

COMMISSION ON THE 21ST CENTURY JUDICIARY

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“An independent judiciary guarantees every citizen access to a branch of government designed to protect the rights and liberties afforded by federal and state constitutions and to resolve disputes peacefully and impartially.”¹

I. REPORT ON THE ABA COMMISSION ON THE 21ST CENTURY

We approach the centennial of one of the most famous critiques of the legal profession with a new set of challenges facing the judiciary. When Roscoe Pound delineated “The Causes of Popular Dissatisfaction with the Administration of Justice” in a 1906 speech to the American Bar Association, he attributed the dissatisfaction to what citizens decried as “the necessarily mechanical operation of legal rules.”²

The “arbitrary technicalities,”³ as Pound described them, are still a frustration for those who represent themselves in legal disputes or those untrained in the liberties protected by those technicalities. Pound also noted that the public is frustrated by the slow pace of change in the law and by the “restraint and regulation”⁴ embodied in the law.

Pound’s observations are still valid, but modern circumstances have

* Thomas J. Moyer was first elected Chief Justice of Ohio in 1986 and has served as President of the Conference of Chief Justices. He was a member of the *American Bar Association Commission on Standards for State Judicial Selection* and testified before a 2001 public hearing in Detroit of the *ABA Commission on the 21st Century*. Chief Justice Moyer testified in support of Ohio House Bill 1, which required full disclosure of contributions to non-candidate campaign groups.

1. American Bar Association, *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, Executive Summary at iii (2003) [hereinafter *Justice in Jeopardy*].

2. Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Speech to the American Bar Association (1906) in *HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS* 221 (Kathleen M. Sampson, ed. 2004).

3. *Id.* at 220.

4. *Id.* at 225.

resulted in a broader dissatisfaction with the judiciary brought about by an increasingly partisan judicial selection process and a growing misperception that the judicial system is biased in favor of the wealthy and well-connected. Public opinion polls have also found widespread public concern with the treatment of racial and ethnic minorities.

A statistical portrait of public perception of the judiciary is contained in a 1999 survey by the National Center for State Courts and the Hearst Corporation, *How the Public Views the State Courts*.⁵ The survey was based on interviews with 1,826 randomly selected citizens, including an over-sampling of 300 African-Americans and 300 Hispanic-Americans.⁶

The survey found that 75 percent of respondents had confidence in the courts in their community, but a majority expressed skepticism about judges who are elected.⁷ Seventy-eight percent of those surveyed agreed that “[e]lected judges are influenced by having to raise campaign funds,”⁸ and 81 percent agreed that “‘judges’ decisions are influenced by political considerations.”⁹

The significant role of campaign contributions has only escalated since the release of the National Center survey. In 2004 candidates for state supreme court seats raised \$42 million, nearly 45 percent more than was raised in 2002, according to preliminary statistics compiled by the judicial campaign monitoring group Justice at Stake.¹⁰ And in a single race for the Supreme Court of Illinois, candidates raised more than \$9.3 million, more than the amounts raised in 19 of the 34 races for the United States Senate.¹¹

In a 2004 race for a seat on the Supreme Court of West Virginia, candidate spending reached \$2.8 million, and an additional \$5.5 million was spent by groups unaffiliated with the candidates.¹²

Much of the increase has been spent on television advertising. According to national statistics compiled by the Brennan Center for Justice, supreme court candidates in 2004 purchased more than \$21

5. National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, (May 14, 1999) available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (last visited April 14, 2005).

6. *Id.* at 11.

7. *Id.* at 12.

8. *Id.* at 42.

9. *Id.* at 41.

10. Justice at Stake Campaign, *2004 State Supreme Court Election Overview* (2005) available at <http://www.justiceatstake.org/files/JASElection2004SummaryNEW.pdf> (last visited April 14, 2005).

11. *Id.*

12. *Id.*

million in air time, with television spending for the four seats on the Supreme Court of Ohio reaching nearly \$7 million, the highest state total in the country.¹³

The Brennan Center also found that negative advertising is prominent in television advertisements in supreme court races:

In 2004, close to one-quarter of the spots were negative in tone. The number of attack ad airings increased more than 400% from 2002 and almost doubled from 2000. Interest groups continue to sponsor more negative ads, with 60% of all attack ads paid for by groups, and 53% of interest group ads negative in tone. Most (56%) political party ads were also negative.¹⁴

The United States Supreme Court decision in *Republican Party of Minnesota v. White* and subsequent federal court decisions relating to judicial campaign speech have removed many of the restraints on what a judicial candidate might say in advertising and campaign appearances.¹⁵ While many candidates have unilaterally abided by the previous standards, some candidates have chosen to publicly discuss their position on issues that could come before the court.

Prior to the most recent supreme court campaigns, it was apparent to many in the legal community that steps must be taken to reverse the trends of increased political activity in judicial campaigns and decreased public trust of the courts. In 1999, for example, the National Center for State Courts held the National Conference on Public Trust and Confidence in the Justice System which developed a National Action Plan to identify issues affecting public trust of the judiciary.¹⁶ In 2000, the American Bar Association Standing Committee on Judicial Independence Commission on State Judicial Selection Standards issued its report, *Standards on State Judicial Selection*, which set forth recommendations to improve the judicial selection process in states that elect members of the judiciary.¹⁷ Various states also have undertaken

13. Brennan Center, *BUYING TIME 2004: Total Amount Spent on Judicial Advertising Peaks at \$21 Million* (November 18, 2004), available at http://www.brennancenter.org/presscenter/releases_2004/pressrelease_2004_1118.html (last visited April 14, 2005).

14. *Id.*

15. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (holding that “[t]he Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.”).

16. National Center for State Courts, *National Conference on Public Trust and Confidence in the Justice System, National Action Plan: A Guide for State and National Organizations* (2000) available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_NatlActionPlanPub.pdf (last visited April 14, 2005).

17. American Bar Association, *Standards on State Judicial Selection: Report of the ABA*

efforts to improve public trust of the courts and to address issues related to their respective judicial selection process.

In 2002, American Bar Association President Alfred P. Carlton convened the Commission on the 21st Century Judiciary “to study, report and make recommendations to ensure fairness, impartiality and accountability in state judiciaries.”¹⁸

During public hearings held in Detroit, Philadelphia, Portland (Oregon) and Austin, Commission members heard from a broad range of citizens, lawyers, judges, elected officials, business executives, and researchers.¹⁹ A national colloquium also addressed the politicalization of the judiciary and how other trends affect the administration of the courts.²⁰

The Commission concluded in its final report that the profile of the courts has been raised by an ever-increasing case load of high-profile social, economic and business issues:

A number of factors and trends have led to the excessive politicization of state courts. Among these are the proliferation of controversial cases generally; the rediscovery of state constitutions as a basis to litigate constitutional rights and responsibilities; the increases in caseload; the interposition of intermediate appellate courts between trial courts and courts of last resort; the spread of the two-party system; the emergence of single-issue groups; and the presence of a skeptical and conflicted public. Additional challenges for the judiciary include changes in classes of litigants, including a trend towards pro se litigation and its impact on the role of the trial judge; changes in the demographic composition of America, with concomitant impact on the public’s confidence in the courts; and changes in the role of the courts, including the rise of problem-solving courts.²¹

The Commission report provides a full discussion on the above issues which will not be repeated here due to the scope of this review. But the overall findings of the Commission conclude that these issues are “placing the fair and impartial administration of justice at risk.”²² The report serves as a clarion bell that our system of justice is in need of

Standing Committee on Judicial Independence Commission on State Judicial Selection Standards (July 2000).

18. *Justice in Jeopardy*, *supra* note 1, Executive Summary at i.

19. *Id.* at Appendix B. 1 Roster of Witnesses and Faculty Commission Hearings and National Colloquium.

20. *Id.* at Appendix B. 3 Roster of Witnesses and Faculty Commission Hearings and National Colloquium.

21. *Id.* at Executive Summary, ii.

22. *Id.*

clear, definitive action to strengthen the independence of the judiciary, while restoring public trust and confidence in the courts:

The promise of America is broken if the public thinks 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 must contribute to fulfilling that promise.²³

II. ENDURING PRINCIPLES

The Commission developed an extensive set of principles which should be the starting point of any effort to enhance the independence of the judiciary:

- Judges should uphold the law.
- Judges should be independent.
- Judges should be impartial.
- Judges should possess the appropriate temperament and character.
- Judges should possess the appropriate capabilities and credentials.
- Judges and the judiciary should have the confidence of the public.
- The judicial system should be racially diverse and reflective of the society it serves.
- Judges should be constrained to perform their duties in a manner that justifies public faith and confidence in the courts.

III. PRESERVING THE JUDICIARY'S INSTITUTIONAL LEGITIMACY

A. Judicial Qualifications, Training and Evaluation

- States should establish credible, neutral, non-partisan and diverse deliberative bodies to assess the qualifications of all judicial aspirants so as to limit the candidate pool to those who are well qualified.
- The judicial branch should take primary responsibility for providing continuing judicial education. Said continuing judicial education should be required for all judges, and state

23. *Justice in Jeopardy*, *supra* note 1, at Chair's Introduction, ix.

appropriations should be sufficient to provide adequate funding for continuing judicial education programs.

- Congress should fully fund the State Judicial Institute.
- States should fully fund the National Center for State Courts.
- States should develop judicial evaluation programs to assess the performance of all sitting judges.

B. Judicial Ethics and Discipline

- The American Bar Association should undertake a comprehensive review of the Model Code of Judicial Conduct.
- The codes of judicial conduct should be actively enforced.

C. Diversification of the Justice System

- Members of the legal profession should expand their use of training and recruitment programs to encourage minority lawyers to join their firms, they should include them fully in firm life, and they should prepare them for pursuing careers on the bench following their years in practice.
- Courts should promote a representative work force and diverse court appointments.
- Courts should act aggressively to ensure that language barriers do not limit access to the justice system.
- Courts should have in place formal policies and processes for handling allegations of bias.
- Information regarding diversity should be shared among the courts in a state and among the states.
- Measures should be adopted to improve and expand jury pool representation.

D. Improving Court-Community Relationships

- Courts should take steps to promote public understanding of and confidence in the courts among jurors, witnesses and litigants.
- Courts should engage and collaborate with the communities of which they are a part, by hosting trips to courthouses and by having judges and court administrators speak in schools and other community settings.
- The continuation of problem-solving courts as a means to promote public confidence in the courts.

IV. IMPROVING JUDICIAL SELECTION

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

- The governor should appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, non-partisan, diverse deliberative body or commission.
- Judicial appointees should serve until a specified age. Judges so appointed should not be subject to reselection processes, and should be entitled to retirement benefits upon completion of judicial service.
- Judges should not otherwise be subject to reselection, nonetheless remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.

A. Alternative Recommendations of Systems of Judicial Selection

- For states that cannot abandon the judicial reselection process altogether, judges should be subject to reappointment by a credible, neutral, non-partisan, diverse deliberative body.
- For states that cannot abandon judicial elections altogether, elections should be employed only at the point of initial selection.
- For states that retain judicial elections as a means of reselection, judges should stand for retention election, rather than run in contested elections.
- For states that retain contested judicial elections as a means to select or reselect judges, all such elections should be non-partisan and conducted in a non-partisan manner.
- For states that continue to employ judicial elections as a means of judicial reselection, judicial terms should be as long as possible.
- For states that use elections to select or reselect judges, states should provide the electorate with voter guides on the candidate(s).
- For states that use elections to select or reselect judges, state bars or other appropriate entities should initiate a dialogue among affected interests, in an effort to deescalate the contributions arms race in judicial campaigns.
- For states that use elections to select or reselect judges, state

bars or other appropriate entities should reach out to candidates and affected interests, in an effort to establish voluntary guidelines on judicial campaign conduct.

- For states that do not abandon contested elections at the point of initial selection or reselection, states should create systems of public financing for appellate court elections.
- For states that retain contested judicial elections and do not adopt systems of public financing, states should impose limits on contributions to judicial candidates.

B. Promoting an Independent Judicial Branch that Works Effectively with the Political Branches of Government

- Standards for minimum funding of judicial systems should be established.
- The judiciary's budget should be segregated from that of the political branches, and it should be presented to the legislature for approval with a minimum of non-transferable line itemization.
- States should create independent commissions to establish judicial salaries.
- States should create opportunities for regular meetings among 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 the courts.²⁴

The Commission proposals have been incorporated in the efforts of many states that have attempted to reform both their judicial selection process and judicial administration. I am most familiar, however, with efforts in Ohio and will now describe those efforts.

In March 2003 other leaders of the bench, bar and civic groups and I, organized to convene a forum on judicial impartiality that brought together political, civic, and governmental leaders. Many of these leaders have been on opposing sides in this debate but had never met to discuss the issues.

The Ohio State Bar Association joined me in co-sponsoring the discussion, and the other conveners were the League of Women Voters of Ohio, the John Glenn Institute at Ohio State University and the Ray

24. *Justice in Jeopardy*, *supra* note 1, at Executive Summary, iv – vii.

Bliss Institute at the University of Akron. The forum resulted in general agreement that steps must be taken to ensure the integrity of our system of selecting and qualifying judges.

Forum participants formed work groups, chaired by the conveners, and developed proposals designed to enhance the independence of the judiciary. The most obvious and widely accepted recommendation addressed the current minimum statutory requirement of six years in the practice of law to serve as a judge in Ohio.

The recommendation would require that candidates for common pleas court must have a minimum of ten years in the practice of law, district appellate judges twelve years, and supreme court justices fifteen years of practice. The current six-year minimum for candidates for municipal and county courts would not change.

A judicial candidate would also be required to complete 40 hours of specially designed course work in constitutional law, criminal and civil procedure, judicial ethics, and court administration before becoming a candidate.

A second work group proposed extending the terms of office for judges, raising the term for common pleas court to ten years, and appellate court judges—including justices of the Supreme Court—would serve twelve years. Municipal and county court judges would continue to serve six-year terms. Currently, all judges in the state serve six-year terms, leaving Ohio with one of the shortest terms for appellate-level judges in the nation.

The Voter Education-Public Funding Work Group proposed increased use of voter guides and the public funding for candidates for the Supreme Court. An electronic voter guide was posted on the Internet for candidates running for the four open seats on the Supreme Court of Ohio in 2004.

Attempts at public funding of judicial races in states such as Wisconsin and Maine have not been successful, but last year North Carolina held its first appellate races that were publicly funded.

The initial reaction in North Carolina is that public funding was a success, as nearly \$1.5 million was provided to 12 Supreme Court and Court of Appeals candidates.

Funds raised through a \$3 check off on individual tax returns and \$50 voluntary donations from attorney registrations also funded a voter guide that was distributed to every household in the state.

The fourth work group addressed the issue of campaign finance disclosure, an issue addressed by legislation approved during the special session of the Ohio General Assembly in December 2004. Among the

important provisions of House Bill 1 is a requirement of full disclosure of the supporters of advertisements aired in the closing weeks of a campaign, including those groups that are unaffiliated with any campaigns, and whose supporters have previously not been publicly disclosed.

The new law would not prevent individuals from writing an editorial about a candidate, or prevent any civic group from printing and distributing flyers. It does not affect small, grass-root campaigning. All it requires is that the supporters of expensive media campaigns make themselves known by providing voters the information necessary to make an informed choice.

These principles and proposals of the ABA Commission on the 21st Century may not be practical in all states, but the ideals represented here should serve as a guiding light for all branches of government and the citizens for whom they serve.

The authority of the judiciary derives from beyond the pages of the Constitution. It has roots in the people who authored it and the citizens who approved it and live under its rule. This authority stems from the political will that defines a country—the expectations and morals and the principles and beliefs of the citizenry.

This nation was founded on the expectation that individuals have rights and that government will protect those rights, not abridge them as was the case in feudal Europe.

Citizens in a democracy also expect that the legislative and executive branches of their government will address their desires for the betterment of their communities. Expectations and beliefs are the basis for the rule of law, and that is why the authority of the judiciary is both resilient and fragile, and it is worthy of respect and dignity. It must be protected and exercised with wisdom and restraint.

The rule of law and the beliefs of the citizenry are indelibly linked. Yale Law School professor Paul Kahn wrote about this in his book *The Reign of Law*. He writes: “Faith in the rule of law is not the conclusion of a course of reasoning but rather the starting point from which we approach the particular problems that arise within the political order.”²⁵ In other words, law does not engender trust on its own. Words on paper can mean little if they are pushed aside and trampled upon. It is the exercise of those words—bringing life to these words—that gives laws and constitutions meaning.

25. PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 2 (1997).

The ABA Commission drew into sharp focus the fact that the rule of law is jeopardized when citizens are subject to single-issue attack advertisements against judicial candidates and when these same citizens question the independence of a judicial candidate who must raise millions of dollars for a statewide judicial campaign. The Commission concluded that, left uncorrected, these perceptions might lead to even more political involvement in the courts.²⁶ 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.²⁷

Judicial independence is the fulcrum of the balance of power in a constitutional democracy. Courts that are free from outside influences, and are perceived by citizens to be independent of political pressures, are the surest guardians of the rule of law. By ensuring that judges are independent, impartial, and that they properly maintain the trust and confidence of all citizens, we will preserve for future generations a vibrant judiciary.

26. *Justice in Jeopardy*, *supra* note 1, at § 2 Recent Developments, 13 (opining that “[a] confluence of trends has contributed to making state high courts more politicized.”).

27. *Id.*