, May 1, 2002].

Nichol has also worked extensively in public affairs. In 1991, he served as a member of the Colorado Reapportionment Commission. He was named special master by a three-judge federal court in *Martinez v. Romer* to resolve a dispute between the Governor and Legislature over the drawing of federal congressional districts. In 1996, Nichol ran for the Democratic nomination for the United States Senate from Colorado - winning the state convention, but losing in the primary. He was elected to membership in the American Law Institute, the American Bar Foundation Fellows, and is Vice-President of the North Carolina Bar Association.

Nichol attended Oklahoma State University, where he received a degree in philosophy with high honors and played varsity football. He graduated Order of the Coif from the University of Texas Law School in 1976. He is married to Glenn George and they have three daughters, Jesse (15), Jenny (13) and Soren (9).

ROBERT F. ORR

Justice Orr grew up in Hendersonville, North Carolina. He attended the University of North Carolina at Chapel Hill where he received both his undergraduate degree and law degree. He was admitted to the Bar in 1975 and entered the practice of law in Asheville concentrating in civil trial work. He was appointed to the North Carolina Court of Appeals in September of 1986 by Governors James G. Martin. He was elected statewide on November 8, 1988, and was re-elected on November 3, 1992. On November 8, 1994, he was elected to an eight-year term on the North Carolina Supreme Court. On November 5, 2003, he was re-elected for another eight-year term.

Justice Orr was a Vice-President of the North Carolina Bar Association from 1991-1992 and is currently serving as a member of the Race Relations Committee. He has served as a member and Chairman of the National Park System Advisory Board. He was the Chief Justice's designee to the Governor's Crime Commission from 1995-2002. He was the Conference Chair for the Southeast Regional Judicial Conference on Genetics in the Courtroom, September 2000, in Chapel Hill, North Carolina. He is a member of the Chief Justice's Actual Innocence Commission. He currently teaches Appellate Advocacy in the Evening Program at NCCU School of Law.

THOMAS R. PHILLIPS

Thomas R. Phillips was appointed Chief Justice of the Supreme Court on January 4, 1988, and was subsequently elected in 1988, 1990, and 1996.

A Dallas native, Phillips earned a B.A. from Baylor University and a J.D. from Harvard Law School. After serving one year as a briefing attorney to Justice Ruel C. Walker of the Supreme Court of Texas, Phillips was a trial attorney with Baker & Botts in Houston for nearly six years. In 1981, he was appointed by Governor William P. Clements as judge of the 280th District Court in Harris County.

Chief Justice Phillips is past president of the National Conference of Chief Justices and past chair of the Board of Directors of the National Center for State Courts. He is an elected member of the American Law Institute, serving as an advisor to its Federal Judicial Code project. From 1989 to 1996 he served on the Federal-State Jurisdiction Committee of the Judicial Conference of the United States and is a director of the American Judicature Society. He is a member of both the Philosophical Society of Texas and the Houston Philosophical Society and the board of the Southwestern Legal Foundation.

By virtue of his office, Chief Justice Phillips chairs both the Texas Judicial Council and Texas Judicial Districts Board. He was president of the Harvard Law School Association of Texas in 1981-1982 and serves on several boards and committees at Baylor University.

Chief Justice Phillips received the Texas Chamber of Commerce Award of Excellence in Government in 1992, the Outstanding Texas Leader Award from the John Ben Sheppard Public Leadership Forum in 1989, and the Houston Outstanding Young Lawyer Award from the Houston Young Lawyers Association in 1986. He was awarded an honorary L.L.D. from Texas Tech University in 1997 and an honorary D.H.L. from St. Edward's University in 1998 and was named a Distinguished Alumnus of Baylor University in 1998. In 1999 the National Center for State Courts honored him with its Distinguished Service Award.

J. NORFLEET PRUDEN III
108th PRESIDENT
NORTH CAROLINA BAR ASSOCIATION

J. Norfleet Pruden III of Charlotte was installed as president of the North Carolina Bar Association in June at the 2002 NCBA Annual Meeting in Wilmington. A fourth-generation lawyer, Pruden is the NCBA's 108th president. His great-grandfather, W.D. Pruden of Edenton, was the sixth president of the NCBA, serving in 1903-04.

Norfleet is a native of Edenton, N.C., where he was born on Sept. 1, 1948. He earned his bachelor's degree from the University of North Carolina at Chapel Hill in 1970 and his law degree from the University of Virginia in 1973.

Norfleet and his wife, Cindy, have two children, daughter Haines and son Matt, a law student.

Norfleet is a partner in the firm of Kennedy, Covington, Lobdell and Hickman LLP. He joined the firm in 1973 and has concentrated his practice in corporate, securities and general business law.

Prior to being named president-elect at the 2001 NCBA Annual Meeting in Asheville, Norfleet served on the NCBA Board of Governors from 1993-96 and chaired the NCBA's Business Law Section in 1991-92 and 1992-93. He has also served on the NCBA's Investment, CLE, Business Law Curriculum, Resolutions, Finance and Charter & By-Laws committees.

BARBARA ROBERTS

In December of 1998 former Oregon Governor Barbara Roberts joined Portland State University's Hatfield School of Government's Executive Leadership Institute as Associate Director of Leadership Development. Her first major leadership program began operation in September of 1999 and is called the "Legacy Program." It serves local, state government and non-profit leaders in Oregon and Washington.

Prior to her association with Portland State University, Governor Roberts had a five-year association with the John F. Kennedy School of Government at Harvard University, serving as Director of the Harvard Program for Senior Executives in State and Local Government and later as a senior fellow to the Women and Public Policy Program.

In November of 1990 Barbara Roberts was elected as Oregon's first woman governor. During her four-year term (1991-1995), Governor Roberts was recognized as a strong advocate for environmental management, for human and civil rights and for creative workforce development.

In 1993, Oregon was recognized by *Financial World Magazine* as the 7th best manage state in the nation. The National Alliance for Business also recognized Oregon as State of the Year in 1991 for its workforce and education innovations. In 1994, the state won a prestigious Innovations in Government Award from the Ford Foundation and the Kennedy School of Government in recognition of the nationally acclaimed Oregon Benchmarks program. Roberts used the Benchmarks' measurable goals as an integral part of her budgeting and planning efforts during her term. She is recognized and respected nationally as a government reinventor.

Prior to being elected governor, Barbara Roberts was elected Oregon's Secretary of State, serving from 1985-1991. She was a member of the Oregon House of Representatives from 1981-1985 and served as majority leader in 1983-84. Roberts also served as a county commissioner, served a decade as an elected school board member and four years as an elected community college board member. Roberts began her years of public service as an advocate for disabled children as she fought for the educational rights of her autistic son.

Her #1 effort right now is the start-up of a new Relief Nursery in the St. Johns neighborhood of Portland that will serve children 0-4 years who are victims or at-risk of abuse or neglect.

Governor Roberts is an active public speaker now focusing on issues of leadership, women in politics, environmental stewardship and death and grieving. Her recently released book, "Death Without Denial; Grief Without Apology" has receive positive reviews from the press and public and will soon go into third printing.

THOMAS W. ROSS

Thomas W. Ross is the Director of the Z. Smith Reynolds Foundation located in Winston-Salem, North Carolina. The Foundation is a private philanthropic grant-making organization with assets approaching 450 million dollars. Prior to January 2001, Tom served as the director of the North Carolina Administrative Office of the Courts from June 1999-December 2000 and as a North Carolina Superior Court Judge from January 1984 to November 2000. Before 1984, he served as an Administrative Assistant to former Congressman Robin Britt (D-NC), a partner in a Greensboro, NC law firm and an Assistant Professor of Law and Government at the Institute of Government at the University of North Carolina at Chapel Hill.

In November 2000 Tom was presented the William H. Rehnquist Award for Judicial Excellence. This award, named for U. S. Supreme Court Chief Justice William Rehnquist, is presented annually by the National Center for State Courts to one state court judge nationally who possesses the qualities of judicial excellence. In 1994, he was one of ten people in the United States selected as "Public Official of the Year" by *Governing Magazine*. In 1995, he received one of nine Foundation for the Improvement of Justice Awards presented nationally. In 1996, Tom was named "North Carolina Trial Judge of the Year". In 1999, he was presented the Order of the Long Leaf Pine by Governor Jim Hunt and the *Raleigh News and Observer* named him "Tarheel of the Week." Most recently, in 2001, he was awarded the Distinguished Alumni Award by Davidson College.

Tom received a BA degree from Davidson College in 1972 and a JD degree with honors from the University of North Carolina in 1975. He is a 1985 graduate of the National Judicial College. He lives in Winston-Salem, North Carolina with his wife, Susan, and has two grown children, Tommy and Mary Kathryn.

WILLIAM S. SESSIONS

William S. Sessions joined Holland & Knight LLP in 2000 and is a partner engaged primarily in Alternative Dispute Resolution procedures.

Judge Sessions is admitted to practice law in the District of Columbia and Texas and is a member of the State Bar of Texas, the San Antonio Bar Association, the Federal Bar Association, the American Bar Association, the American Bar Foundation, the Judicature Society, the William S. Sessions American Inn of Court and the National Association of Former United States Attorneys. Currently, Judge Sessions is the Vice Chairman of the Governor's Task Force on Homeland Security for the State of Texas and he actively participates in the Judiciary Relations Committee for the State Bar of Texas. Additionally, he served as the President of the Waco-McLennan County Bar Association, the Federal Bar Association of San Antonio, the District Judges Association of the Fifth Circuit and as a member of the Board of Directors of the Federal Judicial Center in Washington, D.C. Judge Sessions holds the highest rating assigned by Martindale-Hubbell.

Judge Sessions serves as an arbitrator and mediator for the American Arbitration Association, as a Certified Panelist and Advisory Board Member of the National Patent Board and for the CPR Institute of Dispute Resolution as a District Panelist, National Panelist of Distinguished Neutrals and on the Arbitration Appeal Panel.

Judge Sessions has served as a Member of the Martin Luther King, Jr. Federal Holiday Commission, the Texas Commission on Judicial Efficiency (1995-1997) and the Texas Commission on a Representative Student Body (1997-1998).

Following 10 years of private practice with the firm of Haley, Fulbright, Winniford, Sessions & Bice in Waco, Texas, Mr. Sessions served as the Section Chief of the Government Operations Section of the Department of Justice in Washington, D.C., the United States Attorney for the Western District of Texas, United States District Judge for the Western District of Texas, Chief Judge of that court and as the Director of the Federal Bureau of Investigation.

Judge Sessions received his bachelor's degree in political science and economics from Baylor University in 1956 and his J.D. from the Baylor University School of Law in 1958. He has received several honorary degrees.

ANDREW SPALDING

Andrew Spalding is a third-year student at the William S. Boyd School of Law at the University of Nevada, Las Vegas. Prior to enrolling in law school, he completed a Ph.D. in Political Science at the University of Wisconsin, Madison, and taught Political Science at St. Cloud State University in St. Cloud, MN, and Augsburg College in Minneapolis, MN. He is currently Articles Editor for the Nevada Law Journal, and after graduation will clerk for the Honorable Howard McKibben, Chief Judge for the U.S. District Court, District of Nevada.

ALAN TARR

Alan Tarr is Director of the Center for State Constitutional Studies and Chair of the Political Science Department at Rutgers University-Camden. He is the author of numerous publications on state and federal constitutionalism, including American Constitutional Law (6th ed., 2003), Judicial Process and Judicial Policymaking (3d ed., 2002), Understanding State Constitutions (1998), and State Supreme Courts in State and Nation (1988). Twice an NEH Fellow, he is currently directing a project on state constitutional reform for The Ford Foundation and serving on the Scholars' Advisory Board of the National Constitution Center.

CARL TOBIAS

Carl Tobias is the Beckley Singleton Professor, William S. Boyd School of Law, University of Nevada, Las Vegas. Tobias has served as a member of the Ninth Circuit District Local Rules Review Committee, the Civil Justice Reform Act Advisory Group for the U.S. District Court for the District of Montana and the Committee to Study the Nevada Rules of Civil Procedure. He writes in the areas of federal and state judicial selection, civil procedure, and civil justice reform.

JOSEPH P. TOMAIN

Joseph P. Tomain is the Dean and Nippert Professor of Law at the University of Cincinnati College of Law. A graduate of the University of Notre Dame and the George Washington University National Law Center, Dean Tomain practiced law in New Jersey before beginning his career in legal education. He has taught at Drake University School of Law, and has served as visiting professor at the University of Texas School of Law. His teaching interests include Energy Law, Land Use, Government Regulation, and Contracts.

Dean Tomain's publications include books entitled *Energy Law and Policy for the 21st Century*, *Regulatory Law & Policy*, *Energy Law and Policy*, *Nuclear Power Transformation*, and *Energy Decision Making*. He has also written numerous articles and delivered papers on the subjects of energy law and government regulation.

In addition to his administrative duties, teaching, and scholarship, Dean Tomain serves on a number of professional and civic organizations. He is Chair of the Board of the KnowledgeWorks Foundation. He serves on the American Bar Association's Standing Committee on Judicial Independence Commission on State Judicial Selection Standards. He is also a member of the Board of Trustees of the Center for Chemical Addictions Treatment, the Black Lawyers Association/Cincinnati Bar Association Round Table, and the Cincinnati Bar Association. Dean Tomain is a delegate to the Ohio State Bar Association Joint Commission on Education for the Legal Profession and he served as a Commissioner on the Ohio Supreme Court Futures Commission.

EMILY FIELD VAN TASSEL

Emily Field Van Tassel is a legal historian who studies and writes about judges and the judiciary. She has served as an editor of the Documentary History of the Supreme Court, as a historian with the History Office of the Federal Judicial Center, and as a consultant to the National Commission on Judicial Discipline and Removal. She has taught law and legal history at several law schools and universities. Among her publications are a history of federal judicial resignations and removals published by the University of Pennsylvania Law Review, and a history of federal impeachments published the Congressional Quarterly Press. Her current project is a history of judicial independence on both the state and federal levels.

ROGER K. WARREN

Roger Warren is the President and Chief Executive Officer of the National Center for State Courts. He was appointed to this position by the National Center's Board of Directors and assumed office in March 1996.

His responsibilities at the National Center include planning, supervising and coordinating all programmatic, administrative and fiscal operations of the organization. Roger is a non-voting member of the National Center for State Courts' Board of Directors by virtue of the office he occupies.

Previously, Roger served in the Sacramento, California Courts for twenty years serving first as the Presiding (Administrative) Judge of the Sacramento Municipal Court and later as Presiding Judge of the Appellate Department, Juvenile Court, Superior Court and Consolidated Superior and Municipal Courts in Sacramento.

His professional achievements include membership on the California Constitution Revision Commission, and California Judicial Council where he Chaired the Planning Committee, and Trial Court Presiding Judges Committee. He was active in California judicial education activities, including serving as Chair of the Planning Committee for the week-long Court Management Course for incoming presiding judges. He is the recipient of numerous awards including the American Judges Association Award of Merit in 1996, California Jurist of the Year in 1995, and Sacramento Judge of the Year in 1987, 1993 and 1994.

Roger attended Williams College, and received an MA (political science) and JD from the University of Chicago, where he served as Project Editor, of the University of Chicago Law Review. He served on a Fulbright Fellowship to Iran in 1964.

ALLEN H. WELLONS

EDUCATION	North Carolina Central University Juris Doctor, 1975 University of North Carolina - Chapel Hill Bachelor of Arts, 1971
POLITICAL	1996, 1998 and 2000 NC Senate, 11th District Democratic Chairman, N. Smithfield Precinct Former President of Young Democrats Former member of State Executive Committee, NC Democratic Party Delegate to National Democratic Convention Member Board of Directors of Historic Goodwin House Democratic Nominee to NC House District 20 and 95 State Personnel Commission
CIVIC	Smithfield-Selma Chamber of Commerce Kenly Chamber of Commerce Greater Cleveland Chamber of Commerce Clayton Chamber of Commerce Vance County Chamber Franklin County Chamber of Commerce Former Board Member of Food Bank of NC Chairman of Johnston County Youth Task Force Board Member of Johnston County Habitat for Humanity Former Scoutmaster, Troop #22 Board of NC Museum of Natural History Smithfield Kiwanis Club Greater Triangle Regional Leadership Council Co-Chairman of Johnston County YMCA Board of Children's Hospital UNC Chapel Hill Member of Partners in Education, Johnston County

STEPHEN N. ZACK

Stephen N. Zack served as president of The Florida Bar from 1989 to 1990. Prior to that, Mr. Zack served as special counsel to Florida's former Governor, now U.S. Senator Bob Graham. He is past Chairman of the State of Florida Ethics Commission and previously served as a member of the Florida Entertainment Commission and the State of Florida Constitution Revision Commission. Mr. Zack has served as a member of the American Bar Association Board of Governors representing the States of Florida and Texas and was their liaison to the Litigation Section of the American Bar Association. Mr. Zack served as the Florida State Delegate to the American Bar Association and as Chair of the Select Committee of the House. Mr. Zack served on the Board of Governors of the American Bar Association from 1992-1995 and as a member of the Board's Finance, Communications and Operations Committees. He was a member of the Standing Committee on Bar Activities and Services from 1998-2000 and served as its chair from 2000-2002. Additionally, Mr. Zack received presidential appointments to serve as Chairman of the Latin American Council and on the Commission on the Judiciary in the 21st Century. Mr. Zack is a specialist in civil trial law, as well as eminent domain, corporate and international law. He has been board certified as a civil trial lawyer by The Florida Bar since 1984 when certification was first adopted in Florida.

Mr. Zack has served as a member of the Federal Judicial Nominating Commission for the Southern District of Florida, as a member of the 11th Circuit, Miami -Dade County Judicial Nominating Committee and as a member of the Dade County Fair Campaign Practices Committee. He is also a Lifetime Fellow of the American Bar Association. He served as Vice Chairman of the General Practice Section's Litigation Committee, is a member of the Standing Committee on Continuing Education of the Bar and is a Delegate to the General Assembly of the American Bar Association. Mr. Zack also served as a member of the Executive Committee of the National Council of Bar Presidents. He is the past President of the National Conference of Bar Presidents. He has served on the Board of Governors of the Academy of Florida Trial Lawyers. He is a member of the Florida Bar Foundation, Cuban American Bar Association, District of Colombia and New York State Bar Association.

Mr. Zack has been chairman of the Environmental Review Board for the City of Miami and has served on their Search Committee for City Attorney, as well as the Search Committee for City Manager for the City of Miami Beach. He chaired the Committee that revised the Miami Beach City Charter. He has also represented numerous governmental authorities including the Florida Senate and the Cities of Hollywood, Hialeah, Miami Beach and Miami. He was Chairman of The Miami Beach Charter Revision Commission.

Mr. Zack is admitted to practice before the United States Supreme Court, Fifth and Eleventh Circuits of the United States Court of Appeals, The Florida Bar, United States District Court in and for the State of Florida, Southern and Northern Districts, State Bar of New York and the United States Court of Military Appeals.

FRANCES KAHN ZEMANS

Dr. Zemans is a justice system consultant whose areas of expertise include public understanding of the justice system, the role of the jury, judicial selection, judicial conduct and ethics, and research on the justice system. Recently her work has focused on judicial independence, with particular emphasis on legislative-judicial relations. She has written widely for leading journals and testified before legislative committees and study commissions on a broad range of justice issues.

Previously, Dr. Zemans served as Executive Vice President and Director of the American Judicature Society, taught political science at the University of Chicago and conducted research on the legal profession and the judicial system at the American Bar Foundation. She currently serves as Consultant to the ABA Standing Committee on Judicial Independence.

Publications by Dr. Zemans include The Making of a Public Profession and articles in numerous journals including The American Political Science Review, Law and Contemporary Problems, Law and Policy Quarterly, and Southern California Law Review, has served as a member of the Board of Visitors of Southern Methodist University School of Law, the Illinois Judicial Inquiry Board, the Task Force on Judicial Conduct and Ethics of the Special Commission on the Administration of Justice in Cook County, Illinois, the Chicago Police Board and the Board of Editors of the Justice System Journal. Dr. Zemans received her Ph.D. in Political Science from Northwestern University.



SECTION V

American Bar Association
Commission on the 21st Century Judiciary

Draft Report

Prepared for the National Colloquium
on the 21st Century Judiciary

Raleigh, North Carolina

March 14, 2003

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For states that retain judicial elections as a means of reselection, the Commission recommends that judges stand for retention election, rather than run in contested elections100

For states that retain judicial elections as a means to select or reselect the judges, the Commission recommends that all such elections be conducted in a non-partisan manner102

For states that continue to employ judicial elections as a means of judicial reselection, the Commission recommends that judicial terms be as long as possible103

In states that use elections to select or reselect judges, the Commission recommends that states provide the electorate with voter guides on the candidate(s)104

In states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities initiate a dialogue between the business community and the trial bar, in an effort to deescalate the contributions arms race in judicial campaigns105

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REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY

Opening

The judicial systems of the United States remain unparalleled in their capacity to deliver fair and impartial justice, but they are systems in serious jeopardy. They are being jeopardized by the corrosive effect of money on judicial election campaigns, in which lawyers, businesses, and others interested in the outcomes of the cases judges decide seek to buy advantage in the courtroom by influencing at the ballot box who will be judges. These infusions of campaign dollars have often been spent on attack advertising calculated to persuade a majority of the electorate that incumbent judges should be removed from office because they have made unpopular rulings in isolated cases, or are beholden to their own campaign contributors. To date, not all states have experienced such problems, but the number that have is growing rapidly.

Such developments threaten to poison public trust and confidence in the courts, by fostering the perception that judges are less than independent and impartial, that justice is for sale, and that justice is available only to the wealthy, the powerful, or political and racial majorities. Within communities of color—that together will comprise a majority of the American people by the middle of this century—suspicion of the courts is compounded by a lack of diversity throughout the justice system. And these increasingly jaded views of the judiciary have begun to filter their way into the halls of state legislatures, where general assemblies often take a combative posture toward the judiciary when appropriating monies to fund court budgets and salaries.

The time has come to inoculate America's courts against the toxic effects of money, partisanship and narrow interests.

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An independent judiciary is essential in a democracy governed by the rule of law. In our system of government, the people create constitutions that identify their individual rights, empower legislatures to make laws consistent with the terms of those constitutions, and authorize governors to faithfully execute the laws that legislatures make. The laws that the people establish in their constitutions, that legislatures enact in statutes, and that governors execute are intended to protect everyone: the rich, the poor, the majority, the minority, the powerful, and the powerless. If that objective is to be realized, however--if the law is to protect the one as well as the many--it is imperative that the administration of justice *not* become a popularity contest. We need judges who will tell us what the law is and how it applies in individual cases without regard to what the results of the latest opinion poll are, what the judge's campaign contributors think, or what the political agendas of influential public officials may be. In other words, we need judges who are independent enough to uphold the rule of law, even when the law is unpopular. If the constitution is flawed, the solution is for the people to amend it. If a statute is flawed, the solution is for the legislature to revise it. The solution is not to intimidate a judge into declaring that the law says something it does not, because that will serve only to undermine the rule of law, upon which a constitutional democratic republic depends.

As important as an independent judiciary is to the rule of law in a representative democracy, public trust and confidence are equally so. The consent of the governed is a defining feature of democracy. Without it, democratic institutions must inevitably collapse. That is especially true of the judiciary, which controls neither the sword nor the purse and must depend on public acceptance for its continued existence as an

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independent branch of government. To the extent that significant segments of the public think that judges are captured by special interests, controlled by the wealthy and powerful, and unconcerned about the rights of racial, ethnic and political minorities, our system of justice is in very serious trouble.

This is not the first time that our courts have been imperiled. The cyclical threats that our state and federal courts have weathered are familiar to many. Our nation was barely a decade old, when the newly elected Jeffersonian Republicans sought to purge the federal courts of strident federal judges at the turn of the 19th century. A generation later, Jacksonian Democrats attempted to control and in some cases defy state and federal courts. In the aftermath of the Civil War, Radical Republicans embarked on an aggressive program of court-curbing. A generation later, populists and progressives pursued numerous strategies to subdue conservative, *Lochner*-era courts on the state and federal levels, culminating in President Franklin Delano Roosevelt's "court-packing" plan. And two decades thereafter, hostility toward the Warren Court led to threats to defy its rulings and remove its justices.

To say that our courts have been at risk before, however, is not to counsel complacency. To the contrary, it is only because those committed to the well-being of the judiciary responded to crises when they arose by stepping into the breach and defending or reforming the courts, that the judiciary's health has been assured. Nor does the recurrent nature of the challenges the courts have overcome imply that the problems the courts currently confront are no different from those of the past.

Ours is an ambitious project: to review the state of America's courts, and to address their most pressing needs for the coming century. To accomplish such an

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objective, it may help to place our efforts in historical context. Nearly a century ago, the last great court reform movement began with an address of Roscoe Pound to the American Bar Association, on "The Causes of Popular Dissatisfaction with the Administration of Justice." In that address, Pound isolated four primary sources of dissatisfaction.

The first was "causes for dissatisfaction with any legal system." The second was "causes lying in our Anglo-American legal system." Unlike the first two sources of dissatisfaction, which Pound regarded as inherent in legal systems generally or our American system in particular, the third—"causes lying in American judicial organization and procedure"—he viewed as remediable. It is here that Pound focused his reform agenda, and it is here that he deserves credit as a founding father of the modern American judiciary. What was an antiquated array of isolated courts at the beginning of the 20th century, gradually transformed into judicial systems in which the judiciaries themselves began to take responsibility for promulgating their own rules of litigation procedure, administering their own operations, and answering to the legislature for their own budgets.

The fourth and final source of dissatisfaction that Pound discussed, related to "causes lying in environment of our judicial administration." Here, Pound called specific attention to "public ignorance of" and lack of interest in judicial systems; to the "strain" borne by law to replace "absolute theories of morals" that had "lost their hold" upon society; to the "putting of our courts into politics" and "compelling judges to become politicians" which had "almost destroyed the traditional respect for the Bench"; and to the press for creating the "impression that administration of justice is but a game."

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Pound regarded this final source of dissatisfaction as one which reformers could not remedy because it “inhere[d] in the circumstances of an age of transition.” It is, in some sense, a little odd that he should dedicate the entirety of his reform agenda to addressing the penultimate cause of dissatisfaction he identifies, and close not with a bang but a whimper by detailing a final cause of dissatisfaction that he viewed as unavoidable. It is prescient, however, in that this last cause of dissatisfaction with the courts that Pound left dangling, is the one that confounds us most a century later, and is the one to which we devote the bulk of our attention in this report.

It is perhaps understandable that Pound gave short shrift to problems with the “environment of our judicial administration” that he attributed to “an age of transition,” problems which he may have assumed would disappear once the transition was complete. But over the course of the past century, the pace of cultural, social, political and technological change has accelerated to the point of placing us in a state of perpetual transition. The problems to which Pound alluded: the politicizing of our courts; public apathy toward, distrust of, and lack of familiarity with our judicial systems; and friction over the roles played by courts and legislatures in what would become an age of legal realism, have not been transitory, but have become entrenched. As a consequence, his assessment that these problems “will take care of themselves” has proved overly optimistic.

As the Supreme Court has observed, courts serve as “havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement.”¹ Our judicial

¹ Chambers v. Florida, 309 U.S. 227, 241 (1940).

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system is second to none in the world in upholding the rule of law for the benefit of majority and minority alike. But problems nearly a century in the making have recently worsened dramatically, driving that system to the brink of crisis. Now is the time to do something about it.

Commission Mandate

American Bar Association President Alfred P. Carlton, Jr., has directed our Commission:

To provide a framework and ABA policy that enable the Association to defuse the escalating partisan battle over American courts; to accommodate the principles of merit selection in a new model of judicial selection that minimizes the escalating politicization; to develop a set of guiding principles for an independent, accountable, and impartial judiciary in the 21st Century; to involve broad based constituencies of the legal and nonlegal communities in devising the necessary framework.

The first clause of our charge articulates the Commission's goal: to create a framework for addressing and alleviating the extent to which our courts have been excessively politicized. The remainder directs us to pursue this goal in three ways: by exploring how to improve judicial selection; by articulating principles to promote an independent and accountable judiciary; and by reaching out to the widest possible audience in developing recommendations for defusing the partisan battle over the courts and thereby preserving the principles that ensure judicial independence and accountability.

The logical starting point in the Commission's analysis is with the principles that ought to guide the 21st century judiciary—enduring principles underscoring the importance of an independent, impartial judiciary in a constitutional democratic republic, that upholds the rule of law, and maintains the trust and confidence of the people who the judiciary serves. Once these principles have been enumerated in Part I of this Report, in

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Part II we will describe recent developments among the states, including but not limited to events occurring in the context of judicial selection, that have politicized the judiciary in ways that challenge some of those enduring principles. Finally, in Part III, we offer a series of recommendations to serve as a framework for the ABA and the states to begin to address and counteract developments that have politicized the courts unnecessarily.

I. Enduring Principles

In 1780, nearly a decade before the United States Constitution was ratified, the Commonwealth of Massachusetts adopted a constitution of its own, drafted in large part by John Adams. The document begins with a declaration of rights, Article XXIX of which provides that:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

The aspirations Adams articulated for the fledgling judiciary of the late 18th century apply with equal force to the judiciary of the 21st century. Embedded in his simple declaration are several principles that should be isolated and emphasized.

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Before launching into that discussion, however, it bears emphasis that while all states should strive to promote the following principles for all their judiciaries and judges, that is not to say that all states must employ the same means to promote those ends for all judges. Within any given state, the problems confronting the high court of a state may be significantly different in nature or severity from those confronting the trial courts, which may call for very different solutions. Among states, fundamental differences in constitutional structure, history and culture may make certain reforms desirable and viable in some jurisdictions, but not others.

For example, the Massachusetts constitution that John Adams devised, sought to promote an independent and impartial judiciary by providing that its judges would be appointed to serve during good behavior. Beginning roughly fifty years later, a number of states concluded that they could better serve the ends of judicial independence by selecting their judges in partisan elections, on the theory that judges who derived their authority directly from the people would be stronger and more independent than those who had been appointed by the governor. Another fifty years thereafter, around the turn of the 20th century, several states determined that partisan elections made judicial candidates too dependent on the political parties for their nomination, and sought to make judges more independent by opting for non-partisan judicial races. And beginning in the early part of the 20th Century, yet another group of states began to decide that contested elections did not adequately promote a capable, qualified and independent judiciary, and devised a system of appointment based on "merit," in which voters would later have an opportunity to retain or oust the judge in retention elections.

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We thus confront a patchwork of judicial selection systems across the states, each of which is designed to achieve the same goal of promoting an independent, impartial judiciary. While generalizations concerning the desirability of particular reforms are sometimes possible, respect for state autonomy and an appreciation for interstate differences counsel caution in that regard.

That much said, it bears emphasis that each of the approaches to judicial selection described above were the products of different movements emerging over the course of our history. It has been close to a century since the last of those movements began its course. The time is ripe for a fresh look at an old problem.

Principle 1: Judges should uphold the rule of law

In our system of government, “we the people” ordain, establish, and in so doing consent to be governed by organic laws known as constitutions. The U.S. and state constitutions structure the federal and state governments and enumerate the rights of the people that the government must respect. Those constitutions have structured our governments as representative democratic republics, in which the people elect representatives to make and execute statutory laws that govern them.

Representative democratic republics depend for their success upon the rule of law in two critical respects. First, the rules of law that the people’s representatives have embodied in statutes will serve their purpose only if they are honored in the observance and enforced when they are broken. Second, those who make and implement the statutory law must respect both the limits on their own power and the rights of the people as required by the higher law of the constitution.

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The all-important task of upholding the rule of law, by determining what the constitutional and statutory law requires and bringing it to bear in individual cases, is one that our constitutions have delegated to judges. When constitutional or statutory law supports the position of an unpopular litigant or group, judges are required to uphold the law in favor of the minority, despite majority opposition. Thus, Adams was not overstating his point by declaring that if the “rights of every individual” are to be protected, it is “essential” that judges be willing and able to interpret and uphold the laws preserving those rights.

To say that judges should uphold the rules of law that the people and the political branches make warrants qualification. Under the common law, for instance, judges remain responsible for lawmaking. More important, perhaps, the notion that constitutional or statutory law is sufficiently fixed and clear that judges can invariably divine its meaning uninfluenced by their personal or political experience is increasingly unrealistic. One can, however, concede that constitutional and statutory law is sometimes subject to differing interpretations that can be influenced by the judicial or political philosophy of the interpreter, and still recognize that ambiguous law is nonetheless law, which judges have a duty to interpret and uphold. Indeed, it is ambiguity in the law and its application to specific cases that make judges indispensable to the operation of government and the ultimate triumph of the rule of law.

Principle 2: Judges should be independent

Governors and legislators are not expected to be “independent” of the people; to the contrary, these officials are expected to represent their respective constituencies by acting on the policy preferences of those who elected them. Judges, however, are

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different. Once voters' policy preferences are enacted into rules of law, it is up to judges to ensure that those rules of law are faithfully interpreted and upheld—an all but impossible task if judges are subject to the influence of threats, favors or “constituencies” that could endanger their unbiased judgment. Put another way, the rule of law would be corrupted if interest groups, public officials, powerful private citizens, or fleeting majorities of the public could intimidate a judge into interpreting a law to their liking or reading a law out of existence altogether. Unlike governors and legislators, then, judges must be, as John Adams urges us, as “independent as the lot of humanity will admit.”

Although Adams extolled the virtues of judicial independence generally, it is possible to subdivide judicial independence into two distinct forms, both of which are instrumental to upholding the rule of law. First, judges must be independent enough individually to resist external efforts to influence their decision-making inappropriately. In this regard, it is essential that a judge's interpretations and applications of law be controlled by what she construes the law to mean, and not by what others would coerce or cajole her into saying it means.

Second, judges must be independent enough collectively as a branch, to resist institutional encroachments from the other branches of government that could place the judiciary—and the decisions its judges make—under political branch control. On this point, the adequacy of judicial salaries, budgets and working relationships with the other branches of government, among other concerns, may be critical to the judiciary's capacity to preserve its strength and institutional integrity. In sum, it is important that judges and the judiciary possess decision-making *and* institutional independence.

Principle 3: Judges should be impartial

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A primary goal of judicial independence, as Adams recognized, is “impartial interpretation of the laws.” Judges occupy the role of umpires in an adversarial system of justice; their credibility turns on their neutrality. To preserve their neutrality, they must neither prejudge matters that come before them, nor harbor bias for or against parties in those matters. They must, in short, be impartial, if we are to be governed by the rule of law rather than judicial whim.

Judicial independence is necessary but alone may be insufficient to ensure impartiality. It is necessary, because a judge who is not independent may be unable to remain impartial; if he is subject to external manipulation or control of his decision-making, he may lack the capacity to be or remain open-minded and unbiased. Independence alone, however, is insufficient, because independence provides no guarantee of impartiality: a judge can be entirely independent, but nonetheless biased and closed-minded. If independence alone is not enough to assure impartiality, the question becomes: what more is necessary?

Principle 4: Judges should possess the appropriate temperament and character

If judges are to be impartial, they must not only be independent, but also possess the appropriate judicial temperament. They must be committed to the rule of law. They must be women and men of integrity, who are evenhanded, open-minded, and unyielding to the influence of personal bias. They must be strong-minded and tolerant of criticism, yet resistant to intimidation. Then, and only then, can we be certain that an independent judge will be a truly impartial judge.

Principle 5: Judges should possess the appropriate capabilities and credentials

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Up to this point in the discussion, the focus has been on those principles that will assist in discouraging judges from consciously ignoring the rule of law, because they are less than independent, less than impartial, or lack the necessary judicial character or temperament. All of this assumes, however, that the judge is capable of ascertaining what the law is, and how it should be enforced on a case-by-case basis. For this to be a safe assumption, however, the judge must possess the requisite intelligence, legal training and experience. To the extent that the skills of a lawyer are different from those of a judge, the training a judge receives may likewise need to be different.

The relevance of judicial temperament, character, capabilities and credentials underscores the importance of the relationship between judicial selection and the rule of law. Judicial systems can and should be structured to provide judges and the judiciary with institutional and decision-making independence. But independent judges may not be impartial judges who will uphold the rule of law, unless the pool from which their selection is made is carefully limited to those who possess the necessary temperament, character, capabilities and credentials. That, in turn, may underscore the role that independent, deliberative bodies can and should play in defining the pool from which judicial candidates are elected or appointed.

Principle 6: Judges and the Judiciary should have the confidence of the public

The first five principles focus on those attributes needed to enable judges to uphold the rule of law. Even if judges follow the rule of law admirably and to the letter, however, it is also important that the public perceives them as doing so. When it comes to judges and the judiciary, appearances matter. That is why Canon 2 of the Model Code of Judicial Conduct declares that “a judge shall avoid . . . the appearance of impropriety

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in all of the judge's activities," and specifies in Part A of that Canon, that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." And that is why, in the federal system, judges must recuse themselves not only when the judge "has a personal bias or prejudice concerning a party," but also when a judge's "impartiality might reasonably be questioned."

Appearances matter because the public's perception of how the courts are performing affects the extent of its confidence in its judicial system. And public confidence in the judicial system matters a great deal, for at least two reasons. First, and perhaps foremost, public confidence in our judicial system is an end in itself. A government of the people, by the people and for the people rises or falls with the will and consent of the governed. The public will not support institutions in which they have no confidence. The need for public support and confidence is all the more critical for the judicial branch, which by virtue of its independence is less directly accountable to the electorate and thus perhaps more vulnerable to public suspicion.

Second, public confidence in the courts is a means to the end of preserving an independent judiciary. If the public loses its faith in a judiciary it perceives to have run amok, the obvious solution will be to bring the judiciary under greater popular control, to the ultimate detriment of judicial independence and the rule of law that judicial independence makes possible.

The courts are required to protect all the people, and not just popular majorities, for which reason an assessment of the extent of public confidence in the courts must go beyond cursory reviews of general public opinion surveys. If certain segments of the public, defined along racial, ethnic, economic or other lines, do not share the majority's

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faith in the judiciary, it is a problem that must be addressed. Principle 5 underscored the importance of a judge's qualifications and credentials. Given the need for promoting public confidence in the judiciary within segments of the community that have become increasingly suspicious of the courts, efforts to diversify the bench may fairly be regarded as a qualifications issue as well as one germane to promoting public confidence. We are becoming a more and more diverse people, and if our courts do not reflect the diversity of the society in which we live, the legitimacy of those courts will be called into question with increasing frequency.

The importance of public confidence in the courts is difficult to overstate. The ability of the courts to serve their purpose in a constitutional democratic republic turns on the public's acceptance and support. Without it, an otherwise sound judiciary can not long endure.

Principle 7: Judges should be constrained to perform their duties in a manner that justifies public faith and confidence in the courts

Judicial independence has its limits. While we do not want judges to be dependent on any individual or group that might impair their capacity to apply the law fairly and without favoritism, neither do we want judges to exercise power arbitrarily. The judge who acts arbitrarily undermines both the rule of law and the public's confidence in the judicial system.

Judicial independence, then, must be tempered by judicial accountability. We are mindful that the phrase "judicial accountability" is subject to misuse. It can be employed in the service of those who would, in the name of "judicial accountability," obliterate judicial independence and the rule of law altogether by intimidating judges into contorting the law to reach results that are popular with temporary majorities of the

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public. In our view, however, accountability should be defined more narrowly, to serve the principles of a good judicial system that we enumerate here.

Principle 1, for example, declares that judges should uphold the rule of law; those who do not should be accountable to an appellate process that corrects judicial error. Principle 2 declares that judges should be independent; those who compromise their independence by taking bribes should be held accountable to criminal and impeachment processes. Principle 3 declares that judges should be impartial; judges who exhibit bias in individual cases should be held accountable to a recusal process. Principles 4 and 5 declare that judges should maintain the appropriate temperament and competence; if they do not, they should be accountable to a disciplinary process.

Taken together, then, these processes for promoting this seventh principle of accountability advance the goals of principles 1 through 5. At least as, if not more important, these processes, will further the cause of Principle 6: enhancing public confidence in the courts.

II. Recent Developments

Having spelled out some of the principles that have guided our state and federal judiciaries in the past and, in the Commission's view, should continue to guide them in the future, we turn now to the task of describing recent developments that have politicized the American judiciary. "Politicize" is an amorphous term. The self-evident definition of "politicize" is "to make political," and if "political," is defined innocuously to mean pertaining the "structure or affairs of government,"² then a "politicized judiciary" is an untroubling truism. When we speak in terms of making the judiciary more "political," however, we typically mean to say making judges more like politicians,

and the judiciary more like the political branches. Even then, a “politicized” judiciary is not invariably problematic: the judiciary, like the political branches, should be answerable for its budget, subject to improvements in the efficiency of its operations, and open to criticism. It is only when the courts are politicized in ways that undermine the defining principles of a good judiciary enumerated in the preceding part of this report that problems arise. It is to these problems that we now turn.

A. The Politicizing of State High Courts

Although the recent developments this report discusses are categorized in terms of their application to lower courts and high courts, this is at best a rough means of classification. As we emphasize again later, many of the problems we describe here in our discussion of appellate courts likewise apply to lower courts. By the same token, some of the problems we elaborate upon later in our discussion of lower courts—such as the lack of diversity within the judiciary—apply equally to the appellate courts.

1. Trends Contributing to the Politicizing of State High Courts

A confluence of trends has contributed to making state high courts more politicized. Some of these trends are generations in the making, and reflect fundamental changes in the role of American courts over time. These trends, described in this subsection, have created an environment conducive to the emergence of problems to which we turn in the subsection that follows.

a. The proliferation of controversial cases generally

Commission consultant G. Alan Tarr reports on “the increasing involvement of courts, particularly in recent decades, in addressing issues with far-reaching policy consequences,” which he characterizes as a “major development with implications for

² THE AMERICAN HERITAGE DICTIONARY 960 (2d Coll. Ed. 1982)

judicial independence.”³ Professor Robert Kagan noted the beginnings of this trend a generation ago, when he observed that courts had recently become “less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change.”⁴ Consistent with Professor Kagan’s observations on state courts, in the federal system only 296 civil rights suits were commenced in 1961, as compared to 34,027 cases thirty years later.⁵ The expanding civil rights docket is one manifestation of a trend toward increased judicial involvement with policy-laden social and political issues that has embraced a wide range of subjects, from environmental protection, to the rights of criminal defendants, abortion, political apportionment, education funding, and the liability of entire industries for toxic torts.⁶

Explanations for this trend are many, varied, and sometimes contradictory: some attribute it to lawyers who have encouraged litigation into controversial arenas.⁷ Others point to judges and their alleged propensity toward greater judicial activism.⁸ Still others, such as former Chief Justice Warren Burger, have argued that the people themselves labor under a “mass neurosis,” which leads them to “think that courts were created to solve all the problems” of society.⁹ And still others explain the development in terms of

³ G. Alan Tarr, *State Judicial Selection and Judicial Independence* 10 (see appendix)

⁴ Robert Kagan, et al, *The Business of State High Courts, 1870-1970*, 30 STAN L. REV. 121, 155 (1977).

⁵ Elizabeth Norman, Jacob Daly, *Statutory Civil Rights*, 63 MERCER L. REV. 1499, 1499-1500 (2002).

⁶ Richard Birke & Louise Teitz, *U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 183-85 (2002) (discussing categories of cases contributing to the “litigation explosion”).

⁷ See, e.g. WALTER OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991)

⁸ See, e.g. MAX BOOT, *OUT OF ORDER* (1998); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjorn Vallinder, eds) (1995)

⁹ Warren Burger, *Using Arbitration to Achieve Justice*, 40 ARB. J. 3, 5 (1985)

a "law explosion" in which legislatures have expanded the range of statutory remedies available to litigants.¹⁰

It is beyond the scope of our project to divine the root cause for this trend toward increased judicial decision-making on politically sensitive subjects, or to applaud or condemn it. Suffice it to say that while the courts have always heard cases on highly controversial issues, they may be doing so now more than ever, which places the courts in the middle of politically charged situations with unprecedented frequency.

b. The rediscovery of state constitutions

While federal and state courts both witnessed an upsurge in the controversial, policy-laden cases they were called upon to decide in the latter half of the twentieth century, this trend has become especially noticeable in state court systems. In her report to the Commission, consultant Emily Van Tassel observes that "the politicization of state constitutional decision-making coincides with the 'new federalism' of the Reagan era and the willingness of many state appellate courts to look to their own constitutions for guidance in many areas of law previously left to the federal constitution."¹¹ Professor Tarr concurs that this "rediscovery of state constitutions" called upon state judges to "shape the law of their states," and reports that this development was encouraged by social reform groups that "began to look to state courts as a new arena in which to pursue their goals" as the U.S. Supreme Court became increasingly unsympathetic to their agenda.¹²

¹⁰ Albert Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases*, 99 HARV. L. REV. 1808, 1817-18 (1986).

¹¹ Emily Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciaries* 3 (see appendix).

¹² See also William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)

As Professor Tarr implies, state courts do not explore novel questions of state constitutional law on their own initiative, but rule on such questions because litigants ask them to do so. As social reform groups began to shift the focus of their efforts toward the less familiar terrain of state constitutional law, state courts were called upon to explore this new frontier. Often times, state constitutions have been read no differently than their federal counterpart. In some instances, however, state courts have read the text of their constitutions differently than comparable text from the U.S. Constitution as construed by the U.S. Supreme Court. In other instances, state constitutions explicitly provide for the protection of rights that the federal constitution does not. The net effect is that state courts have become a new forum of choice for litigation of constitutional rights and responsibilities, which has placed them in the political spotlight with increasing frequency.

c. Increases in appellate caseload and the interposition of intermediate appellate courts between trial courts and courts of last resort

The National Center for State Courts reports that “starting in the 1950s and continuing through the 1980s, the number of cases filed in state appellate court systems grew to the point that caseloads were doubling nearly every ten years.”¹³ The Center adds, that “[i]n response, states established two-tiered appellate court systems.”¹⁴ As of 1958, only thirteen states had established intermediate appellate courts.¹⁵ Today, they are in place in forty-one states.¹⁶

¹³ National Center for State Courts, *Examining the Work of the State Courts*, 2001 at 76.

¹⁴ *Id.* See also, Robert Kagan, Bliss Cartwright, Lawrence Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 972-81 (1978).

¹⁵ Victor Eugene Flango, Nora Blair, *Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State's Highest Court?*, 64 JUDICATURE 75, 77 (1980).

¹⁶ Peter Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME L. REV. 43 (2000)

The success of intermediate appellate courts at reducing state high court workload has been mixed: often, high courts have experienced temporary relief in the years after intermediate appellate courts were created, but gradually returned to their earlier state of congestion.¹⁷ To provide the state high courts with an additional means of docket control, many states have coupled the creation of courts of appeals with adjustments to the supreme court's appellate jurisdiction, that has given the highest court greater discretion to decline appeals from decisions of the intermediate courts.¹⁸ This has put the high courts in a position to limit their caseload by allowing the courts of appeals to serve as courts of last resort in routine or "easy" cases and confine the cases they hear to important, difficult, and often controversial matters.¹⁹ As a consequence, the percentage of the high courts' docket dedicated to politically sensitive cases is greater, and the likelihood that its decisions will more routinely generate political controversy is correspondingly higher.

d. The spread of the two-party system

Alan Tarr identifies the spread of two-party competition throughout the United States as "one of the most dramatic changes during the latter half of the twentieth century."²⁰ The relationship between this development and the politicizing of the judiciary is readily apparent. States without meaningful two-party competition typically foster less rancorous judicial races than states where competition between the parties is intense. The decline of single-party dominance in many states over the course of the past generation—particularly in the south—has corresponded with increasingly fractious

¹⁷ Victor Eugene Flango, Nora Blair, *supra* note __ at 84.

¹⁸ G. ALAN TARR, MARY CORNELIA ALDIS PORTER, *STATE HIGH COURTS IN STATE AND NATION* 49 (1988); NATIONAL CENTER FOR STATE COURTS, *EXAMINING THE WORK OF THE STATE COURTS* 76 (2001).

¹⁹ *Id.*

judicial campaigns in those jurisdictions. The recent advent of heated campaigns in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina and Texas are illustrative. Even states with ostensibly “non-partisan” general elections for judges, such as Michigan and Ohio, have experienced highly politicized races, where two-party competition is fierce and the party affiliations of the candidates are widely known.

e. The emergence of a skeptical and conflicted public

The preceding developments have not been lost on the general public, which shows signs of becoming increasingly skeptical of the view that judges are apolitical decision-makers who simply interpret and apply the law. Alan Tarr attributes this growing skepticism to two trends: a “general decline of confidence in the major institutions of American society;” and the “lessons of legal realism,” which have filtered down from the legal community to the general public and left it with a deeper appreciation for the law’s indeterminacy and susceptibility to political influence. James Bopp, Jr., made the point more bluntly in his testimony before the Commission: “[T]he secret is out. . . Judges in the United States make law and the people in the United States know that.”²¹

Survey data lend support to this observation. A New Mexico survey conducted in the mid 1990s revealed that 61% of respondents disagreed with the proposition that “Politics do not influence court decisions in New Mexico.”²² More recently, a national survey commissioned in 2001 by the Justice at Stake Campaign asked whether the term

²⁰ Tarr, *supra* note_ at 8.

²¹ Testimony of James Bopp, August 21, 2002 at 234.

²² State Bar of New Mexico & Admin. Office of the Courts, Community Survey of Lawyers and the Legal System, §16 at xi (1997).

“political” accurately described judges, and 76% responded that it described them “well” or “very well.”²³

It would be premature, however, to deduce from this survey data that the public simply rejects the notion that judges follow the rule of law and embraces the view that political considerations do or should be permitted to dominate judicial decision-making. Although 76% of respondents in the Justice at Stake survey thought that judges were “political,” 79% of that same group believed that judges were “dedicated to facts and law.” When asked whether judges “make decisions based more on facts and law,” or “more on politics and pressure from special interests,” 58% answered the former. In short, the public is alert to the interplay between politics and law, believes that both are involved in judicial decision-making, and is divided as to which is more influential, with a relatively slender majority believing that law trumps politics.

f. The emergence of single-issue groups

Alan Tarr discusses the emergence of single-issue groups and their relevance to politicizing the judiciary in his consultant’s report. In the latter half of the twentieth century interest groups that formed to promote a specific political issue have become increasingly prominent in American politics generally, and more recently have begun to involve themselves in judicial politics. Several consultants have reported to the Commission on roles played by such groups as the Florida Right to Life Committee, the Chamber of Commerce, Oklahomans for Judicial Excellence, Citizens for a Strong Ohio, and the National Rifle Association in seeking to influence the outcomes of judicial elections. The potential for single-issue groups to influence judicial races may be

²³ Campaign, National Survey of American Voters:
<http://faircourts.org/files/JASNationalSurveyResults.pdf>

heightened by the general absence of voter interest and participation, insofar as it may then be easier for a comparatively small, highly motivated block of voters to affect the results.

By their very nature, these groups politicize judicial elections because they seek to link an incumbent's tenure in office to her position on a single, politically incendiary issue. It is unsurprising, then, that these groups have been at the center of several of the most troubling developments described below.

2. Specific Problems Arising out of Heightened Politicization of State High Courts

The trends described in the preceding subsection have created a politicized climate among state high courts in which a series of troubling developments have recently occurred.

a. State High Court election campaigns are increasingly focused on isolated issues of intense political interest

As state high courts began to decide more politically sensitive cases in a climate of increased two-party competition, with voters believing that politics influences judicial decision-making, and single-issue voter groups seeking to gain ground in judicial races, it was inevitable that high court campaigns would become more contested, and that those contests would center on one or two "hot button" cases decided by those courts. In some instances, attempts to punish judges with loss of tenure for making unpopular decisions in these cases have been explicit. One notable example occurred in the aftermath of a retention election in Tennessee, in which the Governor

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remarked: "Should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so."²⁴

Without disputing the right of voters to elect whom they choose for whatever reason they deem persuasive, there is an obvious tension between this right and the preference of 78% of those polled in a recent survey, who believed that courts "should be free of political and public pressure."²⁵ As Florida Justice Ben Overton observed, "It was never contemplated that the individual who has to protect our rights would have to consider what decision would produce the most votes,"²⁶ and putting judges in such a position complicates considerably the principles that a judge should be independent, impartial, and uphold the rule of law.²⁷

It is worth noting that the problems posed by hinging the outcome of judicial races on one or two politically sensitive issues are most acute in the context of campaigns in which an incumbent is up for reelection or retention. To be sure, there may be problems associated with placing pressure on would-be judges to compromise their future impartiality by revealing how they would decide an especially incendiary issue. But it is incumbents who are put at future risk of losing their tenure when they uphold unpopular laws, invalidate popular laws, or protect the rights of unpopular litigants. In such cases, it is incumbents who are thus presented with the impossible choice of sacrificing either

²⁴ Stephen Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 166 (1997).

²⁵ See note __ *supra*.

²⁶ Bright, *supra* note __ at 166.

²⁷ Note that such dilemmas potentially faced by judges are not limited to the election context. In Virginia, "an otherwise routine public hearing on judicial nominations" in the Virginia House of Delegates erupted into a heated interrogation, when House Speaker S. Vance Wilkins, a staunch gun-control opponent, noticed that the judge before him had issued a controversial pro-gun-control ruling. While Wilkins foreswore any attempts to keep the judge off the bench, "the speaker's unusual personal interest" caused some to speculate whether "past rulings in gun-related cases could become litmus tests for reappointment to judicial posts. R.H. Melton, *House Speaker Presses Judge on Case*, WASHINGTON POST, January 25, 2002.

their careers, or their independence and the rule of law.²⁸ In thinking about the relationship between politicized judicial elections and the threats they can pose to judicial independence, then, it is important to differentiate between the issues that arise in the context of initial selection, and those that arise later, in the context of retention or reelection.

The issue at stake in these hot-button cases has varied from jurisdiction to jurisdiction:

Criminal cases: Consultant Jeannine Bell²⁹ indicates that “state court judges around the country” have been challenged because of their rulings in capital and other criminal cases. Among the examples Professor Bell includes:

- In 1992, Florida Justice Rosemary Barkett’s retention was opposed by the National Rifle Association and a group of prosecutors and police officers, on the grounds that she was “soft on crime.”

- In 1992, Mississippi Justice James Robertson lost his reelection bid, on the basis of a death penalty decision the Justice wrote.

- In 1995, a sitting South Carolina justice was challenged for the first time in over a century, on the grounds that she was “soft on crime.”

- In 1996, The Tennessee Conservative Union and other groups successfully campaigned for the defeat of Tennessee Justice Penny White on account of a decision she

²⁸ By example, a West Virginia editorial, pointing to state judges’ lack of life tenure as the reason the state’s powerful coal and labor interests prefer state over federal venues, asks: “What [state] judge is going to take on the coal industry? . . . What are the chances that any three of any five Supreme Court justices ever in office would want to simultaneously take on both the coal industry and the labor movement?” Dan Radmacher, *State Courts Best for the Status Quo*, CHARLESTON, W.V. GAZETTE, May 4, 2001.

²⁹ Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence* (see appendix).

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joined overturning a death sentence. In the next election cycle, Justice Adolpho Birch, Jr., resisted a challenge to his retention based upon his decision in the same case.

- In 1999, a candidate challenged the Wisconsin Chief Justice's dissent from a decision upholding the constitutionality of the state's child predator law, suggesting that predators would be free to prey on children if the incumbent had her way.

- In some cases, judges have been supported or attacked for their positions on criminal justice issues as a pretext, by groups concerned about other issues less likely to play well with voters. Thus, for example, one group whose web page explained that it was launching a multi-state advertising campaign in judicial races to "stop the tidal wave of new lawsuits," ran ads in Mississippi focused entirely on the candidates' victims rights record.³⁰

- It is also apparent that pressure on judges to decide criminal cases in certain ways is being brought to bear indirectly in the context of political, rather than judicial campaigns. In 2002, state senator Frank Murkowski, a candidate for Alaska governor, delivered a campaign speech in which he criticized Alaska judges for "cuddling criminals," and he vowed to "alter the judicial selection system to favor tough-on-crime judges."³¹

Civil cases: Consultants Carl Tobias and Andrew Spalding report to the Commission that in several jurisdictions, the controversial decisions occupying center stage in judicial races have concerned the issue of tort reform and defendants' liability in products and medical malpractice cases. They note that there has been a concentration of tort cases filed in a small group of counties in a handful of states that have yielded

³⁰ Emily Heller & Mark Ballard, *Hard-Fought, Big-Money Judicial Races: U.S. Chamber of Commerce Enters Fray With Ad Money*, THE NATIONAL LAW J., Nov. 6, 2000 at A1.

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“spectacular” punitive damages awards. These decisions have alarmed corporate defendants and their lawyers, who have lobbied more aggressively for tort reform legislation. That, in turn, has prompted the plaintiffs’ trial bar to increase its contributions to judicial candidates, while the business community has done likewise. The net effect has been an escalating cycle of contributions and single-issue advertising campaigns in a number of jurisdictions around the country.

- In Alabama, a 1987 supreme court decision invalidating tort reform legislation has triggered an increasingly expensive battle for control of the court, in which some commentators have characterized judicial elections as “referenda on the trend of the court.”

- In 2001 in Illinois, business groups vowed to focus on the next year’s supreme court race, amid predictions that the cost of the race could exceed \$2.5 million. The catalyst for the business groups’ interest was an earlier decision striking down tort reform legislation.

- The Commission heard testimony from several witnesses, including ABA President Elect Dennis Archer and Michigan Bar Association President Reginald Turner, on the 2000 Supreme Court races in Michigan. Those races featured multi-million dollar campaigns with ads attacking and defending justices regarded as business-friendly.

- In the Commission’s hearing in Detroit, Michigan, several witnesses, including Chief Justice Thomas Moyer, Dean Joseph Tomain, and Dr. Bill Burges alluded to the 2000 election campaign of Ohio Justice Alice Resnick, who was criticized in ads run by the Chamber of Commerce, after writing the majority opinion in a case striking down tort reform legislation.

³¹ *Tough on . . . Judges?*, ANCHORAGE DAILY NEWS, August 16, 2002.

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- A recent study reports that in Idaho, Louisiana, Ohio, and Michigan, “business groups . . . are preparing ‘simplistic and misleading’ evaluations of how judges vote in environmental and other cases and using the results as the basis for supporting the judges for re-election or targeting them for defeat.”³²

Additional constitutional and statutory issues: Consultant Emily Van Tassel³³ reports on a number of additional races in which other discrete constitutional cases have served as a focal point in judicial races.

- In the 1998 California supreme court elections, Chief Justice Ronald George and Ming Chin withstood challenges to their retention based on their rulings in abortion cases.

- In Florida, Justice Leander Shaw’s retention was opposed on the basis of **his** ruling in an abortion case.

- In Idaho, Justice Cathy Silak lost her reelection bid, in large part because of her decision in a federal water rights case.

- In Ohio in 1998, opposition to Justice Paul Pfeifer focused on his decision in a school funding case decided under the Ohio Constitution (and was an ancillary issue in the reelection battle of Justice Alice Resnick in 2000).³⁴

b. Judicial races are becoming more expensive

One natural consequence of judicial elections becoming more competitive

³² Susan Finch, *Court Races Linked to Ecological Battles*, NEW ORLEANS TIMES-PICAYUNE, October 31, 2000.

³³ See appendix.

³⁴ Thomas Suddes, *Editorials and Forum*, CLEVELAND PLAIN DEALER, May 6, 1998 at 11B.

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and heated, is that more money is spent on judicial campaigns. In 2001, the ABA Commission on Public Financing of Judicial Campaigns found, “The cost of running judicial election campaigns is increasing dramatically across the country,” and offered illustrations from eleven different states in support of that proposition. Since 1994, campaign expenditures by Supreme Court candidates have increased by over 100%, and by 61% between 1998 and 2000 alone.³⁵ In 1995-96, average spending for 116 judicial candidates was around \$260,000. In 1997-98 it had risen to an average of over \$340,000 for 95 candidates; and in 1999-2000, 116 candidates spent an average of \$431,000.³⁶

During the 2000 election cycle, more than a million dollars was spent on supreme court races in each of nine states, including: Alabama, Illinois, Michigan, Mississippi, Nevada, North Carolina, Ohio, Texas and West Virginia.³⁷ It bears emphasis however, that there is tremendous variation among the states in campaign spending, with candidates in some states spending little or nothing.³⁸ One possible explanation for the variation may lie in the nature of the issues at stake in the different campaigns. Lawyers and business interests constitute the two most significant sources of contributions to judicial races nationally, and it is therefore reasonable to assume that spending will be greatest in those states where the issues at stake are those of greatest importance to lawyers and business. Consistent with that assumption, the four states with the highest spending levels—Alabama, Illinois, Michigan and Ohio—were states where the hot-button issue was tort-related liability, a matter of acute interest to plaintiff’s trial lawyers,

³⁵ Deborah Goldberg, Craig Holman & Samantha Sanchez, *The New Politics of Judicial Elections*, available at http://bennancenter.org/resources/resources_books.html#ji, at 4.

³⁶ *Id.*; In Montana, the 2000 race for chief justice of the state Supreme Court was “one of the state’s costliest” election campaigns of any branch, with each candidate raising more than one-third of a million dollars. Erin P. Billings, *High Court Race Getting Expensive*, BILLINGS GAZETTE, May 23, 2000.

³⁷ Goldberg & Holman, *supra* note ____.

³⁸ *Id.*

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on the one hand, and the business community on the other.³⁹ In Illinois, for example, lawyers contributed more than \$60,000 to Appellate Court Justice Melissa Chapman's campaign. Her opponent was able to raise only one-tenth as much money, with little of it coming from lawyers.⁴⁰

It would be an over-generalization to suggest, as some have, that these competing interests are driven simply by a crass desire of plaintiffs or defendants to "buy" judges in jurisdictions where they happen to sue or be sued. As Thomas Gottschalk explained from the perspective of General Motors, his company does business, hires employees and litigates frequently in every state of the nation. As a "virtual... resident in the courts of most states," his company became concerned by the size of punitive damages awards in cases decided by courts in a limited number of jurisdictions, and lobbied legislatures to reform their tort laws.⁴¹ For its part, the plaintiff's trial bar challenged the constitutionality of tort reform legislation in states across the country, and increased its contributions to judicial races that in turn prompted increased contributions by business interests. The net effect was to create a cycle of escalating contributions from all concerned, driven less by a scheme to manipulate case outcomes than a mutual desire to "level the playing field."

The spiraling cost of judicial campaigns may not, in and of itself, threaten the core principles identified in Part I of this report. It does, however, contribute to a series of related problems described below. As Dean Joseph Tomain testified before the Commission:

³⁹ *Id.*

⁴⁰ Kevin McDermott, *Lawyers Give Big to Judges' Campaigns*, ST. LOUIS DISPATCH, September 9, 2002.

⁴¹ Testimony of Thomas Gottschalk, November 22, 2002 at 184-96.

Money is the elephant in the room on judicial selection. It raises serious questions, such as how much money is required for judicial election, from whom does it come, what is the public perception, and so on.⁴²

c. The Public believes that judges are influenced by their contributors

As judicial races have become more expensive and hotly contested, the need to generate campaign contributions sufficient to cover escalating costs has become increasingly important. The sources of campaign contributions can be difficult to determine, although a recent study has been able to ascertain the contributor interests associated with 76% of the contributions to high court races between 1989 and 2000. It found that 29% of total contributions came from lawyers; 19.8% from general business; 11.8% from political parties; 7.8% from the candidates themselves; and the remaining 7.6% of identifiable contributions from labor interests, small contributions, other ideological groups, public subsidies, and “other” contributors.

Lawyers and businesses—the two most significant sources of campaign contributions—have an obvious interest in the outcomes of cases decided by the judges whose campaigns they help finance. As judicial candidates become ever more dependent on campaign contributions from lawyers and business for their continuation in office, it is unsurprising that the public has come to suspect campaign contributions of influencing judicial decision-making. One survey commissioned by the American Bar Association in 2002 found that 72% of respondents were extremely, very, or somewhat concerned that “the impartiality of judges is compromised by the need to raise campaign money to successfully run for office.”⁴³ Seventy-six percent of respondents in the Justice at Stake survey believed that campaign contributions exert some, or a great deal of influence on

⁴² Testimony of Joseph Tomain, August 21, 2002 at 163.

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judicial decisions.⁴⁴ Fifty-five percent went so far as to agree with the statement that judges were “beholden to campaign donors,” and 52% agreed that judges were “controlled by special interests.”⁴⁵

These results are consistent with earlier surveys conducted in several states. In Ohio, a 1995 survey reported that nine out of ten residents believed that campaign contributions influenced judicial decisions.⁴⁶ In Pennsylvania, a 1998 poll sponsored by a special commission appointed by the Pennsylvania Supreme Court, also found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.⁴⁷ In Illinois, a 2002 survey sponsored by the nonpartisan Illinois Campaign for Political Reform showed that 85% of respondents agreed that campaign contributions influenced the decisions of judges.⁴⁸ In New Mexico, a poll conducted by the state’s Administrative Office of the Courts revealed a strong perception that judges’ decisions are influenced by “political considerations” and by “having to raise campaign funds.”⁴⁹ And in Texas, a 1998 survey sponsored by the state Supreme Court found that 83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions “very significantly” or “fairly

⁴³ Harris Interactive, A Study About Judicial Impartiality (August 2002)

⁴⁴ See note __, *supra*.

⁴⁵ *Id.*

⁴⁶ T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE CLEVELAND PLAIN DEALER, February 15, 2000 1A.

⁴⁷ Executive Summary, ABA Task Force Report on Judicial Campaign Finance, November, 1998 at 2.

⁴⁸ Steve Neal, *State Needs Fairer Way to Pick Judges*, CHICAGO SUN-TIMES, September 4, 2002.

⁴⁹ *Take Partisan Politics Out of Justice System*, THE SANTA FE NEW MEXICAN, June 20, 2000.

significantly,” while 48% of judges indicated that money had an impact on judicial decisions.⁵⁰

According to a Kansas editorialist, “[t]he money that is being contributed to the election campaigns of judges in parts of Kansas is compromising the integrity of the courts. Inevitably, people expect something in return for their contributions.”⁵¹ This notion was echoed by a Maryland judicial candidate, attorney Stuart Robinson, who in his 2002 race refused to accept campaign contributions. Calling his stance “a battle for the conscience and soul of our system,” Robinson stated that “there’s a perception that if you contribute money, there’s a payback down the road.”⁵² Such perceptions are perhaps inevitable where, as in Nevada, “[a]ttorneys who appear before judges, and casino officials whose companies sometimes have millions riding on rulings, are the ones who write the checks.”⁵³ In Washington, an executive from an industry that had contributed the bulk of one Supreme Court candidate’s sizable campaign war chest, said candidly: “[B]usinesses have a lot to lose in this election if the right person . . . isn’t elected.”⁵⁴

Ohio Chief Justice Thomas Moyer summarized the concern well in his testimony before the Commission: there is “a perception from the people,” Chief Justice Moyer explained, “that money contributions to judicial candidates do[] affect their decision[s].” He noted that public suspicion of the extent of influence will vary, depending on “how much money” is at issue, “how educated the people are,” and “whether they’ve served on

⁵⁰ Supreme Court of Texas, State Bar of Texas and Texas Office of Court Administration, *The Courts and the Legal Profession in Texas - The Insider's Perspective* (May 1999).

⁵¹ *Keep Judges Out of Politics*, KANSAS CITY STAR, November 18, 2002.

⁵² Michael Olesker, *To Candidate, Contributions May Seem to Tip Justice's Scales*, BALTIMORE SUN, August 29, 2002.

⁵³ Steve Sebelius, *Tipping the Scales of Justice*, THE LAS VEGAS REVIEW-JOURNAL, May 30, 2002.

⁵⁴ Angela Galloway, *Builders Backing Top-Court Candidate*, SEATTLE POST-INTELLIGENCER, October 25, 2002.

juries.” Regardless of “whether it’s true or not,” however, “with the judiciary, the perception is almost as important as the fact.”⁵⁵

d. Some of the most politicized and misleading campaign related speech comes in the form of “issue advertising” developed by outside groups

In addition to the support that judicial candidates receive from direct contributions, candidates are often supported indirectly by independent campaigns that run their own advertising. A study of the 2000 supreme court election cycle reveals that of \$10.7 million spent on television advertising, outside groups accounted for \$2.8 million, as compared to \$6.4 million by the candidates’ themselves, and \$1.5 million by the political parties. Although most of the dollars spent on television advertising came from the candidates, Dr. Craig Holman reported to the ABA Commission on Public Financing of Judicial Campaigns that 76% of all “attack ads”—ads attacking opponents, as opposed to promoting or comparing the candidates—were produced by independent groups.⁵⁶

It has been this downward spiral of attack politics often run by independent groups—most notably in Ohio and Michigan—that Commission witnesses have found most problematic. Political consultant Bill Burges described the negative advertising campaign against his client, Ohio Justice Alice Resnick, by the group called Citizens for a Strong Ohio. Burgess noted the challenge posed by independent campaigns is that contribution and disclosure limits applicable to the candidates do not apply to such groups, making it “hard for a state legal system to get their hands around it.”⁵⁷ Although the campaign backfired and Resnick won reelection easily, Dean Joseph Tomain told the

⁵⁵ Testimony of Thomas Moyer, August 21, 2002 at 107.

⁵⁶ REPORT OF THE ABA COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001)

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Commission that he found the experience quite troubling. The negative advertising, which “more than impl[ied] that Justice Resnick was receiving bags of money from special interests,” made him rethink his earlier view that “matters of quality and independence are not dependent upon a particular judicial selection process” and led him to become increasingly skeptical of “the continued use of elections for judicial processes.”⁵⁸

In Michigan likewise, ABA President-elect Dennis Archer testified that the Supreme Court candidates themselves did not “engage in any negative campaigning,” but that outside supporters did, the net effect of which undermined respect for Michigan’s system of justice.⁵⁹ Michigan State Bar President, Reginald Turner, went further, describing the episode as a “debacle,” that dealt “a serious blow to public confidence in Michigan’s judicial system.”⁶⁰

It is important to note that such developments are by no means confined to states such as Michigan and Ohio where media exposure of the problem has been greatest. In a 2002 primary election for the Idaho Supreme Court, for example, a group calling itself “Idahoans for Tax Reform dumped an estimated \$75,000 into ads against Supreme Court Chief Justice Linda Copple Trout and for challenger Starr Kelso.”⁶¹

e. The public is insufficiently familiar with judicial candidates, judicial qualifications, and the justice system

The developments described above place the electorate in a very difficult situation. High courts are deciding more and more controversial questions. Those

⁵⁷ Testimony of Bill Burges, August 21, 2002 at 194.

⁵⁸ Testimony of Joseph Tomain, August 21, 2002 at 163.

⁵⁹ Testimony of Dennis Archer, August 21, 2002 at 18.

⁶⁰ Testimony of Reginald Turner, August 21, 2002 at 83.

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questions are of central importance in judicial campaigns. The information voters receive concerning those questions is communicated largely via advertising run either by the candidates themselves with money from contributors whom the public suspects of buying influence, or by outside groups whose largely unregulated and often misleading negative campaigns have helped to undermine public confidence in the courts. Under-informed about the candidates' positions on relevant issues, uncertain about the candidates' qualifications or training, and unfamiliar with the candidates' job performance, voters are often unable to cast an informed ballot, and so decline to vote in judicial races. It is, therefore, not uncommon to see less than 20% of the electorate voting in judicial races,⁶² and as much as 80% of the electorate unable to identify the candidates for judicial office.⁶³

One manifestation of this phenomenon is voter "roll-off," in which voters go to the polls and cast ballots for political branch candidates at the "top" of the ballot, but decline to vote in judicial races at the "bottom" of the ballot. For example, Michigan State Bar President Reginald Turner told the Commission that in 2000, there were 900,000 voters who voted for governor, Attorney General or Secretary of State, who did

⁶¹ Wayne Hoffman, *Task Force to Look at Role of Money in Judicial Campaigns*, IDAHO STATESMAN, June 8, 2002.

⁶² William Yelverton, *Low Turnout, But Voters Had Some Surprises*, TAMPA TRIBUNE, September 5, 1996 (reporting 17.5% turnout in local Florida judicial races); Stephanie Gauthreaux, *Judicial Race Vote Turnout Running Low*, THE BATON ROUGE STATE TIMES, December 8, 1990 (Reporting 13-15% turnout in Louisiana judicial race); Erich Smith, *Election Watchdogs Expect Low Turnout in Philadelphia*, Associated Press, May 17, 1997 (reporting an anticipated 12% turnout as a sign of "traditional voter apathy toward judicial races"); Sharon Theimer, *Lavish Campaign Spending Doesn't Lift Voter Turnout*, The WISCONSIN STATE JOURNAL, April 3, 1997 (reporting 21% turnout in state Supreme Court race).

⁶³ *People Want to Elect Judges But Don't Know Them*, THE BIRMINGHAM NEWS, March 26, 2000 (Reporting that between 80-85% of Alabamians could not identify 11 of 12 Supreme Court candidates); Gene Nichol, *Better Justice, By Appointment*, The Raleigh News & Observer, May 10, 2001 (citing exit polls in a neighboring state which revealed that "over 80% of voters said they had no idea who the judges they had just selected were").

not vote in the supreme court races on the same ballot.⁶⁴ There is thus an obvious relationship between voter knowledge, voter apathy and the extent to which judicial elections can promote meaningful judicial accountability.

On a more general note, there may also be an extent to which lack of familiarity with the justice system and its operations corresponds with a lack of public confidence in the courts. A survey conducted by the American Bar Association in 1999 found that only 17% of respondents could name the Chief Justice of the United States; only 39% could identify all three branches of the national government; and when the questionnaire identified the three branches, many respondents exhibited considerable confusion as to their respective functions.⁶⁵ The survey then asked respondents about their confidence in the justice system and found that “people who are most knowledgeable are those who have the most confidence in the justice system.”⁶⁶ Although this conclusion is not free from doubt,⁶⁷ it is corroborated by other studies.⁶⁸

f. The recent decision of the United States Supreme Court in Republican Party of Minnesota v. White creates considerable uncertainty surrounding the constitutionality of ethical limits on judicial campaign speech

Historically, state codes of judicial conduct have imposed significant limits on what judicial candidates may say in judicial races. They may not comment on pending

⁶⁴ Testimony of Reginald Turner, August 21, 2002 at 83.

⁶⁵ American Bar Association, Perceptions of the U.S. Justice System (1999)

⁶⁶ *Id.* at 10.

⁶⁷ For example, a 1999 survey conducted by the National Center for State Courts found that “respondents who reported a higher knowledge about the courts expressed lower confidence in courts in their community.” National Center for the State Courts, *How the Public Views the State Courts: a 1999 National Survey* 7 (1999). There is, however, a difference between respondents who *reported* a higher degree of knowledge in the NCSC survey, and those who *exhibited* a higher degree of knowledge in the ABA survey; moreover, the “knowledge” at issue in the ABA survey concerns factual knowledge about the justice system, as opposed to more general knowledge that may be derived from personal experience with the justice system.

⁶⁸ American Bar Association, Perceptions of the U.S. Justice System at 7-8 (1999).

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cases,⁶⁹ take positions that appeared to commit them on issues that may come before the court,⁷⁰ appear at political functions,⁷¹ or make promises of conduct in office.⁷² This may help to explain why so much of the negative, case-specific advertising in judicial races has come not from the candidates themselves, but from independent groups. In *Republican Party of Minnesota v. White*, however, the U.S. Supreme Court left the continuing validity of some—if not all—of these restrictions in doubt, when it invalidated, on first amendment grounds, Minnesota’s so-called “announce clause,” which forbade candidates from announcing their views on disputed legal issues. Numerous witnesses before the Commission emphasized the significance of the *White* decision and the extent to which it will change the rules of judicial ethics and judicial elections across the country.

Some argue that the decision liberates candidates to communicate more information directly to voters and thereby offset the impact of misleading attacks by outside groups and address the information shortfall that discourages voters from participating more actively in judicial races. Attorney James Bopp, Jr., who represented the Republican Party in the *White* case, testified before the Commission that in his view, “preventing judicial candidates from expressing their general views is . . .decided,” and that the “judicial canons frankly require a major revision” to be compliant with *White*. He regarded this as a positive step that the ABA should encourage rather than resist:

Incumbent judges are most likely to be vulnerable to attacks. . .and the question is, are they going to be hamstrung? . . . There are just massive restrictions on judicial candidates that make judicial incumbents

⁶⁹ ABA Model Code of Judicial Conduct Canon 3(B)(9).

⁷⁰ ABA Model Code of Judicial Conduct Canon 5(A)(3)(d)(ii).

⁷¹ ABA Model Code of Judicial Conduct Canon 5(A)(1)(d).

⁷² ABA Model Code of Judicial Conduct Canon 5(A)(3)(d)(i).

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particularly victims of the process. They need to be allowed to participate . . . fully.⁷³

Political consultant Bill Burges concurred. "If we're going to elect judges, then these races need to be political," he argued, and the candidates "need to be able to talk," because "if they can't, too much is taken out of their hands and the interest groups. . . will take over the entire debate."⁷⁴

Others, however, worry that the decision in *White* threatens to compromise judicial independence and impartiality. Ohio Chief Justice Moyer testified that *White* had created a "treacherous" situation for candidates. As the Chief Justice noted, the decision invalidated a rule that prohibited judicial candidates from taking positions on issues likely to come before them, but did not address the validity of a related rule that prohibits candidates from promising to decide those issues in particular ways. That enables candidates to "pound the podium and say, I believe, I believe, I believe, and never . . . commit, never pledge, but. . . it's disingenuous to think people don't walk away thinking, if that issue ever comes by that candidate, he or she will probably vote that way."⁷⁵

Illustrative, perhaps, of Chief Justice Moyer's point is a questionnaire that James Bopp, Jr., circulated to Indiana judicial candidates on behalf of Indiana Right to Life, shortly after he testified before the Commission. In the cover memo accompanying the questionnaire, Mr. Bopp carefully distinguished between candidates "speaking their minds on controversial political or legal issues," which was appropriate after *White*, and "pledges or promises," which in Mr. Bopp's view, were not. Candidates were then asked such questions as: whether they "believe that there is no provision in our current Indiana

⁷³ Testimony of James Bopp, August 21, 2002 at 243-44.

⁷⁴ Testimony of Bill Burges, August 21, 2002 at 207.

⁷⁵ Testimony of Thomas Moyer at 119.

constitution which is intended to protect a right to an abortion;” whether they “believe that there is no provision of our current Indiana Constitution which is intended to protect a right to assisted suicide;” and whether they “believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted.”

Candidates cannot be required to complete questionnaires such as those circulated by Mr. Bopp. In the post *White* environment, however, those who resist may be accused of hiding behind invalidated ethics restrictions and to that extent feel political pressure to take positions on controversial legal issues they are likely to decide as judges. As a 2002 editorial in the *Idaho Statesman* pointed out, a “no-holds barred judicial campaign” could result in “wild pledges on anything from gun control to abortion” which might “box in a winning candidate” and “force a good judge to issue a bad ruling just to make good on an election promise.”⁷⁶ Moreover, to the extent that candidates become increasingly embroiled in disputes over their positions on issues likely to come before them as judges, the recent wave of attack politics that dominates many independent advertising campaigns may soon reach advertising sponsored by the candidates as well.

g. Relationships between courts and legislatures have often been problematic

The effects of trends contributing to politicized high courts have not been confined to judicial elections. The political branches of government have an interest in the cases those courts decide because the political branches represent the people affected by court decisions, and because some of the cases those courts decide have a direct impact on the political branches. Legislatures typically control court budgets, judicial pay increases, court jurisdiction, judicial impeachment, and the means to propose

⁷⁶ *Justice Should Be Blind: Must It Be Silent As Well?*, IDAHO STATESMAN, September 19, 2002.

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amendments to, if not actually amend, state constitutions. Governors are the most visible and powerful political figures in their states, who—apart from their central role in judicial selection—are uniquely positioned to influence public debates on the role of the courts in the administration of justice. Insofar as these political branch actors use the weapons at their disposal to retaliate against courts for making unpopular rulings, and to encourage them to be more attentive to the will of the majority when deciding cases in the future, the net effect is to politicize the judiciary, and in some cases threaten its institutional integrity and independence.

Commission consultants have catalogued a number of recent episodes in which altercations between the political branches and their respective judiciaries have culminated in threats to the judiciary's budget or jurisdiction, or other proposals to exert greater control over the judiciary as an institution. This is not to imply that such episodes are universal; Chief Justice Moyer, for example, testified that in Ohio, there was no evidence of the legislature retaliating against the courts. Nor is it our intention to characterize each of the interbranch altercations described below as independence threatening or otherwise inappropriate. Rather, the goal is simply to document recent legislative efforts to affect the courts in ways that may have further politicized the judiciary.

Attempts to cut the judiciary's budget

In his testimony before the Commission, Dr. Roger Hartley observed that there is a "great potential for court budgets to be threatened or even reduced in response to unpopular decisions," and that budgets have, in fact "been used as a sword against

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courts.”⁷⁷ There have been a number of instances reported by Commission witnesses, consultants, and in the press, in which the judiciary’s budget was threatened in retaliation for unpopular decisions:

- Prior to oral arguments in a case involving Florida’s Death Penalty Reform Act, the chair of the Florida House council in charge of court appropriations sent a note to members of the Florida Supreme Court stating, “your decisions continue to be a mockery to the victims and their families.” The note identified him as chairman of appropriations, and was interpreted by one newspaper as a budgetary threat.⁷⁸

- The President of the Maryland Senate threatened to cut the budget of the state’s highest court because of a constitutional decision. This occurred after the legislature had voted for two years running to withhold millions of dollars from the state budget for Baltimore’s courts until court reforms requested by Baltimore’s mayor were implemented.⁷⁹

- Professor Aviam Soifer has described an episode in Massachusetts in which the legislature “used its budgetary power to slash funding crucial to the judiciary’s infrastructure” in retaliation for the court upholding the clean elections law.⁸⁰

- Lawyer Andru Volinsky, who testified before the Commission, noted that in New Hampshire “the court’s budgets had pretty much been accepted by the legislature” until the court decided an unpopular school funding case, at which point they began to receive cutbacks higher than state agencies. Volinsky surmised that “there’s some

⁷⁷ Testimony of Roger Hartley, November 1, 2002 at 115, 116.

⁷⁸ Lisa Getter, Mitchell Landsberg, *Decision 2000/America Waits*, LOS ANGELES TIMES, November 16, 200 A21

⁷⁹ Matthew Mosk, *Legislative Antagonism to Courts Intensifying*, THE WASHINGTON POST, March 27, 2000 B01

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animus there that motivates that,”⁸¹ a point bolstered by the statements of the New Hampshire governor, who had proposed cutting court funding in response to the court’s school funding decision.⁸²

- In North Carolina, Democratic legislators prepared a budget plan that sought to eliminate the judicial district of a judge who had ruled against the Democrats in a redistricting case. A Democratic Senator acknowledged that the cuts were not unrelated to the judge’s decision.⁸³

- A recent survey of state court administrators and some legislative and executive budget officers found that over 36% of court administrators (15 respondents) and 28.9% of legislative budget officers (13 respondents) believed that their legislatures had threatened (directly or indirectly) to reduce the judiciary’s budget to “influence or protest court rulings or policies.” Eleven court administrators and eight legislative budget officers responded that the legislature had actually reduced the judiciary’s budget at least once for those reasons.⁸⁴

- Cutting the judiciary’s budget is not always perceived as specific retaliation for court policies or decisions. When Massachusetts Acting Governor Jane Swift proposed to cut \$37 million from state court budgets, a Boston Globe editorial observed that Massachusetts state courts are “kicked around like a football at the State House, whose leadership likes to show judges how limited their power is.”⁸⁵

⁸⁰ Aviam Soiffer, *Legislators Seek to Undermine State’s Separation of Powers*, BOSTON HERALD, October 13, 2002.

⁸¹ Testimony of Andru Volinsky, September 27, 2002 at 136.

⁸² *As Shaheen Plans are Foiled, Some Judges Fallout of Favor*, BOSTON GLOBE, May 2, 1999.

⁸³ Scott Mooneyham, *State Budget Keeps Judiciary Cuts*, THE NEWS & OBSERVER, June 20, 2002.

⁸⁴ Douglas & Hartley “The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process” Table 7 (forthcoming, Public Administration Review 2003).

⁸⁵ Adrian Walker, *A Matter of Justice*, BOSTON GLOBE, July 25, 2002.

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Attempts to curb court jurisdiction

Several state court systems have confronted efforts to curb their jurisdiction in reaction to unpopular decisions. Commission consultant Emily Van Tassel reports the following:

- After Florida's Supreme Court stayed the implementation of the Death Penalty Reform Act the governor and legislature threatened to shift rulemaking authority from the supreme court to the legislature.
- In both Ohio and New Hampshire, decisions invalidating the states' school financing schemes met with attempts to remove school funding jurisdiction from the courts and give the legislature sole authority to determine what constitutes a "thorough and efficient education" under the state constitution.⁸⁶
- In New Hampshire, the state legislature proposed a constitutional amendment that would dramatically reduce the state Supreme Court's power to make rules governing state courts.⁸⁷
- New York's Governor George Pataki attacked the state's high court for its strict interpretation of the exclusionary rule. He then proposed legislation that would deprive the court of authority to decide cases on unlawfully seized evidence under the state constitution.⁸⁸

⁸⁶ Randy Ludlow *School Call: Skip Courts-- Lawmakers Want Funding Control* Cincinnati Post, March 4, 1999; Catherine Candisky, *Two Senators Propose to Amend State Constitution in School Funding Debate*, COLUMBUS DISPATCH, MARCH 4, 1999; Shirley Elder *Supreme Court Controversies Have Staying Power* BOSTON GLOBE, June 24, 2001.

⁸⁷ *Removing Trump Card: Judicial Reform Not Up to Judges*, MANCHESTER UNION LEADER, April 30, 2001.

⁸⁸ *The Governor's Attack on the Judges*, THE NEW YORK TIMES, A-14, Feb 3, 1996.

Attempts to remove judges from office

Professor Emily Van Tassel describes several incidents in which legislators have sought to remove judges or justices for making unpopular decisions:

- After the Vermont Supreme Court ruled unconstitutional Vermont's system of funding schools, opponents sought removal of the Justices of that court. Vermont's state system gives the legislature the power over re-appointment to the courts. Former Senator John McClaughry led the charge against the Court, arguing that the court's reasoning in the school funding case was enough "to fire [Justices] Dooley, Johnson and Morse."⁸⁹

- In New Hampshire, Chief Justice David Brock faced down an attempted ouster by Bill of Address in 1999 only to be impeached in 2000. Although the charges had to do with lax enforcement of the court's recusal rules, the removal attempts apparently had their roots in the court's school funding ruling. Justice Brock was acquitted on the impeachment charges, but amassed an estimated \$1 million legal bill.⁹⁰

- In another school funding case, a Wyoming senator threatened to begin impeachment proceedings against the state's supreme court justices for their decision in that case.⁹¹

Constitutional amendments to constrain the courts' constitutional interpretations

In several states, legislators have introduced constitutional amendments designed to constrain the courts' power to interpret the constitution.

⁸⁹ Ross Sneyd, *Senators Seek to Open Retention Process*, Associated Press, Feb. 10, 1999.

⁹⁰ Shirley Elder, *Supreme Court Controversies Have Staying Power*, BOSTON GLOBE, June 24, 2001.

⁹¹ "Senator Ready to Impeach Judges" CASPER (WYOMING) STAR-TRIBUNE, June 9, 2001.

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- Professor Jeannine Bell reports on a proposed constitutional amendment in Texas that would prevent the Texas courts from interpreting the protections of the Texas constitution more broadly than its federal counterpart.

- Two members of the New Jersey State Assembly proposed an amendment to the state Constitution that would deny the state Supreme Court's final authority to rule legislative actions unconstitutional. The proposed amendment would allow a two-thirds majority of both houses of the state legislature to override any state Supreme Court decision.⁹²

Emily Van Tassel's report includes two other examples:

- In Florida, a "forced linkage" amendment required state search and seizure provisions to be "construed in conformity with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court." Political scientist Barry Latzer noted: "Before forced linkage, Florida Supreme Court cases rejected U.S. Supreme Court interpretations in favor of broader rights 80% of the time; after forced linkage the rejection rate dipped to 18%."

- In 1997, Washington state legislators sought a constitutional amendment that would give final authority to the legislature on issues of constitutional interpretation.

The general sufficiency of judicial budgets and salaries

There is little evidence to date that legislatures have actually withheld pay increases for judges in retaliation for unpopular decisions. This is not to say, however, that the issue of judicial salaries is immune from political branch manipulation. For example, when the Illinois Judges Association contemplated a suit challenging the

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constitutionality of the legislature's decision to deny state officials—including judges—an annual cost of living pay increase, one Illinois legislator warned that that “would not be a wise move on their part,” because “those folks in the General Assembly will tend to remember that.”⁹³

When it comes to judicial salaries, however, the more pressing concern is that the strength of the judiciary as an institution depends on its ability to attract judges who embody the principles articulated in Part I of this report. As Professor Richard Creswell explained with respect to the Georgia courts, “Having an excellent system of administering justice. . . depends on having excellent personnel.” That, in turn, requires judges to be:

sufficiently supported with legal research tools, law assistants, clerical staff, educational opportunities, reasonable performance expectations, and compensation and benefits packages to make Georgia's judgeships successfully competitive with the many other attractive opportunities available to excellent lawyers.⁹⁴

When judicial salaries are low, or routine cost of living adjustments are not made, it makes judicial office less attractive to qualified candidates and incumbents alike. The *Los Angeles Lawyer*, for example, reported on “a serious brain drain going on in our courts,” in which “we are losing many of our most experienced jurists” to alternative dispute resolution firms or private practice. “The dominant reason,” the article reported, was that “they cannot afford to continue to serve as judges.”⁹⁵

⁹² Associated Press, *Lawmakers Want to Curtail New Jersey's Supreme Court's Power*, TRENTON TIMES, December 12, 2000.

⁹³ *Some Judges Mull Lawsuit Over Pay Freeze*, THE HERALD NEWS, July 15, 2002.

⁹⁴ Richard Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 33 (2001).

⁹⁵ *The Case for Raising Judicial Salaries*, LOS ANGELES LAWYER, February, 2001.

With regard to budgets, there are some indications, noted above, that legislators and governors have sought to manipulate the courts' non-remunerative resources for political purposes. Regardless of whether or how often these manipulations occur, however, an essential point remains that the health and well being of the 21st century judiciary depends on it being adequately funded. In times of fiscal austerity, state judiciaries—which typically lack the political and lobbying clout of the executive branch and its agencies—often find it very difficult to secure adequate funding,⁹⁶ and this carries the potential for inter-branch confrontation. For example, in Kansas, the supreme court recently resorted to implementing a “stopgap emergency” surcharge on court filings to compensate for a shortfall in the legislature’s appropriation.⁹⁷ Charging that the court had strayed from its proper boundaries in taking such a measure, Kansas State Rep. Tony Powell warned: “I do not think the Supreme Court wants a showdown with the legislature.”⁹⁸ In Delaware, the Chief Justice appointed a court resources task force to study ways to stretch the state court budget. “The judiciary has compelling budget needs that must be met,” the Chief Justice told the General Assembly, and “we should not put at risk the performance of the judiciary, which is a uniquely valuable Delaware asset.”⁹⁹

B. The Lower Courts

Although considerable attention has been devoted to the issues of judicial independence and accountability in the last several years, the vast majority of that attention has been focused on state appellate courts, and high courts in particular. This is

⁹⁶ Testimony of Roger Hartley, November 1, 2002 at 118-19 (discussing the courts’ unique disadvantages in securing adequate funding from legislatures).

⁹⁷ *The Price of Justice*, ABA JOURNAL E-REPORT, May 10, 2002..

⁹⁸ John Hanna, *Supreme Court’s Budget Order Alters Balance of Power in Government*, Associated Press, March 17, 2002.

⁹⁹ *Fresh Thinking on Funding Outside Resources are Among Options a Task Force will Consider to Help Support Delaware Courts*, ABA JOURNAL E-REPORT, February 1, 2002.

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to some extent understandable, insofar as the high courts are obvious targets of campaigns to curb courts and judges: they are highly visible, fewer in number, and their decisions have generated the most controversy by virtue of being the final word on what the law is in their respective jurisdictions, which has led to more competitive and expensive campaigns for high court seats.

There are, however, compelling reasons to devote more attention to under-studied issues affecting the trial courts. In the year 2000, there were 290,000 appeals filed in the nation's appellate courts, staffed by 1,300 judges and justices.¹⁰⁰ In that same year, there were 92 million new cases filed before more than 29,000 trial judges and quasi-judicial officers staffing over 16,000 courts of limited and general jurisdiction.¹⁰¹ In short, our system of justice in the United States is administered largely by the lower courts. To the extent that the public's perceptions of the judicial system matter, and the sixth principle articulated in Part I of this report tells us why they should, those perceptions may be formed in no small part on the basis of personal experiences with the trial courts, as litigants, witnesses and jurors.

Another reason to devote more attention to the trial courts is that many of the problems discussed above with reference to the high courts afflict the trial courts as well. A limited number of examples should suffice:

- Trial judges, like high court justices, are put at risk of losing their seats on account of unpopular decisions rendered in isolated cases. One highly publicized example was the retention election of Illinois Judge Daniel Locallo, who generated

¹⁰⁰ NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 76 (2001)

¹⁰¹ *Id.* at 11.

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significant opposition on the basis of a sentence he imposed in a single case.¹⁰² And Professor Jeannine Bell reported to the Commission on Los Angeles trial Judge Joyce Karlin, who faced demands for her recall in the wake of a sentencing decision in a racially charged case.

- On a related front, corporate and insurance defense counsel and their clients have expressed with increasing vehemence concern that a limited number of state trial courts are unduly plaintiff-friendly in tort-related cases. In support of their position, they point to data that Carl Tobias and Andrew Spalding have summarized in their report to the Commission. Spalding and Tobias report, for example, that in one county court “there had never been a punitive damage verdict that surpassed \$9 million prior to 1995. Since then, there have been at least 19, totaling more than \$2 billion.” In response to defense-side arguments that judges in these courts are exhibiting a lack of independence and impartiality, pro-plaintiff groups have accused the accusers. A spokesperson for Americans for Insurance Reform recently alleged that by attacking these judges during an election cycle, “these corporations, particularly insurance companies, are so fanatical about their crusade for corporate immunity that they are now undermining one of the most sacred precepts of our democracy, judicial independence.”¹⁰³

- Problems associated with raising money in judicial campaigns are hardly limited to high courts. A recent survey of over 2,400 judges found that 45% of lower court

¹⁰² R. Bruce Dold, *Judges Up for Election Walking a Delicate Tightrope*, CHICAGO TRIBUNE, October 23, 1998, N27.

¹⁰³ *Consumer Coalition Calls on State Officials to Investigate Corporate Efforts to Intimidate and Oust Judges*, October 2, 2002 (press release).

judges felt under pressure to raise money for their campaigns during election years, as compared to 36% of high court justices.¹⁰⁴

- Trial judges appear no less concerned than their counterparts in the high courts about the real and perceived relationship between campaign contributions and judicial decisions. Forty-five percent of trial judges expressed the view that campaign contributions influenced judicial decisions to at least some degree (4% said “a great deal,” 21% said “some” and 20% said “just a little,” as compared to 36% who reported “none”); an identical percentage of high court respondents thought likewise, although more thought that contributions exerted a greater degree of influence. That same survey revealed that 58% of trial judges—as compared to 55% of high court justices - supported the proposition that “judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign.”¹⁰⁵

- The concern that judicial campaigns have become increasingly politicized is likewise shared by trial judges. Asked whether “the conduct and tone of judicial campaigns has gotten better or worse over the past 5 years,” 54% of lower court judges thought it had gotten much or somewhat worse, as compared to only 8% who thought it was better; those results mirrored the views of high court justices, 54% of whom thought it had gotten worse (although as compared to trial judges, more high court justices thought it was “much” worse), and 7% of whom thought it had gotten better.¹⁰⁶

- Concern for the state of voter knowledge and apathy may, if anything, be even more acute among trial judges, whose campaigns typically receive less attention and where voter turnout can be lower than the high court’s. Eighty-two percent of trial judges

¹⁰⁴ <http://faircourts.org/files/JASJudgesSurveyResults.pdf>

¹⁰⁵ *Id.*

were concerned (59% “concerned a lot” and 23% “concerned a little”) that “in some states, as few as 13% of people vote in judicial elections.” And 87% of trial judges were concerned (61% “concerned a lot” and 26% “concerned a little”) that “because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications.”

- Uncertainty surrounding the impact of *Republican Party of Minnesota v. White* on judicial codes of ethics applies with equal force to the trial courts. For example, a New York trial judge recently filed an action in federal court citing *White* in support of the proposition that an ongoing disciplinary proceeding investigating his campaign related conduct violates his first amendment rights.¹⁰⁷

Over and above the fact that the trial courts are experiencing many of the same problems as the high courts, there are a number of trends especially relevant to the trial courts that make separate study particularly important.

1. Increases in Trial Court Caseload Over Time

The reports of Commission consultants discuss some of the factors contributing to the generally accepted point that lower court caseloads have increased, more or less, steadily over time. On the civil side of the docket, Dr. Spalding and Professor Tobias refer to the so-called “litigation explosion,” variously blamed on increased case filings in the areas of medical malpractice, products liability and insurance coverage. On the criminal side, Professor Bell discusses escalating public fear of crime in the 1980s and 1990s that precipitated political branch “wars” on crime in the state and federal systems. And in her report, Professor Babb discusses major developments in child protection, child

¹⁰⁶ *Id.*

¹⁰⁷ Andrew Tilghman, *Ethics Probe Targets Judge*, TIMESUNION.COM, October 19, 2002.

custody, juvenile delinquency, marital dissolution and family violence that have contributed to a recent surge of interest in those areas, which together account for more than 35% of the civil case filings in the nation's state courts.¹⁰⁸

These developments and others have contributed to increases in lower court case filings that have exceeded the rate of population growth over the course of the past generation. The National Center for State Courts has reported that between 1977 and 1981, civil filings increased by 23% and criminal filings increased by 29%. Between 1984 and 2000, civil filings increased by 30%, criminal filings by 46%, juvenile filings by 66% and domestic relations filings by 79%. In the last two or three years, however, there are signs that this pattern of steady growth is leveling off—at least temporarily. The National Center reported that in 1999 and 2000, juvenile, criminal and civil filings declined for two consecutive years.¹⁰⁹

The inexorable rise in lower court caseloads is relevant for two reasons. First, it creates the need for larger budgets and additional salaries that can contribute to friction between the judiciary and the political branches over issues of resource allocation. Second, as discussed below, caseload burdens coupled with the changing nature of the litigants themselves have contributed to the emergence of coping strategies that have changed the role of lower court judges in ways that arguably contribute to politicizing the judicial function.

2. Changes in the Nature of Litigants

In addition to there simply being more litigants in courts across the country than

¹⁰⁸ Barbara Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: Application of an Ecological and Therapeutic Perspective*, 72 IND. L. J. 775 (1997).

¹⁰⁹ NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS (2001)

there used to be, there have been changes in the nature of the litigants themselves. Two changes are worthy of special mention here. First, more litigants are proceeding *pro se*. Second, people of color represent an increasingly significant percentage of the population and the litigant pool. As described below, these developments portend to change the role of the trial judge in ways that may affect the political climate in which the courts function.

a. The trend toward pro se litigation and its impact on the role of the trial judge

In its 2001 annual report on *Trends in the State Courts*, the National Center for State Courts reports that “the courts have experienced an increase in the number of litigants that are representing themselves.”¹¹⁰ In his testimony before the Commission, David Tevelin, the director of the State Justice Institute, explained this development in terms of a wider cultural phenomenon:

More and more people will be coming to court without lawyers and not just because they can't afford to pay them. They are coming because they live in a culture that makes self-reliance a virtue that is easier to achieve than ever before. Without anyone's help, Americans pump their own gas, run businesses out of their homes, and thanks to the internet, they do everything from diagnose their own medical [symptoms] to record their own albums to sell anything imaginable that happens to be lying around the household. Why shouldn't they think they can represent themselves in court?¹¹¹

In response, court systems have begun to develop an array of mechanisms to assist *pro se* litigants. Included among these mechanisms, are: self-help centers to provide *pro se* litigants with reference materials; one-on-one assistance with court staff or volunteers; court-sponsored legal advice by “facilitators;” improved internet access to

¹¹⁰ NATIONAL CENTER FOR STATE COURTS, *TRENDS IN THE STATE COURTS* 30 (2001).

¹¹¹ Testimony of David Tevelin, September 27, 2002 at 212.

court information; and collaborative approaches to assisting *pro se* litigants, that includes legal and community services organizations and the local bar.

The relevance of this development to the mission of this Commission is subtle, but potentially profound. As David Tevelin emphasized in his testimony, the move toward accommodating *pro se* litigants, along with the advent of problem-solving courts (discussed in greater detail below):

encourage greater participation by judges [in] broad-based efforts to improve the justice system, if not society in general, greater involvement with members of the public, and a more prominent public role of the bench.¹¹²

Insofar as judges are shedding the mantle of aloof neutrality and becoming more actively involved in helping litigants to help themselves, it may represent a significant shift in the role of the trial judge. The issue is whether this is a troubling trend that needs to be addressed, or a positive one that ought to be encouraged.

b. Diversification of America and public confidence in the courts

Perhaps the most critical demographic change to affect the 21st century judiciary will be the changing racial and ethnic make-up of the American public. The U.S. Census Bureau has projected that the non-Hispanic white population will be declining steadily from 74% in 1995, to 72% in 2000, to 64% in 2020, and to 53% in 2050. During the same time period, the Hispanic population is projected to increase at a rate of more than 2% per year, while the black population is projected to double in size.

The implications of such demographic shifts are many and complex, but one demands particular attention in the present context. Principle 6 of this report states that “Judges and the judiciary must have the confidence of the public.” Yet among people of

¹¹² *Id.* at 214.

color in this country, African-Americans in particular, such confidence is dramatically lower than among the population as a whole. A 2001 survey conducted by the Justice at Stake Campaign revealed that 85% of African-Americans believe that "there are two systems of justice--one for the rich and powerful, and one for everyone else." Also, while a majority of whites (62%) believe that judges are fair and impartial, a majority of African-Americans (55%) believe that judges are *not* fair and impartial. Moreover, only 43% of African-Americans, as opposed to 67% of whites, believe that judges are committed to the public interest.¹¹³ In a 1999 national survey conducted for the National Center for State Courts, while 34% of non-Hispanic whites "strongly agreed" that "Judges are generally honest and fair in deciding cases," the percentage declined to 29% for Hispanics, and 18% for African-Americans. Almost 70% of African-Americans believed that the courts treated blacks worse than they treated whites and Hispanics, and 40% of whites and Hispanics agreed.¹¹⁴

Nor are these perceptions confined to the lay public. In a survey conducted by the *ABA Journal* and the *National Bar Association Magazine*, 52% of African-American lawyers polled believe that "very much" racial bias exists in the justice system; and 55% of white lawyers believe "some" racial bias exists.¹¹⁵

These numbers demand sincere and immediate attention for at least two reasons. First, to the extent that the justice system actually disfavors African-Americans or other people of color, it is sharply at odds with the principle of even-handed justice upon which the health and legitimacy of the system depends. Second, if minority populations' lack of

¹¹³ See note __, *supra*.

¹¹⁴ National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (1999).

¹¹⁵ Terry Carter, *Divided Justice*, A.B.A. J. 43 (February 1999).

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confidence in the judiciary is left unaddressed, then as these populations grow to occupy a larger and larger proportion of the demographic whole, then the overall level of public confidence in the judiciary will correspondingly diminish.

Among indicators of bias toward minorities in the justice system, observers commonly point to racially unrepresentative juries, disparate arrest, sentencing and incarceration rates, tolerance of police misconduct, inferior access to competent counsel, and unequal treatment at bail and probation proceedings.¹¹⁶ All of these perceptions exist against a backdrop of disproportionately low numbers of people of color serving in official capacities in the justice system relative to their numbers in the population at large. In Georgia, for example, African-Americans make up 26% of the state population yet only 6% of state court judges.¹¹⁷ Bryan Stevenson, Executive Director of the Equal Justice Initiative of Alabama, told the Commission that 73% of felony defendants in Alabama are people of color, and when they appear at trial:

They face a white judge. They face a white prosecutor. We have elected district attorneys. There are no black district attorneys in Alabama. And less than 2% of the State Bar is African American. So, frequently, they are the only person of color in the court. And we're a state with unlimited peremptory strikes . . . [W]e still have cases where, in majority black counties, African American defendants are tried by all-white juries that involved 24 or 26 peremptory strikes being used.¹¹⁸

¹¹⁶ See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 828-32 (1998).

¹¹⁷ *The Percentage of Georgia Judges who are Black Remains Small*, SAVANNAH MORNING NEWS, May 19, 2002. Moreover, this is not confined to southern states. In Maryland, for example, where African-Americans have made notable progress in securing judgeships, of the state's 261 judges, two are Hispanic and none are Asian. Manuel Roig-Franzia, *Asian, Hispanic Judges Rare*, WASHINGTON POST, March 3, 2002.

¹¹⁸ Testimony of Bryan Stevenson, November 22, 2002, at 51; A former president of the Hispanic National Bar Association notes that judges "are feared, not respected, by minorities who appear in lily-white forums." Mike Martinez, *Why Doesn't Utah Have More Hispanic Judges?*, DESERET NEWS, December 3, 2001.

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Mr. Stevenson notes that “there are no black judges on any of our appellate courts . . . There are no people of color on the Alabama Supreme Court, the Alabama Court of Civil Appeals, or on the Alabama Court of Criminal Appeals.”¹¹⁹ Further, given that all judicial offices in Alabama are elected offices, he points out that any effort to increase diversity through minority voting initiatives or electoral reform confronts some very sobering facts and statistics.

We have disenfranchisement laws. In Alabama you permanently lose the right to vote based on a criminal conviction. Right now 31% of the black male population have permanently lost the right to vote. The projection is that by 2005 that number could be as high as 40%, which would actually get us at about the same level we were in the 1960s before the Voting Rights Act. As these trends continue, the kind of political reforms many of us thought possible become less and less viable.¹²⁰

It appears clear that minority representation in the justice system has direct implications for the perceived legitimacy of judicial decisions. John Bonifaz, executive director of the National Voting Rights Institute, commenting to the ABA Commission on Public Financing of Judicial Campaigns with regard to racial diversity of California courts, noted that:

[T]he Los Angeles County court system doesn’t reflect the population as a whole. And when it comes to matters of racial justice, particularly when it comes to matters with the criminal justice system and disproportionate numbers of African-Americans and Latinos in our prison system, the question of appearing to be fair was a real one.¹²¹

In a similar vein, Lisa Chang, President of the National Asian Pacific American Bar Association, testified before the Commission:

¹¹⁹ Testimony of Bryan Stevenson, at 28.

¹²⁰ *Id.* at 52.

¹²¹ Testimony of John Bonifaz before the ABA Commission on Public Financing of Judicial Campaigns , November 17, 2000, at 162-63.

if we see that we have Asian Pacific American judges, that we are part of the system, and we can communicate with that system and participate in the system, it will go a long way towards addressing . . . perceived differences in terms of sentencing or treatment in the courts. I think people will be willing to accept the legitimacy of the court if they see that they are actually participating in it in a meaningful way.¹²²

In her testimony before the Commission, Suzanne Townsend, President of the Native American Bar Association, agreed that diversifying not only the judiciary, but the legal profession as a whole would do much to reverse the ongoing erosion of public trust and confidence in the justice system. She pointed out, however, that the trends are moving in the wrong direction:

Ever fewer minority students are choosing law as a career. The entry into the profession has slowed considerably since 1995. And in 1999, for the first time since 1985, minority entry into law school actually declined. The scarcity of minority lawyers has a direct effect on the makeup of the judiciary, as does the scarcity of minority lawyers who are partners at large law firms, which in most states serve as farm teams for the state bench.¹²³

Where experienced minority lawyers are relatively scarce, it becomes increasingly important that legislatures and governors in states using merit selection systems make conscious efforts to not overlook the qualified minority candidates who *are* available for judicial posts, as this can exacerbate public perceptions of exclusion.¹²⁴ It is also clear that these governors must be alert to the racial make-up of the judicial nominating

¹²² Testimony of Lisa Chang, September 27, 2002, at 104-05

¹²³ Testimony of Suzanne Townsend, November 1, 2002, at 43-44.

¹²⁴ When Massachusetts Acting Governor Jane Swift appointed only 4 minority judges in 25 opportunities, Robert V. Ward, dean of Southern New England School of Law, observed: "A total of about 15 percent is not likely to cause anyone to label the governor a champion of diversity. Fifteen percent is hardly a profile of courage." Robert V. Ward, *Swift's Legacy Could Be Her Judges*, BOSTON GLOBE, August 23, 2002; This applies in the context of gender as well. For example, when Colorado Governor Bill Owens was presented with three candidates (two male and one female) for an El Paso County judgeship, he chose to interview only the two male candidates. State Representative Jennifer Vierga called Owens's decision "absolutely atrocious," and noted that she found it "disrespectful that the governor chose to not interview the one female in the group." Lynn Bartels, *Group Claims Spurning Indicative of Governor's Pattern of Favoring Men*, ROCKY MOUNTAIN NEWS, June 6, 2002.

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commissions through which the candidates they select must first pass. Historically, state judicial nominating commissions have been overwhelmingly white and predominantly male; and despite some progress in the 1990s, they remain largely so.¹²⁵

In the context of increasingly politicized state judicial elections, questions about the level of the minority presence on the bench take on particular relevance. Minority groups rely on an independent judiciary to protect their legal rights by upholding the rule of law even when it is unpopular with the majority. As the judiciary becomes more subject to majoritarian political pressures, the continuing ability of the courts to maintain the level of independence necessary to protect the outnumbered is a matter of understandable concern. As Malcom Robinson, President of the National Bar Association, told the Commission:

The judiciary, as we see it, is there to interpret the Constitution and [to] protect the minority from overreaching by the majority. [As] we go into the 21st Century, there are certain things we have observed. One is that the independence of the judiciary is being seriously eroded. The body politic appears to be losing confidence in the judiciary. There seems to be a disconnect between the judiciary and the body politic. . . . The fact is, that the body politic is made up of very diverse populations, in terms of race, gender and other areas. And that type of diversity is not reflected significantly on the judiciary.¹²⁶

In her testimony before the ABA Commission on Separation of Powers and Judicial Independence, Constance Rice, the Western Regional Counsel for the NAACP Legal Defense and Educational Fund, emphasized that the judiciary derives its legitimacy, and thus its power to persuade, "through the consent of the public and because the public has faith in that judiciary." She added, however:

[T]here are parts of the community that I work in [where] I cannot speak with any credibility about the credibility of the judicial system. I'm talking mainly about

¹²⁵ See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 730-32 (2002)

¹²⁶ Testimony of Malcolm Robinson, November 22, 2002, at 101-03.

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class. It is poor African-Americans, poor whites, poor Latinos, poor Asian Pacific Americans, poor people of every race who are considered part of the underclass.

I can no longer go to that sector of the public and speak credibly about the integrity, the fairness or the lack of bias in our judicial system. I simply can't. [T]here are sectors of the public I can not discuss the judicial system with anymore and convince them that they should have faith with it, that they should view it as impartial, that they should give it the credence and the support that the public has to give it in order for the judiciary to work. We have lost poor people.¹²⁷

As Ms. Rice's testimony implies, in an era of heavily-financed judicial elections, the system's ability to protect the interests of the outspent is likewise deserving of scrutiny. Lisa Chang notes that "[a] lot of the Asian Pacific American community is not affluent, and . . . is not familiar with and used to the idea of making political contributions."¹²⁸ Judge Patricio Moya Serna, then Chief Justice of the Supreme Court of New Mexico, told the Commission that without significant changes in the way judicial elections are financed, "it's going to be exclusion, exclusion, exclusion, because minorities cannot compete. They cannot get millions of dollars."¹²⁹

In his testimony before the ABA Commission on Public Financing of Judicial Campaigns, John Bonifaz pointed to data from Wisconsin relating to the intersection of minority status and wealth in the context of judicial elections. He reported that .0003% of the electorate in Supreme Court races supplied 18.5% of total contributions, and that 4.1% of contributors, representing less than 2% of the voters in Supreme Court elections, provided over half of all donations to those races. In addition, when contributions were traced to the zip codes of the contributors, he found that ten wealthy, largely white Wisconsin zip codes supplied 43.3% of all contributions, as compared to the ten

¹²⁷ Testimony of Constance Rice before the ABA Commission on Separation of Powers and Judicial Independence, February 21, 1997 at 244-45, 248-49.

¹²⁸ Testimony of Lisa Chang, September 27, 2002, at 94.

Wisconsin zip codes where people of color are in the majority, which contributed only 1.8%. He concluded that "there's a real disparity here between those who have access to the money and their ability to participate in this process and those who don't, and the impact is felt most severely on communities of color."¹³⁰

Stephen Bright offers the following summation of the relationship between the modern justice system and communities with insubstantial financial resources:

We're going to come to a reckoning here very shortly where we are going to have to either sandblast "Equal Justice Under Law" off the Supreme Court building, or we're going to have to do something about access to justice for people who don't have any money.

Poor people, more than anybody, need access to the courts . . . because they don't have a PAC, they don't have a representative, they don't have a congressman, they don't have anybody else. And unfortunately, I think the courts are farther away from those people, both state and federal, than they've been in a long time.¹³¹

In short, while the combined effects of increasing politicization and soaring levels of special-interest financing on state judicial elections are points of concern for the American public in general, they are of particular concern for people of color, and low-income people of all backgrounds, and may exacerbate their sense of estrangement from the courts. Any concerted effort to ensure – and earn -- public confidence in the 21st century judiciary will be critically incomplete if it does not allocate substantial and sincere attention to these sectors of the American public that are increasing both in their numbers and in their sense of disenchantment with the justice system.

3. Changes in the Role of Courts

Certain changes in the role of courts over time are well documented. The term

¹²⁹ Testimony of Patricio Serna, November 1, 2002, at 32.

¹³⁰ Testimony of John Bonifaz, before the ABA Commission on Public Financing of Judicial Campaigns, November 17, 2000 at 166-68.

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“trial judge” is increasingly becoming a contradiction in terms as fewer cases go to trial in state or federal courts.¹³² The time, expense and unpredictability of trials have made negotiated or judge brokered settlements, and alternative dispute resolution mechanisms increasingly attractive in a wide range of contexts. One effect of this development has been to create an alternative dispute resolution market for judges, which as discussed above in connection with the importance of adequate judicial salaries, can serve as a “brain drain” for jurists who leave the bench to become mediators or arbitrators. Another effect is to change the role of the judge from someone who dispassionately tries cases, to someone who roles up her sleeves and helps the parties to resolve their dispute by means short of trial.

Another less widely appreciated sign of the changing role of the trial judge has been the nation-wide move toward problem-solving courts. The nation’s first problem-solving court opened in Dade County, Florida, in 1989.¹³³ In response to chronic, drug-related criminal recidivism and overcrowded correctional facilities, the county court began sentencing drug-addicted offenders to long-term, judicially supervised drug treatment in lieu of incarceration. The success of that court attracted national attention and is credited with setting off what Chief Judge of New York, Judith S. Kaye, has called “the quiet revolution called problem-solving justice.”¹³⁴ The idea has been extended beyond drug courts to encompass dozens of specialized area of concern, including: mental illness, domestic violence, as well as numerous “quality-of-life” crimes such as prostitution and shoplifting.

¹³¹ Testimony of Stephen Bright, November 22, 2002 at 177, 179.

¹³² Viner Samborn, *The Vanishing Trial*, ABA J. 24 (October 2002).

¹³³ Symposium, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 FORDHAM URB. L. J. 1790, 1805 (2002).

While no single definition fits all problem-solving courts, in his testimony before the Commission, Greg Berman, director of the Center for Court Innovation, identified three essential features of the problem-solving court idea:

1) *Intensive judicial monitoring*: even after sentencing, problem-solving courts tend to require offenders to return to court regularly to report on their progress with drug or mental health treatment, job training, community restitution and other components of their sentence not involving incarceration.

2) *Aggressive professional outreach*: problem-solving courts reach beyond the courthouse walls to engage social scientists and social service providers to create a more symbiotic relationship between these off-site providers and the courts.

3) *Community engagement*: problem-solving courts reach out to not only professional service providers, but also to community leaders, community groups, and to citizens, to encourage them to become involved participants in the justice system.¹³⁵

Clearly, problem-solving courts represent a marked departure from the traditional roles of both state courts and state court judges. They have arisen in response to equally dramatic changes, as described by Chief Judge Kaye:

Unquestionably the first modern day reality that you have to look at is the numbers of cases in the state courts, which are huge. Then there is the nature of the cases—there are not only more of them, but they've changed. We've witnessed the breakdown of the family and of other traditional safety nets. We're seeing many, many more substance abuse cases . . . huge numbers of domestic violence cases . . . [and] quality-of-life crimes. And it's not just the subject of the cases that's different. We get a lot of repeat business. We're recycling the same people through the system.¹³⁶

¹³⁴ Judith S. Kaye, *Problem-Solving Courts: Keynote Address*, 29 FORDHAM URB. L.J. 1925, 1928 (2002).

¹³⁵ See testimony of Greg Berman, September 27, 2002, at 179-80.

¹³⁶ Quoted in Greg Berman, *What is a Traditional Judge Anyway? Problem-solving in the State Courts*, 84 JUDICATURE 78, 80 (2000).

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As this description implies, there is more behind the movement toward problem-solving courts than just the courts trying to find non-traditional ways to cope with what Greg Berman called the “incredible explosion in state court caseloads.” In a sense, the movement is non-traditional in two directions: the courts are reaching out, trying to influence what comes into the court from the community (i.e., the debilitating caseload); but the community is also reaching in, trying to influence what comes from the court back out into the community (i.e., the procession of unreformed, repeat offenders with intact drug addictions or other features that render them ill-equipped to play a healthy role in the community.)

Although a body of reliable data has yet to emerge, this more collaborative, holistic approach to justice has shown promising results. There are now more than 1,500 problem-solving courts across the country and many report remarkable reductions in low-level crime and improved compliance by offenders sentenced to community restitution or substance-abuse treatment programs. Drug courts have achieved consistent reductions in recidivism and drug use among participants as well as significant reductions in overall criminal justice costs.¹³⁷

Perhaps most promising is that, as Greg Berman observes, “these problem-solving courts have shown some signs that they are able to chip away at the decline in public trust and confidence” in the justice system. Berman notes, for example, that only 9% of community members polled had positive views of the justice system before the establishment of the Red Hook Community Justice Center, a problem-solving court in Brooklyn. After the court had been established this number rose to 70%. According to

¹³⁷ Greg Berman and John Feinblatt, *Problem-solving Courts: A Brief Primer*, 23 LAW & POLICY 9, 9-10 (2001).

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Aubrey Fox of the Center for Court Innovation, public opinion surveys about problem-solving courts show that “the people who are most supportive of these measures are exactly the same groups, blacks and Latinos, who report being dissatisfied with the operation of the courts.”¹³⁸

At the same time, there is concern that, positive results notwithstanding, the very idea of courts and judges “reaching out” and social workers or treatment professionals “reaching in” represents a challenge to the core principles of judicial independence and impartiality. Even supporters, such as David Tevelin from the State Justice Institute, acknowledged that “the responsibilities of being a judge in the state courts of the 21st century differ from the traditional responsibilities,” noting that “judges are being called upon—fairly or unfairly, wisely or unwisely—to become involved in a variety of collaborative, off-the-bench type activities.” David Tevelin describes risks inherent in such an approach:

I think the more courts get pulled into the role of social service agencies, the role of collaborator—and [as] I’ve said, there’s many good aspects to that—the more likely it may be that people will try to continue to politicize the judiciary, try to exercise more executive and legislative control, try to make judges less traditional and more like other politicians.¹³⁹

Problem-solving courts have shown considerable potential to address some of the most intractable problems state courts face - clogged dockets, strained budgets, recidivism, and perhaps most importantly, and lack of public confidence in the justice system, especially within communities of color. It is therefore understandable that

¹³⁸ Aubrey Fox, panelist, Eleventh Annual Symposium on Contemporary Urban Challenges, *What the Data Shows*, 29 FORDHAM URB. L. J. 1827, 1843 (2002).

¹³⁹ Testimony of David Tevelin, September 27, 2002, at 221.

problem-solving courts have demonstrated themselves to be more than a fad. According to Greg Berman:

There's just too many of them now to be dismissed in that way, and I think the real question is . . . what's the fit? . . . Is the goal here to continue to replicate these things or is the goal to somehow embed the ideas of problem-solving courts in every courtroom throughout a state system or throughout the country?"¹⁴⁰

As encouraging as some of the early experiences with problem-solving courts have been, however, there is no denying the tension between the role of judge as engaged problem-solver, and the more traditional model of judge as detached referee. As problem-solving courts continue their ascendancy, coming to terms with this tension may be increasingly important.

III. CONCLUSIONS AND RECOMMENDATIONS

As the preceding section of this report reveals, our survey of the issues confronting the 21st century judiciary has been wide-ranging. It is possible, however, to organize those issues—and the Commission's corresponding conclusions and recommendations—into three broad categories: those that relate to preserving the judiciary's institutional legitimacy; those that relate to improving judicial selection; and those that relate to promoting an independent judicial branch that works effectively with the political branches of government. It is to those conclusions and recommendations that we now turn.

A. Preserving the Judiciary's Institutional Legitimacy

¹⁴⁰ Testimony of Greg Berman, September 27, 2002, at 183, 186.

In *The Federalist Papers*, Alexander Hamilton described the judiciary as “the least dangerous branch.”¹⁴¹ A casual glance at the 21st century judiciary might lead one to suspect that Hamilton got it wrong, for today there is virtually no issue of political, social or economic importance that courts have not helped to shape, and on matters arising under our constitutions, courts are—more often than not—the final word. Hamilton’s point, however, was simply that the courts are dependent on Congress for their funds and on the President to execute their orders, which ensures that the judiciary can not act without the acquiescence of the political branches and the people they represent. The continuing ability of the courts to function, then, depends upon public acceptance of their institutional legitimacy; without it, the courts can and will be ignored or obliterated.

All issues addressed in this report are, in a very real way, relevant to promoting public acceptance of the courts, including those of judicial selection and the judiciary’s relationship with the political branches, which we reserve for discussion in later sections. There are, however, a number of issues that we regard as especially vital to the judiciary’s institutional legitimacy, which warrant separate treatment here.

1. Judicial Qualifications, Training, and Evaluation

The Commission recommends that states establish credible, neutral, non-partisan, deliberative bodies to assess the qualifications of all judicial aspirants

The issue of ensuring a qualified judiciary is typically linked to judicial selection. That makes obvious sense: the point at which to determine whether a lawyer possesses the qualifications necessary to be a judge is at the point when he or she is selected. For that reason, the conclusions and recommendations here will be relied upon later, in our

¹⁴¹ THE FEDERALIST PAPERS, No. 78.

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discussion of judicial selection. The Commission believes, however, that the importance of a qualified judiciary transcends the issue of selection to such an extent as to warrant separate treatment here. There is more at stake here than simply promoting judicial competence. The continuing legitimacy of our judicial institutions requires that a process be in place to reassure the public that the judges who interpret our laws, rule on our civil claims, resolve disputes affecting our families, and sentence our citizens, are capable and qualified.

It is quite common for states in which judges are initially appointed to rely on judicial selection commissions to evaluate the qualifications of candidates the governor appoints. In some states, such as California, the Commission evaluates candidates the governor has previously identified. In other states, such as Missouri, the Commission creates a pool of qualified candidates from which the governor's appointees are drawn.

In 2000, the ABA adopted standards for state judicial selection that expanded commission-based systems for the evaluation of judicial aspirants, to include candidates in contested elections. In its report, the Commission on State Judicial Selection Standards offered the following explanation:

The evaluation of a judicial aspirant's qualifications by a neutral, non-partisan, credible, deliberative body is a key element of traditional appointment systems. By incorporating this crucial element into an election system, as well as bolstering the process in appointment systems, the standards strive to provide a fundamental shift in the selection process, without advocating an institutional change in state judicial selection methods. The creation of credible, deliberative, non-partisan bodies to evaluate the qualifications of all judicial aspirants, regardless of whether that person stands for election, is nominated through the appointment process, or reaches the bench through the interim appointment process, serves to assure the public that those judicial aspirants have met a threshold set of qualifications.

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We agree with the Commission on State Judicial Selection. This is not to imply that judges who have been selected in states with contested elections that have no commission-based evaluation system are, on average, less qualified than their counterparts in states where such systems are in place. Rather, our point is simply that a commission-based evaluation system can make a valuable contribution toward promoting public trust and confidence in the courts by reassuring the public that no judges—regardless of how they are selected—will be allowed to serve unless they possess the qualifications necessary to be good judges.¹⁴²

This recommendation should not be construed as an endorsement of all commission-based judicial evaluation programs currently in place. In some jurisdictions, concerns have been raised that the selection commission's evaluations of judicial candidates are unduly influenced by the appointing authority. In others, critics assert that evaluations are influenced too much by politics in general.¹⁴³ If such concerns are well founded, the selection commission is neither nonpartisan nor neutral, will not be perceived by the public as credible, and will fail in its essential purpose. Just as judicial independence is needed to ensure an impartial judge, so too an independent selection commission is needed to ensure impartial evaluation of judicial aspirants.

¹⁴² For example, despite controversy surrounding an appointment to the state supreme court, New Jersey Governor McGreevey was praised for first sending the appointment to the state bar association for review, a practice that had been discontinued by his predecessor, Governor Whitman. *Bar Code*, PHILADELPHIA INQUIRER, July 16, 2002.

¹⁴³ For example, a Rhode Island editorial asserted that the state judicial nominating commission rejected a highly qualified candidate, Superior Court Judge Michael Silverstein, for a seat on the state Supreme Court solely because of his lack of political connections. *The High Court Here*, PROVIDENCE JOURNAL, December 12, 2000; More pointedly, a Nebraska editorialist derides the state's judicial nominating commissions for corrupting the state's merit selection system. He asserts that the commissions have changed the nomination process from "a legitimate evaluation of merit" to "a clandestine, political crapshoot," whereby the candidate of the commission's choice is deliberately grouped "with individuals the commissioners believe will be unacceptable to the governor." J. Kirk Brown, *Judicial Commissions Fail People of Nebraska*, OMAHA WORLD-HERALD, September 7, 2000.

The Commission recommends that state appropriations be sufficient to provide adequate funding for judicial education

Just as a process for assessing judicial qualifications can promote public confidence in the judiciary by assuring that all judges are capable and qualified, so too, continuing judicial education programs can promote public confidence by assuring that judges keep abreast of new developments relevant to the work they do. The Commission is aware of an ongoing controversy surrounding whether and to what extent it is appropriate for judges to attend privately funded judicial education programs in which program sponsors reimburse attendees their expenses. Without taking a position on that controversy, the Commission believes that state court systems have a critical role to play in the continuing education of their own judges. The courts themselves are often best situated to monitor their own judges' familiarity with recent developments and to develop programs to address deficiencies.¹⁴⁴ Funding to develop continuing judicial education programs is therefore essential.

The Commission recommends that Congress fully fund the State Justice Institute to ensure that judicial education needs are met

Although our report focuses on state court systems, the issue of promoting judicial education as a means to ensure judicial competence and public confidence in the courts is one with obvious national implications. Over the course of the past two decades, our federal government has returned a range of issues of nation-wide importance to state control. With respect to the perennially pressing problem of crime, the federal

¹⁴⁴ Arizona Supreme Court Justice Charles Jones, is now "using his supervisory powers over lower courts to increase training requirements for justices of the peace and Municipal Court judges." This, according to the Arizona Republic, is "the least the public should expect." This Commission agrees. *Training Reform in JP Courts Welcome*, ARIZONA REPUBLIC, June 30, 2002.

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government has continued to play a significant role, but has also devoted considerable resources to expanding the states' capacity to police their communities and prosecute law-breakers. The success of these ventures depends in no small part on the state courts, which must process the influx of cases these developments generate. In this regard, preparing state judges to undertake the responsibilities that Congress is counting on them to perform capably and conscientiously should fairly be characterized as a national priority.

The State Justice Institute has funded judicial education programs around the country, and served as an information clearinghouse for court systems interested in replicating programs that others have tried.¹⁴⁵ The Commission concludes that Congress should continue to fund the important work of the State Justice Institute. Although the Commission's focus here has been on the role that State Justice Institute plays in promoting judicial education, the State Justice Institute's larger mission to fund projects designed to improve state court operations generally should be of considerable importance to our federal government at a time when we depend increasingly on states to further our national priorities.

The Commission recommends that states explore and experiment with pre-judicial training programs

In some European judicial systems, judicial office is a career track, in which judicial aspirants are specially trained to serve as judges, begin at the "bottom" of the judicial hierarchy, and are gradually promoted to higher judicial office over the course of their careers as they acquire experience and expertise. In the United States, it is unlikely that any state would adopt a comparable system any time soon. At the same time, there is

no denying that the skills that make for an excellent lawyer in our legal system, do not necessarily make for an excellent judge. To ensure that first time judges have acquired the skills needed to serve effectively, states may wish to experiment with programs and courses designed to provide judicial aspirants with pre-judicial training. Although the Commission does not go so far as to recommend that such training be mandatory, if credible and rigorous pre-judicial training courses were offered by law schools, the National Judicial College, or state court systems, the completion of such training might fairly constitute a qualification that judicial selection commissions and voters should look upon favorably when evaluating aspirants for judicial office.¹⁴⁶

The Commission recommends that states develop judicial evaluation programs to assess the performance of all sitting judges

Many states employ some form of judicial performance evaluation. In most states, evaluations are conducted by state bars; in six states, official, state-sponsored evaluations are conducted as part of the retention election process. In the latter jurisdictions, retention evaluation commissions, comprised of lawyers, judges and non-lawyers, evaluate judges on the basis of information gathered from litigants, witnesses, jurors and lawyers. The factors subject to official state-sponsored evaluation vary from state to state, but typically include such matters as an incumbent's integrity, communications skills, judicial temperament, administrative performance, fairness, preparation and attentiveness. The judge's knowledge and understanding of the law may likewise be evaluated, on the basis of information gathered from members of the bar. Of course, there is no reason why these more comprehensive criteria cannot be used even in

¹⁴⁵ Testimony of David Tevelin, September 27, 2002 at 202, 209

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states that rely on state bars for evaluations. The Iowa State Bar Association recently revised its ratings system for retention elections from one that simply surveyed whether attorneys thought a judge should be retained or not, to one where attorneys rate judges on 12 factors including knowledge of the law, objectivity, and clarity of writing.¹⁴⁷

As with judicial qualifications, discussion of judicial evaluation programs is often linked to judicial selection. The virtues of judicial performance evaluations are, however, multi-faceted. To be sure, voters in retention elections can gather valuable information about incumbent judges from such evaluations, and there is some support for the proposition that judicial performance evaluations exert a positive impact on voter turnout in judicial retention elections.¹⁴⁸ In the Commission's view, however, performance evaluations can be extremely useful regardless of how judges are initially selected or whether they are subject to reselection processes.

Irrespective of whether judges stand for election at any stage in their careers, judicial performance evaluations can be an important accountability-promoting measure. Judges are public servants whose salaries are paid and operating budgets are funded by taxpayers who are entitled to know whether the public officials they support are doing their jobs satisfactorily. Even if the judges under review are not subject to re-selection, publicizing performance evaluations can be rewarding or chastening (depending on the results) for the affected judge, and furnish an excellent opportunity for judicial self-improvement. A commendable example in this regard is the Chief Justice of the South Carolina Supreme Court, Jean Toal, who requested the state bar to issue an early report

¹⁴⁶ For a discussion of one pre-judicial training proposal, see Marc Amy, *Judiciary School: a Proposal for a Pre-Judicial LLM Degree*, 52 J. LEGAL EDUC. 130 (March/June 2002).

¹⁴⁷ *Sizing Up State Judges*, DES MOINES REGISTER, October 4, 2000.

¹⁴⁸ Seth Andersen, *Judicial Retention Evaluation Programs*, 34 Loy. L.A. L. Rev. 1375, 1379 (2001).

on her performance, three years before she would face re-election. “[T]he chief ought to set the tone,” she stated. “I’m a big proponent of this rating. I think it keeps us on our toes.”¹⁴⁹ As Chief Justice Toal implies, the routine availability of regular feedback on all judges within a court system will serve the long-term interest of reassuring the public that judges are not immune from scrutiny.

The Commission concludes that bar-sponsored surveys alone are insufficient to achieve the above-stated objectives. If the public is to have confidence in the judicial evaluation process, it is important that non-lawyers participate both as information providers and as evaluators. Accordingly, the Commission recommends that states create judicial performance evaluation commissions modeled after the retention evaluation commissions already in place in six states, with one important difference: the primary purpose served by the commissions recommended here is to evaluate and facilitate the improvement of judicial performance, and not merely to assist in judicial re-selection.

2. Judicial Ethics and Discipline

Judicial accountability is absolutely essential to preserving public trust and confidence in our courts. Judges are entrusted to uphold the law independently and impartially. When they violate that trust, it is vital that processes be in place to correct the problem. As discussed below, in conjunction with its recommendations on judicial selection, the Commission does not believe that judicial elections are a desirable means to promote accountability, because of their potential to undermine judicial independence, impartiality and the rule of law. There are, however, other means to promote accountability that the Commission supports and seeks to enhance.

¹⁴⁹ Cindi Ross Scoppe, *Evaluations Show Toal, Other Judges Doing a Pretty Good Job*, THE STATE, January 2, 2001.

The Commission recommends that the ABA undertake a comprehensive review of the Model Code of Judicial Conduct

Codes of judicial conduct serve a critical role in promoting judicial accountability by creating a body of rules designed to ensure that judges comport themselves in ways consistent with their duty to uphold the law impartially. If adequately publicized, moreover, codes of conduct can reassure the public that there are established ethical constraints on judicial conduct.

Existing codes of judicial conduct have served the state judiciaries well over time, but recent events called to the Commission's attention over the course of four hearings lead it to conclude that the time has come for the ABA to undertake a comprehensive review of its Model Code of Judicial Conduct: First, and perhaps most obviously, the United States Supreme Court's decision in *Republican Party of Minnesota v. White* requires a rethinking of the Code as it pertains to judicial campaign conduct. Easily a dozen witnesses who testified before the Commission alluded to the uncertain impact that *White* will have on rules regulating campaign speech in judicial elections. How far can and should the Code go in continuing to regulate candidates who take positions, appear to commit themselves, or make explicit promises with respect to issues they are likely to decide as judges? To the extent that the Code may not prohibit candidates from making particular kinds of statements during judicial campaigns, may it still require those candidates to recuse themselves later, in cases to which their prior comments relate? During the life of the Commission, at least two federal court cases have been decided, relying on the Supreme Court's decision in *White* to strike down other state ethics

restrictions on judicial campaign speech, that have only added to the state of uncertainty.¹⁵⁰

Second, the changing role of trial judges, described in the background section of this report, may justify some rethinking of the Code as it applies to them. The traditional image of a judge, which the Code seeks to preserve, is that of a disinterested referee. An emerging trend that several witnesses brought to the Commission's attention, however, calls upon judges to roll up their sleeves and serve as engaged problem solvers on a disparate array of issues ranging from crime, juvenile delinquency and drug and alcohol dependency, to divorce and child support. As will be discussed at greater length below, the Commission encourages the growth and development of problem-solving courts as a means to enhance public confidence in our judicial systems. But the Model Code of Judicial Conduct may require revision to accommodate such changes.

Third, and more generally, the Model Code of Judicial Conduct last received a comprehensive review in the years leading up to its revision in 1990, prior to the acceleration of events leading to a heightened level of interest in and concern over issues of judicial independence and accountability around the country. Revisiting the Code in light of those developments is well advised.

The Commission recommends that codes of judicial conduct be actively enforced

It goes without saying that to be effective, codes of judicial conduct must be enforced. All states have disciplinary systems in place, but the aggressiveness with which their respective codes of conduct are enforced can vary dramatically. In North Carolina, an editorial notes that "more than 100 times, the agency that investigates

¹⁵⁰ Adam Liptak, *Judges and Politics Mix: U.S. Ruling breaks Down a Wall*, New York Times, February 24, 2003 (reporting on case involving New York trial judge Thomas Spargo); *Weaver v. Bonner*, No. 00-

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elected judges accused of misconduct has told judges that they have committed a violation of judicial ethics and warned them not to do it again—all in secret.” As a result, “voters will go to the polls without complete information. . . . By state law, the [agency’s job] is to investigate complaints, dismiss unfounded ones, and recommend . . . censure or remov[al] [of] judges for misbehavior. The law says nothing about private admonitions.”¹⁵¹

Texas presents a good example of successful reform. The Texas Commission on Judicial Conduct is comprised of eleven members—five judges, two practicing lawyers, and four non-lawyers. ABA Commission member and Texas State Representative Pete Gallego described the State Commission on Judicial Conduct as “a backwater agency that did nothing to anybody for a long time” until it encountered “problems with the legislature in terms of criticism,” at which point Margaret Reaves was appointed as the new executive director.

In her testimony before the Commission,¹⁵² Ms. Reaves described how the Commission revitalized itself. First and foremost, the Commission took steps to “create more public awareness,” by “giving the sanctions to the press and notifying them of what was going on,” putting relevant information on the Commission’s web page, and by “letting people know they had the right to file complaints, that the complaints they filed would be investigated fully and fairly . . . and that they would be notified of the results.” With respect to the notice complainants received when their complaints were dismissed, the Commission moved from a perfunctory form notice to a personalized letter explaining

15158 (11th Cir. 2002).

¹⁵¹ Matthew Eisley, *Voters in Dark about Judges’ Ethical Records*, RALEIGH NEWS & OBSERVER, October 14, 2002.

¹⁵² Hearing of November 22, 2002 at 229-247.

why. And the entire staff began to travel the state, meeting with judges in judicial education programs to discuss the ethical rules and their enforcement.

The effects of Ms. Reaves' efforts are measurable. In the year before her arrival, the Commission received a total of 743 complaints against the state's 3,500 judicial officers; in her first year, that number increased to over 1,200. During her tenure, the number of requests for reconsideration of complaints the Commission dismissed, declined from 133 in the year prior to her arrival, to 43. Thomas R. Phillips, the Texas Chief Justice and a member of this Commission, commended the Texas Commission on Judicial Conduct for hiring "Margaret without any consultation with us . . . they're totally independent—as they ought to be," and for "making the public aware that they exist as an outlet" without creating an adversarial relationship with the judiciary.¹⁵³

In the Commission's view, the experience of the Texas Commission on Judicial Conduct should serve as a model for other states. If judicial discipline is to promote the legitimacy of our courts in the public eye:

- The disciplinary body should include non-lawyer members;
- The public should be made aware of the disciplinary process;
- Discipline should be imposed when it is deserved;
- The public should be made aware when sanctions are imposed;
- When sanctions are not imposed, complainants should be furnished with an explanation as to why.

3. Diversification of the Judiciary

This Commission is convinced that increasing the diversity of the judicial branch is more than an attractive goal for the 21st century judiciary. It is a necessity. Within

fifty years, fully half of all Americans will be a member of a racial or ethnic minority. Meanwhile, recent surveys reveal an alarming erosion of trust and confidence in the justice system among people of color. Specifically, surveys reveal persistent attitudes that people of color are not treated fairly by courts, and that because of factors such as language barriers, racial bias, and the increasing influence of money in judicial elections, their access to justice is inferior to that of non-Hispanic whites.

Moreover, the lack of racial or ethnic diversity among legal professionals exacerbates these perceptions. Particularly important in this regard is the relative lack of minority judges in state judiciaries, a figure which now stands at approximately 8%, while people of color comprise nearly 30% of the national population. The Commission is convinced that continued failure to meaningfully diversify the courts will work to the detriment of the 21st Century Judiciary's overall health, quality, and level of public support.

Diversification of the judicial branch should therefore be regarded as an urgent priority.

The Commission recommends expanding the use of mentoring and outreach by members of the legal profession

Diversity among the ranks of legal professionals is critical not only to the perception of inclusiveness, but to its reality. It is imperative that the legal profession aggressively assumes a leadership role and approaches diversification with conscious, persistent, and zealous commitment. African-American and Hispanic lawyers comprise only 4% and 3% respectively of lawyers in the United States, and their membership in leadership positions within the profession is considerably lower.¹⁵⁴ The ABA and other bar associations must actively promote formal mentoring programs for minority lawyers

¹⁵³ *Id.* at 246-47.

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throughout the profession, and specifically assist law firms in establishing practices and programs within firms to ensure that minority lawyers are mentored. Lawyers themselves, as Commission advisor Bernard F. Ashe has written, “must reach out to make the workplace a comfortable environment for success. This means adjusting attitudes, culture and language in the workplace. It also means mentoring to facilitate a feeling of inclusion. . . . Lawyers must play a role in creating an atmosphere for improvement in the tensions of the workplace.”¹⁵⁵

Of course, diversity efforts at the professional level will be futile without a qualified pool of diverse law school graduates. As Patricio M. Serna, then Chief Justice of the Supreme Court of New Mexico, told this Commission: “We’re looking at an institutional problem. . . . We’re going to have to increase the pool of people of color in law schools. There has been a retrenching of recruitment of people of color in law schools throughout the country, and we’ve got to reverse that trend.”¹⁵⁶ Indeed, the increase in minority law school enrollment, “which had been steady since 1985, ended in 1995. In the past five years, minority enrollment has increased only 0.4% -- the smallest five-year increase in 20 years.”¹⁵⁷ Regardless of how the currently unsettled state of the law regarding race-conscious admissions policies is resolved, law schools should aggressively improve minority outreach and recruitment efforts at colleges and universities around the country, including but not limited to those that are traditionally black. Legal professionals themselves, however, should reach even deeper. As Chief Justice Serna observed, “We

¹⁵⁴ See Elizabeth Chambliss, *Miles to Go 2000: Progress of People of Color in the Legal Profession*, American Bar Association Commission on Racial and Ethnic Diversity in the Profession (2000) at 1, 9.

¹⁵⁵ Bernard F. Ashe, *Racial Progress in the New Millennium—A Different Shade: Mentoring and Outreach, Not Buzzwords*, 11 EXPERIENCE 2, 21 (Winter 2001).

¹⁵⁶ Testimony of Patricio M. Serna, November 1, 2002, at 25-26.

¹⁵⁷ *Miles to Go 2000*, at 1.

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have to go even to high schools, because there's a disproportionate dropout rate amongst minorities."¹⁵⁸ Visits by judges and lawyers to high schools, youth centers, and other places where the public congregates, are critical to increase the personal interaction with people of color that can create opportunities for encouraging students to pursue college degrees and legal careers.

The Commission recommends that states with commissions to evaluate the qualifications of judicial aspirants strive to diversify those commissions

Social science research studying whether appointive or elective systems of judicial selection produce a more diverse judiciary has yielded inconclusive results.¹⁵⁹ As elaborated upon below, the Commission concludes that the enduring principles of a sound judiciary are best served if judges are appointed. The Commission notes, however, that several witnesses criticized the commission-based appointive model for judicial selection, on the grounds that it is not as well suited to promote a diverse bench. As one writer has recently explained:

Proponents of a diverse bench argue that merit selection prevents women and people of color from reaching the bench by entrenching a system dominated "by state and local bar associations whose members overwhelmingly are white, male Protestant, conservative 'establishment' attorneys." Some empirical studies of the relationship between judicial diversity on state courts and judicial selection methods validate this assertion. At the same time, several studies find no correlation between selection method and diversity, and others show a positive correlation between merit selection and the diversity of the bench.¹⁶⁰

The varying results of studies comparing the relative ability of elective and appointive systems to promote racial and gender diversity may be attributable, at least in

¹⁵⁸ Testimony of Patricio M. Serna, at 26.

¹⁵⁹ See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 740-42 (2002).

part, to differences among states with appointive systems, in their relative commitment to diverse selection commissions and a diverse bench. The above-quoted author reports on a recent study finding that “[i]n the five states for which data was available, there was some evidence that diverse commissions attracted more diverse applicants and selected more diverse nominees.”¹⁶¹

The message is clear. States with appointive systems that are serious about the need to diversify the bench—and every state should be—can begin by taking steps to make certain that the commissions which evaluate the qualifications of judicial aspirants include more than the “usual suspects.” If special efforts are made to reach out to women and people of color to serve on such commissions, it will send a powerful signal to people of color and women within the legal community and the public at large, that the door to judicial office is open to them.

The Commission recommends active promotion of a representative work force and diverse court appointments

Lawyers and judges are not the only faces of the judicial branch. The rationales of actual and apparent inclusiveness that underlie the need for diversity among lawyers and judges apply equally to other court employees, who often are an individual’s first point of interaction with the judicial system. Courts should adopt formalized recruitment, hiring and promotion policies and practices to ensure that the pool of qualified applicants for court employment is as broad and diverse as possible. The National Center for State Courts recommends “placing ads in foreign-language newspapers, accessing minority

¹⁶⁰ *Id.* at 740-41.

¹⁶¹ *Id.* at 731-32.

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databases, approaching minority colleges, and contacting minority professional associations,” as important outreach efforts in this regard.¹⁶²

The Commission recommends that courts act aggressively to ensure that language barriers do not limit access to the justice system

Implicit in the promise of equal justice under law is the “ability of the courts to understand those who come before them and to be understood in return.”¹⁶³ This can and should be made a practical reality. Courts should enact measures to minimize language barriers so that non-English speaking citizens are not deterred from pursuing their legal rights in American courts. These measures include making all relevant court information – e.g., general information, court forms, signage -- available in non-English languages commonly spoken in the community. The National Conference of Specialized Court Judges has sponsored the publication of a booklet entitled “Translations of Commonly Used Court Phrases,”¹⁶⁴ to be used by judges, court employees, and litigants in the absence of an interpreter. The booklet contains translations of dozens of basic court phrases in 30 languages.

While such measures are indispensable, they cannot displace the need for adequate interpreter services. Interpreters are necessary not only in sufficient numbers to meet the need in a given court setting, but interpreters should also receive appropriate training in cultural and racial diversity. Moreover, judges and other court personnel should be trained to identify the not-always-obvious circumstances under which an interpreter is necessary.

¹⁶² National Center for State Courts, *Race and Ethnic Bias Trends in 2002: Diversity in the Courts*, available online at http://www.ncsconline.org/WC/Publications/KIS_RacEth_Trends02_Pub.pdf

¹⁶³ Robert K. Pirraglia, Foreward, *Translations of Commonly Used Court Phrases*, American Bar Association Judicial Division (1998).

The Commission recommends that courts have in place formal policies and processes for handling allegations of bias

People of color are not fully confident that they will always be treated in an unbiased manner by the courts. If this lost trust is to be restored, it is critical that allegations of bias be vigorously addressed when they arise. Courts should establish formal mechanisms for the investigation, evaluation and resolution of allegations of specific incidents of bias. These mechanisms should include simple and accessible procedures for litigants and other interested persons to report such allegations in a manner that promotes confidence that they will be addressed promptly and objectively.

The Commission encourages sharing of information regarding diversity among the courts in a state and among the states

Diversity is a system-wide goal that will require system-wide solutions. Accordingly, the Commission strongly recommends that state courts assume a leadership role in establishing both intra- and inter-state data collection and information sharing networks to ensure that the best practices and innovative strategies developed on local levels are made available both statewide and nationwide. Such networks would also provide critical information in the effort to identify often overlooked inequities in the system. The National Center for State Courts has taken an important step toward this goal by maintaining an online "Clearinghouse of State Task Force Materials" with up-to-date information about diversity strategies, best practices, and other information resources being developed within each state.¹⁶⁵ Yet as the Conference of State Court Administrators has noted, and this Commission strongly agrees, "States would benefit

¹⁶⁴ *Translations of Commonly Used Court Phrases*, American Bar Association Judicial Division (1998).

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from a structured method of sharing their respective programs with each other, and one way to do this would be by designating a contact person in each state's court administration through whom the NCSC could obtain and share information regularly."¹⁶⁶

The Commission recommends that measures be adopted to improve jury pool representation

Among people of color recently surveyed, 77% believed that "Juries are the most important part of our judicial system."¹⁶⁷ This is therefore a critical point at which minority confidence in the system is determined. Meaningful steps should be taken to ensure that every jury pool represents a fair cross-section of the community from which it is drawn. Such steps include expanding source lists and reducing exemptions to increase the number of residents available for the pool. Also, obstacles common to low-income people often lessen their participation on juries. "Reducing the length and frequency of service, raising compensation, even providing child-care, all make it easier for individuals to serve without unduly interfering with work and family obligations."¹⁶⁸

4. Improving Court-Community Relationships

The Commission recommends that courts take steps to promote public understanding of and confidence in the courts among jurors, witnesses and litigants

Public perceptions of the courts are undoubtedly influenced by what people read in the papers, hear on the radio, see on the evening news or in campaign advertising, and

¹⁶⁵ National Center for State Courts, *Racial and Ethnic Bias: Clearinghouse of State Task Force Materials*, available online at http://www.ncsconline.org/WC/Publications/KIS_RacEthStateTFPub.pdf

¹⁶⁶ Conference of State Court Administrators, *White Paper on State Court's Responsibility to Address Issues of Racial and Ethnic Fairness*, at 6, Government Relations Office (2001).

¹⁶⁷ *Perceptions of the U.S. Justice System*, American Bar Association (1999), at Table 6.

¹⁶⁸ Conference of State Court Administrators, *White Paper on State Court's Responsibility to Address Issues of Racial and Ethnic Fairness*, at 4.

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learn in school. In addition, however, their views can be profoundly shaped by direct contact with the judicial system as jurors, witnesses or litigants, or indirectly when a friend or family member serves in those capacities. These points of contact should be capitalized upon, and a number of courts are already doing so.

Jury service, for example, creates a unique opportunity for court personnel and the judges themselves to provide the public with information on the operation of the courts and the role of juries. When people appear as jurors, witnesses or litigants, they should be made aware of the judge's responsibility to abide by the code of judicial conduct, and of the disciplinary process and their right to lodge a complaint against a judge when circumstances warrant. While such an approach may encourage some to file frivolous complaints, the administrative costs associated with investigating and dismissing those complaints will be more than offset by net gains in public confidence.

The Commission recommends that courts reach out to the communities of which they are a part, by hosting trips to courthouses and by judges and court administrators speaking in schools and other community settings

The preceding recommendation addresses ways to promote public confidence among those who find themselves obliged to go to court as witnesses, jurors or litigants. As to those who are not obligated to come to the courthouse, however, the Commission believes that courts and judges should explore additional ways to strengthen their ties to the community and improve their relationship with the public they serve. Judges and court personnel should be encouraged to speak to civic organizations and at primary and secondary schools, as a way to educate the public on the role of the courts, encourage students from communities of color to pursue legal careers, and build bridges between

judges and the community. Courts should encourage courthouse visits from schools and other groups, and open channels of communication with community leaders. As problem-solving justice becomes increasingly pervasive, the importance of these outreach efforts will only become greater.

The Commission encourages the proliferation of problem-solving courts as a means to promote public confidence in the courts

The ABA is already on record in support of problem-solving courts as an innovative means to better address a range of problems in the areas of crime, substance abuse, juvenile delinquency and family law. In addition, however, the Commission concludes that problem-solving courts should be encouraged as a means to enhance public trust and confidence in the courts. As elaborated upon in the background section of this report, the introduction of problem-solving courts into communities with deep-seated skepticism of their local court systems has yielded promising gains in public approval. By making judges more visible and active “problem solvers” in their communities, such courts have the potential to reduce public alienation from the courts—particularly in communities of color where such alienation is a commonplace.

Problem-solving courts are no panacea, and the Commission’s recommendation encouraging their proliferation should not be read in isolation. To the extent that problem solving-courts require judges to abandon their traditional roles as detached referees, it raises questions as to how far “problem solving” judges may go before running afoul of their ethical obligations. For that reason (among others), the Commission has recommended that the Model Code of Judicial Conduct be reexamined. This recommendation must likewise be read in tandem with earlier recommendations

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regarding diversification of the bench; if courts are to become accepted as community problem solvers, it may be all the more important that the judges in those courts reflect the diversity of the communities they serve. Finally, the Commission's earlier recommendations regarding judicial training and education are uniquely relevant here: to the extent that judges are being asked to serve a very different role than before, the importance of adequate training and education to make the transition smoothly is obvious.

B. Improving Judicial Selection

Some of the most serious problems confronting our judicial systems today relate to judicial selection and reselection. As discussed at length in the background section of this report, judicial election campaigns at all levels are increasingly focused on isolated issues of intense political interest. The issue *de jour* varies by jurisdiction and campaign. Sometimes it is products liability, insurance or medical malpractice litigation; sometimes it is crime; sometimes it is school funding, abortion, or capital punishment. But the message sent to the electorate is the same in each case: sitting judges should lose their jobs if they make a ruling of law in a particular case that a popular majority thinks is wrong. In the Commission's view, that message is antithetical to principles of judicial independence, impartiality, and the rule of law.

These increasingly shrill single-issue messages have been communicated in campaign advertising often run not by the candidates themselves, but by independent organizations. The candidates, then, are left with no choice but to defend themselves by raising more and more money from contributors, from lawyers and from other groups interested in the outcomes of cases judges decide. That, in turn, has undermined public

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confidence in the courts by making judges appear increasingly dependent on their contributors, making judicial office increasingly available only to candidates with wealth or with wealthy contributors, and making judges look and act like stereotypical “politicians.”

To complicate matters even further, judicial elections are likely to become an increasingly problematic means of judicial selection, in the aftermath of the United States Supreme Court’s decision in *Republican Party of Minnesota v. White*. Scholars are bound to disagree as to the breadth of the *White* decision, and the extent to which the first amendment freedom of speech provisions prevent state high courts from imposing ethical limits on the campaign speech of judicial candidates. Although we now know that states may not simply prohibit candidates from announcing their views on controversial issues that could come before them as judges, uncertainties remain as to whether, for example, the states retain regulatory authority over candidates who make statements that appear to commit them to deciding particular issues in particular ways.

Additional litigation may be needed to resolve such uncertainties, but this much is already clear, based upon the testimony we received from supporters and critics of the Supreme Court’s ruling: the *White* case is likely to politicize judicial elections as never before. Judicial candidates will be competing for votes on the basis of their positions on issues they will later decide as judges. When voters ask for the candidates’ views on politically explosive issues of the day, the candidates must either answer, or decline and hazard a negative reaction from the electorate at the ballot box. And the risk that judges will be selected not because they are best qualified to impartially uphold the law, but

because they will best represent their “constituents” views from the bench, becomes increasingly real.

Underlying the majority’s opinion in *White* is a relatively simple and straightforward message: A state that opts to select its judges by election may not, consistent with the first amendment, deny judicial candidates the opportunity to discuss what the election is about; and the election is in no small part about the issues those candidates will decide as judges. If a state is concerned that judicial candidates will compromise their impartiality when they take positions on issues that may come before them later as judges, it has an obvious solution, as emphasized by Justice O’Connor in her concurring opinion: it may select judges by means other than election.

In the Commission’s view, states *should* be concerned about the impact of judicial elections on judicial impartiality and the rule of law. Moreover, as judicial campaigns become further politicized in the aftermath of *White*, the need to act on those concerns and rethink the future of judicial elections may be increasingly acute. Notwithstanding widespread dissatisfaction with the judicial selection process in many states, judicial selection reform is among the most contentious subjects that the Commission has been directed to address, for at least two reasons. First, nowhere is the tension between judicial independence and judicial accountability more palpable than in the context of judicial selection. It is one thing to acknowledge the need for selection systems to preserve and promote independence *and* accountability—a point with which few would disagree—and quite another to determine what selection system strikes the optimal balance between the two, where consensus is highly elusive. Disagreement over the relative merits of appointive versus elective systems of judicial selection thus persists

with no sign of abating. Professor Paul Carrington and Adam Long report on a state chief justice who “not long ago declared that there is no method of selecting and retaining judges that is worth a damn. He was not the first to express that wisdom.”¹⁶⁹ Although we might not go quite that far, it is fairly said that there is no perfect selection system.

Second, nowhere is the challenge of balancing the philosophically preferable and the politically possible more daunting, than in the context of judicial selection. On the one hand, if we recommend that states adopt our preferred selection system without regard to whether there is any realistic hope of those states eventually following our lead, we will have squandered a unique opportunity to improve judicial selection in the United States. On the other hand, if we simply decline to think outside the box created by the political realities that exist in 2003 and confine our recommendations to those that legislatures are willing to implement tomorrow, we will have issued a timid report that ignores our charge to assess and address the needs of the state judiciaries for the coming century.

To overcome these difficulties, the Commission has decided to sequence its judicial selection recommendations. We will begin by presenting our primary conclusions and recommendations to implement the selection system that we regard as optimal in the long term. We will then present additional recommendations to improve other selection systems in states that are unprepared to adopt our primary recommendations.

1. The Preferred System of Judicial Selection

¹⁶⁹ Paul Carrington and Adam Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 471 (2002).

The Commission believes that the preferred system of state court judicial selection is a commission-based appointive system, with the following components:

- **The Commission recommends that the governor nominate judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by an independent, deliberative body or commission**

- **The Commission recommends that states consider conditioning the appointment of judicial aspirants nominated by the governor upon confirmation by the state legislature or some subset thereof**

- **The Commission recommends that judicial appointees serve a single, lengthy term, or until a specified age, and not be subject to a reselection process**

The American Bar Association has long supported appointive-based judicial selection systems, and in the Commission's view, rightly so, for several reasons. First, the administration of justice should not turn on the outcome of popularity contests. If we accept the enduring principles identified in the first section of this report, then a good judge is a competent and conscientious lawyer with a judicial temperament, who is independent enough to uphold the law impartially, without regard to whether the results will be politically popular with voters. Second, initial appointment reduces the corrosive influence of money in judicial selection, by sparing candidates the need to solicit contributions from individuals and organizations with an interest in the cases the candidates will decide as judges. Some argue that in appointive systems, campaign contributions are simply redirected from judicial candidates to the appointing governors, but that is an important difference, because it is the money that flows directly from contributors to judicial candidates that gives rise to a perception of dependence. Third,

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the escalating cost of running judicial campaigns operates to exclude from the pool of viable candidates those of limited financial means who lack access to contributors with significant financial resources. The potential impact of this development on efforts to diversify the bench is especially troublesome. Fourth, the prospect of soliciting contributions from special interests, and being publicly pressured to take positions on issues they must later decide as judges, threatens to discourage many capable and qualified people from seeking judicial office. For these and other reasons upon which the ABA has relied in the past, the Commission believes that judges should initially be selected by appointment.

Consistent with an earlier recommendation in this Report, the Commission likewise recommends that the qualifications of all judicial aspirants be evaluated by an independent deliberative body, and that candidates eligible for nomination to judicial office be limited to those who have been approved by such a body. In grounding its support for appointive judiciaries on the principle that the viability of a would-be judge's candidacy should not turn on her or his political popularity, the Commission does not mean to suggest that appointive systems are apolitical. Any method of judicial selection will inevitably be "political" because judges decide issues of intense social, cultural, economic and political interest to the public and the other branches of government. In this inherently political environment, however, the requirement that an independent commission review the qualifications of and approve all would-be judges provides a safety net to assure that all nominees possess the baseline capabilities, credentials and temperament needed to be excellent judges.

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Despite the occasional tendency to regard “politics” as a bad word, at its root, politics refers to the process by which citizens govern themselves. In that regard, it is not only inevitable but perhaps even desirable that judicial selection have a “political” aspect, to ensure that would-be judges are acceptable to the people they serve. Because judges, by virtue of their need to remain independent and impartial, serve a role in government that is fundamentally different from that of other public officials, the Commission has recommended against the use of elections as a means to ensure public acceptability. Another avenue is, however, available: legislative confirmation of gubernatorial appointments. In addition to increasing the public’s confidence in the judges at the time they are initially selected, by requiring that they be approved by an independent commission and *both* political branches of government, providing for a legislative check on judicial nominees can serve as a form of prospective accountability that reduces the need for resort to more problematic reselection processes later.

The Commission acknowledges that the viability and desirability of legislative participation in the judicial appointments process may turn on such issues as the constitutional structure of a given state’s legislature, the state’s political and constitutional culture, and the relationship between the executive and legislative branches over time. Accordingly, the Commission recommends that states adopting appointive models for initial selection *consider* requiring that the legislature or some subset thereof approve all judicial nominations.

The last of the Commission’s recommendations with respect to the selection system it regards as optimal, is that states not employ reselection processes. Discussions of judicial selection often overlook a distinction that the Commission regards as

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absolutely critical, between initial selection and reselection. When non-incumbents run for judicial office in contested elections, the threat that elections pose to their future independence and impartiality, though extant, is limited. Granted, non-incumbent candidates can be made to appear beholden either to their contributors, to positions they took on the campaign trail, or more generally to the electoral majority responsible for selecting them. But unlike incumbent judges, first-time judicial office seekers are not at risk of being removed from office because they made rulings of law that did not sit well with voters.

A similar point can be made with respect to judges initially selected by appointment. The process by which those candidates are first chosen may be partisan and political, and some judges may feel a lingering allegiance to whomever appointed them. But they are not put in danger of losing jobs they currently hold on account of judicial decisions made in those positions.

In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or rejected the claims of popular litigants, are subject to loss of tenure as a consequence. And it is then that judges may feel the greatest pressure to do what is politically popular rather than what the law requires. Public confidence in the courts is in turn undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived—rightly or wrongly—as motivated by fear of defeat.

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The problems with reselection may be most common in contested reelection campaigns, but are at risk of occurring in any reselection process—electoral or otherwise. For that reason, the Commission recommends against resort to reselection processes.

While the Commission recommends that judges be appointed to the bench without the possibility of subsequent reappointment, reelection, or retention election, the Commission has not made specific recommendations as to the optimal length of a judge's term of office. There are several alternatives available. The federal system, for example, provides judges with tenure during good behavior, which effectively means for life. In contrast, most states that appoint judges without the possibility of subsequent reselection cap judicial terms at a specified age. States could also set judicial terms at a fixed number of years, but if this alternative is pursued, it is important that the term be of considerable length, at least fifteen or more years, for several reasons: first, there are obvious advantages that flow from experience on the bench that will be lost if judges are confined to short terms of office; second, the most qualified candidates for judge will often be lawyers with very successful private practices that they may be reluctant to abandon if they are obligated to return to practice after only a few years on the bench; third, to the extent that lawyers view judicial service as the culmination of their legal careers, and not simply as a temporary detour from private practice, short terms may discourage younger lawyers from seeking judicial office; and fourth, insofar as judges are obligated to reenter the job market at the conclusion of their judicial service, their independence from prospective employers who appear before them as lawyers and litigants in the waning years of their judicial terms, may become a concern.

The Commission opposes the use of judicial elections as a means of initial selection and reselection for the reasons discussed above. Over the long term, as elections become ever “noisier, nastier and costlier,” to borrow the phrase of a noted scholar,¹⁷⁰ the Commission believes that this view will win widespread acceptance. Over the short term, however, the Commission acknowledges that support for judicial elections remains entrenched in many states. It is to those states that the Commission now directs its attention, with recommendations aimed at ameliorating some of the deleterious effects of elections on the enduring principles of a good judicial system.

2. Alternative Recommendations on Systems of Judicial Selection:

For states that will not abandon judicial elections altogether, the Commission recommends that elections be employed only at the point of initial selection

It bears emphasis that the Commission’s greatest concern with respect to judicial elections is their potential to undermine judicial independence, impartiality and the rule of law, by threatening judges with loss of tenure if their prior rulings are disagreeable to a majority of the electorate. As far as elections are concerned, however, that concern is relevant only when they are employed to reselect judges. At the point of initial selection judicial candidates may worry, at least after the *White* decision, that they may not win judicial office in the first place unless they express politically popular views on issues likely to come before them later. But they are not put at risk of losing their jobs because they honored their oaths of office by upholding the law in the teeth of public opposition.

Accordingly, the Commission recommends that if elections are used as a means of judicial selection, they be employed solely for the purpose of initial selection, and not

¹⁷⁰ Thomas Phillips, *When Money Talks, the Judiciary Must Balk*, THE WASHINGTON POST, April 14, 2002 at B2 (quoting Professor Roy Schotland).

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reselection. Once elected, candidates should be permitted to serve until a specified age, or for a single, lengthy term.

Consistent with the Commission's earlier recommendation, candidates favored for judicial office should be limited to those whose qualifications have been approved by an independent, deliberative body. It may be noted that when making the case for appointed judiciaries, the Commission did not contend, as many proponents of appointed judiciaries have in the past, that judges who are appointed will, on average, be better qualified than their elected counterparts. Empirical research contradicts such a conclusion; moreover, lingering doubts can, in the Commission's view, be extinguished if the qualifications of every judicial aspirant—elected or appointed—are evaluated and approved.

If such a system is implemented, subjecting sitting judges to elections may still be necessary in the limited sense that when a governor fills mid-term vacancies with new appointees, those appointees may later need to run for election to be eligible to sit for a full term. In the Commission's view, however, if a judge must be subjected to election, it is preferable for it occur in the initial stage of the judge's tenure, when the risk that the election will become a referendum on the popularity of the judge's past rulings is less likely to occur.

For states that retain judicial elections as a means of reselection, the Commission recommends that judges stand for retention election, rather than run in contested elections

The American Bar Association has long supported so-called "merit selection" systems in which judges are appointed by governors from a pool of candidates whose

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qualifications are approved by a merit-selection commission. The Commission's preferred method of judicial selection embraces all aspects of merit selection systems, except retention elections. Because the Commission is troubled by the impact of reselection on judicial independence, impartiality and the rule of law, it has serious reservations about any reselection process. If elections are unavoidable, the Commission regards it as preferable that they be employed at the point of initial selection, for reasons discussed above.

In criticizing retention elections, the Commission does not intend to undermine the efforts of those who are seeking to implement merit selection systems in states that employ contested elections as means of judicial selection and reselection. Quite the contrary, we are following the lead of a merit-selection system proponent, who admonished the Commission to "take the high ground" and not "compromise [its] principles," before testifying that in merit selection proposals, the "principal goal" of the retention election is itself a "compromise" designed to overcome the "political reality" of entrenched support for judicial elections.¹⁷¹

If, however, a state is unwilling to abandon elections at the point of reselection, the Commission believes that retention elections are preferable to contested elections. In retention elections, judges run against their records, rather than against opposing candidates, which means that incumbents are at risk of losing their seats only if voters deem their records unacceptable. Because voters have no way of knowing whether the judge that the governor would appoint to replace the ousted incumbent would be

¹⁷¹ Testimony of Clifford Haines, Hearing of September 27, 2002 at 52, 67-68, 74-75 (testimony of Clifford Haines). Mr. Haines added that a secondary justification for retention elections was to remove an appointee who "turns out to be a disaster"—a problem the Commission regards as better remedied through improved methods of judicial evaluation, discipline and removal.

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preferable, dissatisfaction must run relatively high before a serious campaign to remove a judge will emerge. In contested elections, on the other hand, an incumbent's record will be challenged whenever there is an opponent who wants the incumbent's job, and the incumbent will lose whenever the opposing candidate convinces the electorate that he is preferable. The political pressure brought to bear on a sitting judge who must decide a controversial case in the months leading up to an election is therefore likely to be correspondingly higher. It is unsurprising, then, that most—though not all—of the meanest, priciest and most troubling judicial campaigns have been in contested elections rather than retention elections. Accordingly, if states insist on some form of election to reselect judges, the Commission concludes that retention elections are preferable to contested elections.

For states that retain judicial elections as a means to select or reselect judges, the Commission recommends that all such elections be conducted in a non-partisan manner

To the extent that states retain their allegiance to contested elections as a means of judicial selection—at the point of initial selection or reselection—the Commission recommends that all such elections be non-partisan. As a general matter, judges are responsible for upholding the law without regard to whether they are Democrats, Republicans, Libertarians or independents. Without disputing that a judge's political philosophy can exert some influence over a judge's thinking on some questions of law, partisan elections make party affiliation the single most salient feature of a judge's candidacy, by including it as the only information about the candidates on the ballot itself. Some states go even further by enabling voters to pull a single-party lever for all

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candidates in all branches of government, including judges. The net effect is to further blur, if not obliterate the distinction between judges and other elected officials in the public's mind, by conveying the impression that the decision-making of judges, like that of legislators and governors, is driven by allegiance to party, rather than to law. It is therefore unsurprising that many of the most extreme examples of independence-threatening election related behavior have occurred in states that select their judges in either openly partisan elections, or elections that are non-partisan in name only.

Contested elections—be they used to elect a judge initially, or to reelect a judge for another term—should therefore be conducted in a non-partisan manner. Political parties should not be responsible for nominating judicial candidates, and the judicial candidates' partisan affiliation should not appear on ballots in either primary or general elections. States with true non-partisan elections, such as those in Wisconsin, must therefore be distinguished from states such as Michigan, where the political parties nominate candidates to run in ostensibly nonpartisan general elections, which in fact are very partisan indeed. In the recent past, states such as North Carolina and Arkansas have moved toward nonpartisan systems—a trend that should be encouraged.

For states that continue to employ judicial elections as a means of judicial reselection, the Commission recommends that judicial terms be as long as possible

The Commission agrees with the first National Summit on Improving Judicial Selection, which concluded that states in which judges serve for relatively short terms would do well to make judicial terms longer.¹⁷² Regardless of whether states employ partisan, non-partisan or retention elections as means to reselect sitting judges, the risk that sitting judges will lose their tenure on account of unpopular rulings or allow

apprehension of the electorate to color their decision-making, is necessarily reduced if elections are made less frequent by lengthening judicial terms. In this regard, we share the view of the Honorable Morris Overstreet, a former Chief Justice of the Texas Court of Criminal Appeals, when he testified before the Commission, that “if you don’t have to go back and face the voters, you don’t have to worry about how they’re going to retaliate or if they’re going to retaliate.” That led him to propose judicial terms of ten to fifteen years, which would “reduce even the thought of having to be reelected or reappointed” and “produce some independence” as a result.¹⁷³

In states that use elections to select or reselect judges, the Commission recommends that states provide the electorate with voter guides on the candidate(s)

In his testimony before the Commission, Dean Joseph Tomain urged the Commission to recommend voter guides as a useful means to better inform the electorate in judicial elections.¹⁷⁴ At our Portland, Oregon hearing, the Honorable Gerry Alexander, Chief Justice of the Washington Supreme Court, furnished the Commission with examples of voters’ pamphlets used in that state.

When Professor Roy Schotland testified before the ABA Commission on Public Financing of Judicial Campaigns, he made a special point of endorsing the use of voter guides in states that elect their judges. As Professor Schotland described them, “voter pamphlets, which have pictures and little descriptions of each candidate for each office, have been in place and enormously popular in the four west coast states for almost a century.” He noted that the effectiveness of voter guides was reflected in exit polling data, which shows that “voters regard [voter pamphlets] as their favorite source of

¹⁷² *Call to Action: Statement of the National Summit on Improving Judicial Selection*, January 16, 2001

¹⁷³ Testimony of Morris Overstreet, November 22, 2002 at 77-78.

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information.” Because voter pamphlet programs are comparatively inexpensive and have been successfully implemented in several states, Professor Schotland concluded that exporting such programs to other jurisdictions would be quite feasible.¹⁷⁵

The ABA Commission on Public Financing of Judicial Campaigns recommended the proliferation of voter guides for states that use judicial elections, and we concur. To the extent that elections are employed to select or reselect judges, voters should be supplied with more information rather than less.

In states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities initiate a dialogue between the business community and the trial bar, in an effort to deescalate the contributions arms race in judicial campaigns

In states where judicial campaigns have focused on issues relating to products liability, tort reform or medical malpractice, dissatisfaction with the process is widespread. Individuals and organizations sympathetic to the interests of defendants in civil litigation dislike spending enormous sums of money on judicial elections and worry about its impact on impartial justice. As Thomas Gottschalk, General Counsel of General Motors Corporation, testified before the Commission:

We are reaping what we sow. Why should the public believe our courts will dispassionately and fairly dispense justice based on the unique facts and pertinent laws of each particular case when each political party, each candidate, and each candidate's supporter are telling the public in each election that the candidates have perceived notions and bias[es] which will dictate how they will rule in many of the cases that come before them? We know these ads are unfair, one-sided, exaggerated and often downright disgusting.¹⁷⁶

¹⁷⁴ Testimony of Joseph Tomain, August 21, 2002, at 168

¹⁷⁵ Hearing before the ABA Commission on Public Financing of Judicial Campaigns, January 27, 2001 at 113-16.

¹⁷⁶ Testimony of Thomas Gottschalk, November 22, 2002 at 196.

Trial lawyers and others with pro-plaintiff leanings are equally troubled by the impact of money on judicial elections. Robert Peck, a Commission advisor and counsel to the American Trial Lawyers Association, echoed Mr. Gottschalk's concerns, adding that "we are equally anxious to look for a way out of this."¹⁷⁷ The problem, from the perspective of both sides, is a reluctance to "disarm" unilaterally, for fear that doing so will give the other side unfair advantage.

We agree with Mr. Gottschalk, that "one of the outcomes of this Commission might be to get much more focused on getting leaders together in a way to talk about bilateral steps that could be taken there."¹⁷⁸ It may be that the differences separating the warring factions on the civil justice issue are simply too great to bridge. But there is clearly common ground, in that a significant segment of the business and trial lawyer communities acknowledges that too much money is being spent on a dubious cause that has yielded disastrous results. The Commission therefore encourages state bars or other appropriate bodies to initiate talks between the affected interests in jurisdictions where campaign costs have soared, for the purpose of exploring whether agreement to suspend the judicial campaign contributions arms race is feasible.

In states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities reach out to candidates and affected interests, in an effort to establish voluntary guidelines on judicial campaign conduct

The U.S. Supreme Court's decision in *White* has created considerable uncertainty as to the first amendment limits on the power of state high courts to regulate candidates' campaign-related speech. Such uncertainties, however, impose no constraints on

¹⁷⁷ *Id.* at 226 (statement of Robert Peck).

voluntary action. In the preceding recommendation, the Commission has urged that state bars or other appropriate entities initiate a dialogue between the business community and the trial bar, in an effort to escape the cycle of escalating campaign spending that a growing number of states have begun to experience. Even if participants in the process are reluctant to “disarm,” however, it may be possible to reach voluntary agreement on campaign practices that can better protect the interests of promoting judicial independence and accountability. In his testimony before the Commission, ABA President-elect Dennis Archer described his efforts to initiate a dialogue with those involved in the recent judicial elections in Michigan, to the end of securing voluntary compliance with a set of campaign conduct guidelines designed to avoid problems encountered in the previous election cycle.¹⁷⁹ The Commission believes that this approach holds promise, and recommends that state bar leaders initiate comparable dialogues in their respective states. The goal should be to convince all affected interests—the candidates, trial lawyers, business interests, political parties and others—that a truly independent and impartial judiciary is in the best interest of *all* concerned, and that compliance with voluntary campaign guidelines is the best means to that end.

The Constitution Project has developed “The Higher Ground Standards of Conduct for Judicial Candidates” that may provide state bar leaders with a starting point in their discussions.¹⁸⁰ They include some provisions that are already a part of many codes of judicial conduct, but elevate their profile if candidates subscribe to them publicly. They declare, for example, that candidates should not make promises about how they will decide issues that may come before them; that they should only solicit or

¹⁷⁸ *Id.* at 222 (testimony of Thomas Gottschalk).

¹⁷⁹ Testimony of Dennis Archer, August 21, 2002.

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accept funds through their campaign committees; that they should promptly disclose the sources of contributions they receive; that they should not make misleading statements themselves, take responsibility for the information their own campaigns disseminate in advertising or otherwise, and condemn misleading statements and advertising disseminated by others on their behalf.

President-elect Archer's statement of principles, a copy of which is included as an appendix, provides another source of information. It seeks to limit signatories from representing that a judicial candidate has engaged in criminal conduct, racial or ethnic bias, immoral conduct or professional misconduct, in the absence of an official ruling by a regulatory or judicial body.

For states that do not abandon contested elections at the point of initial selection or reselection, the Commission recommends that states create systems of public financing for appellate court elections

For states that elect their judges in contested elections, the potential advantages of underwriting judicial campaigns with public funds are clear. The more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcomes of cases the judges decide, which will reduce the potential for campaign contributions to influence judicial behavior and address the public perception that such influence occurs. Indeed, the case for public financing of judicial elections may be more compelling than it is for the legislative or executive branch races, notwithstanding the fact that almost all public funding programs have confined themselves to political branch contests. Governors and legislators are supposed to be influenced by their constituents' point of view. In judicial races, on the other hand,

¹⁸⁰ See <http://www.constitutionproject.org/ci/standards.pdf>

where “constituent” and other external influence over a judge’s independent decision-making is inappropriate, the desirability of insulating judges from the influence of—and the appearance of influence of—private campaign contributions is correspondingly greater. The Commission therefore supports ABA policy, as recommended by the Commission on Public Financing of Judicial Campaigns, that states that select judges in contested elections finance those elections with public monies.¹⁸¹

C. Promoting an Independent Judicial Branch that Works Effectively with the Political Branches of Government

Up to this point, the Commission’s concern with judicial independence has focused on the decision-making independence of individual judges—their capacity to decide cases according to law without inappropriate interference from voters, contributors, interest groups, political opponents, the media, or public officials. As described earlier in the course of enumerating the enduring principles of a sound judiciary, however, there is a second form of judicial independence that relates to the capacity of the judiciary to preserve itself as a separate and coequal branch of state government. Without some measure of “institutional independence,” state judiciaries would be so completely beholden to the political branches for their survival as to eviscerate their capacity to keep the political branches in check through the exercise of judicial review. Accordingly, state constitutions establish their judiciaries as separate branches of government, and many go further than their federal counterpart, by making the separation of powers among the branches explicit, or by delegating to the judicial branch specified powers of self-governance.

¹⁸¹ See REPORT OF THE ABA COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001).

At the same time, state judiciaries are by no means completely independent. Most significantly for our purposes, state constitutions typically give legislatures the power to authorize—or not—the expenditure of funds for judicial budgets and salary increases, which can serve as a powerful check on the judiciary’s institutional autonomy. When exercised responsibly, the legislature’s power of the purse constitutes an appropriate and essential check to ensure that the judiciary is operating efficiently and effectively. Recently, however, states around the country have experienced budgetary deficits that often exert a disproportionate impact on judicial systems. As the ABA Journal recently reported, “A state budget crisis is gripping the justice system, forcing many states to close courts and prisons, release some inmates early, stop prosecuting certain nonviolent crimes and slash indigent defense funding.”¹⁸²

In some cases, discussed in the background section of the report, the legislature has cut the judiciary’s budget in ways that at least appear to be retaliatory. More often, budget cuts are not the product of legislative indifference or animus but of a need for state-wide fiscal austerity. Even then, however, state judiciaries are often ill equipped to lobby legislatures for their fair share of the shrinking fiscal pie, and lose ground relative to other priorities the legislature regards as more pressing.

Although the Commission discusses the issue of the judiciary’s continuing independence as a branch last, and devotes less space to its recommendations here than in the preceding two sections, it would be a mistake to infer that the Commission regards the issue here as less important. The fiscal health of many states has taken a sharp decline in the immediate past, which has created crisis conditions for court budgets in a number of states. Those conditions demand immediate attention. They are, however,

¹⁸² David Hudson Jr., *Courts’ Cash Crunch*, ABA J. E-REPORT, January 24, 2003.

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currently being attended to by other organizations, or other entities within the ABA. For that reason, we have elected not to develop our recommendations here in as much detail, and focus our efforts on lending support to other ongoing efforts by calling public attention to them.

The Commission recommends that states establish standards for minimum funding of judicial systems

State courts must be adequately funded. Protecting and preserving our system for the fair and impartial administration of justice is a priority of the highest order.

Protecting and preserving that system requires, at an absolute minimum, that states appropriate funds sufficient to enable the courts to function effectively. The cost of running state court systems represents a small percentage of the states' overall operating budgets, averaging only 1.5% across the country. For these reasons, the Commission believes that states should develop and adhere to minimum standards for state court funding.

Minimum funding standards can help to guard against retaliatory budget cuts that, in the Commission's view, are simply indefensible. In times of fiscal belt-tightening, minimum funding standards can likewise assist legislatures in assessing whether and how deeply the judiciary's budget can be cut without impairing the courts' capacity to render fair and impartial justice. The Commission notes that the Conference of Chief Justices is in the process of developing standards for minimum funding, which may serve as a model for interested states.

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The Commission recommends that the judiciary's budget be segregated from those of the political branches, and that it be presented to the legislature for approval with a minimum of line-itemization

The state judiciary is not an administrative agency in the executive branch, but an independent branch of government, and needs to be treated as such. In the federal system, the judiciary's annual budget request was controlled by the Department of Justice until 1939, when the Attorney General successfully lobbied Congress to have the judiciary present its own budget requests through a newly created Administrative Office of U.S. Courts. Not all states, however, have followed the federal government's lead.¹⁵⁴ If the judiciary is an independent branch of government, its budget should be assessed independently of the executive branch. The Commission urges states that fold the judiciary's budget request into the executive branch and give the executive branch power to adjust the judiciary's appropriations requests before it is acted upon by state legislatures, to abandon that antiquated practice.

In a similar vein, the legislature has a duty to minimize waste in state government and take pains to assure itself that appropriations are spent wisely, but at some point, careful oversight can degenerate into micromanagement of a coequal branch of government. In Massachusetts, for example, the judiciary's budget is funded in more than 100 separate line items, in which the courts have no capacity to transfer funds from

¹⁵⁴ James W. Douglas and Roger E. Hartley, *State Court Budgeting and Judicial Independence: Clues from Oklahoma and Virginia*. 33 ADMINISTRATION AND SOCIETY 54 (March 2001) "Unlike in Oklahoma, Virginia does not submit its budget request directly to the legislature. Instead, after putting together the budget request, the Chief Justice submits the budget to the governor's Dept. of Planning and Budget. Here the governor's staff has the power to review and alter the request prior to sending it on to the legislature as part of the governor's executive budget document."

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one item to another.¹⁵⁵ The net effect is to invite micromanagement, or worse—retaliatory budget cuts of particular line items, as discussed in Part II of this report.

The Commission recommends that states create independent commissions to establish judicial salaries

If the judiciary is to be capable, qualified and independent, it is imperative that judges be adequately compensated. Judges should be selected from the ranks of our most talented private practitioners, government lawyers and academicians. While it may be true that some financial sacrifice is a price many fine women and men are prepared to pay when they ascend the bench, there is a point below which salaries may not fall without discouraging the best and the brightest from seeking judicial office. And, as we have seen in other countries, an underpaid judiciary becomes increasingly vulnerable to corruption. As recent events described in Part II of this report reveal, however, in many places judicial salaries are not even keeping pace with inflation, let alone staying competitive with the market for the services of qualified lawyers.

The process by which salaries are set is likewise important to the independence and impartiality of the judiciary. Judicial independence can only be harmed by the annual spectacle of judges going, hat in hand, to beg their legislatures for much needed salary increases and cost of living adjustments.

The Commission heard testimony concerning the experience in the State of Washington with a salary commission that sets the pay levels for judges independent of the political branches.¹⁵⁶ The Commission regards this as a very promising avenue to explore. The ABA Standing Committee on Judicial Independence is currently

¹⁵⁵ Hearing of November 1, 2002 at 148-49 (statement of Hon. Margaret Marshall).

¹⁵⁶ Testimony of Hon. Gerry Alexander, November 1, 2002 at 169-72.

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developing a detailed salary commission proposal, and the Commission supports the Standing Committee in its efforts.

The Commission recommends that states host regular summits of representatives from all three branches of government to promote inter-branch communication as a means to avoid unnecessary confrontations on such issues as court funding, judicial salaries, and structural reform of courts

Often the conflicts that arise between courts and legislatures over judicial budgets and salaries, and their priority relative to other state needs, is the product not of political animus, but of a communications failure. Although courts speak to legislatures in their opinions, and legislatures speak to courts in the statutes they enact, opportunities for less formal interaction are often quite limited. The necessary separation and independence of legislative and judicial functions do not require isolation. To the contrary, there is much to be gained by creating mechanisms to foster comity and interbranch communication that can defuse crises before they occur.

The commission therefore recommends that states host annual or biannual summits of representatives from the three branches of government, to discuss issues of mutual concern. On the federal level, the Brookings Institution hosted conferences of this kind for many years. The ABA Standing Committee on Judicial Independence is seeking to establish a model for this kind of interbranch activity.



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