

Independent Judicial Decision Making in the New Millennium

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Introduction

An independent judiciary is a critical cornerstone of the elegant system of checks and balances in federal and state constitutions. This crucial independence is placed at risk when courts are criticized or attacked by interest groups or candidates seeking political gain. As Justice Sandra Day O'Connor has commented, "[c]riticism is fine; retaliation and intimidation are not."¹ Politicians and issue groups regularly assault the courts, perhaps safe in the knowledge that judges cannot fight back because they are prohibited from discussing or defending their actions other than in their oral or written opinions. Courts also face financial pressures, where receding budgets can impact the ability to administer justice. This paper provides some background for a discussion of these and other issues and how they affect an independent judiciary.

Judges, Unpopular Decisions and Politics

Criticism of judges comes from many quarters, including disgruntled litigants, politicians and candidates for judicial election. In the 2016 Presidential election, then Republican Presidential Nominee Donald Trump publicly questioned the fairness of the judge presiding over a case against Trump University because of his "Mexican" heritage. As reported in the Wall Street Journal,

In an interview, Mr. Trump said U.S. District Judge Gonzalo Curiel had "an absolute conflict" in presiding over the litigation given that he was "of Mexican heritage" and a member of a Latino lawyers' association. Mr. Trump said the background of the judge, who was born in Indiana to Mexican immigrants, was relevant because of his campaign stance against illegal immigration and his pledge to seal the southern U.S. border. "I'm building a wall. It's an inherent conflict of interest," Mr. Trump said.² Judge Curiel, of

¹ Sandra Day O'Connor, A Fair, Impartial and Independent Judiciary, *The National Voter*, Feb. 2007 at 8. Justice O'Connor's article and her other writings on judicial independence, are often cited. See, "Rapid Response to Unfair and Unjust Criticism of Judges," ABA 2008 at 1. Her concurring opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which held "[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...", is an eloquent summary of her thoughts on the problems with judicial elections. *Id.* at 788.

² Brent Kendall, "Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'" *Wall Street Journal*, June 3, 2016 (online at <http://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>).

course, could not comment. “An assistant in Judge Curiel’s chambers said he wasn’t commenting on the matter. An aide to the judge has previously said the judicial code of conduct prevents him from responding to Mr. Trump.”³

Unpopular decisions have long been part of political and judicial campaigns. In a 1997 New York University law review article, Professor Steven Bright wrote “Politicians have long blamed judges for forcing them to take unpopular actions—for example, desegregating the schools or bringing prisons or mental health facilities up to minimal standards—but many of those politicians had enough respect for the courts that they were careful not to take their criticism too far. Today, however, politicians criticize judges for the purpose of intimidating them and getting specific results.” The Bright article referenced the defeat of California justices and a Tennessee Justice over death penalty rulings, as well as other examples of politicians – from both sides – using criticism of the judiciary to win votes. These tactics, while not new, have been magnified by the ability of corporations to make political donations under *Citizens United v. Fed. Election Commission*,⁴ and the ability of judges running for election to “announc[e] their views on disputed legal and political issues” under *Republican Party of Minn. v. White*.⁵ The truth may be simpler, as noted by another commentator: “The ‘out of step with public opinion’ attack is used because it works.”⁶

The “out of step” approach was seen in a Supreme Court election in Iowa. In *Varnum v. O’Brien*, the Iowa Supreme Court held that a state statute which limited civil marriage to a “union between a man and a woman” violated the equal protection clause of the Iowa Constitution with Chief Justice Ternus, Justice Streit, and Justice Baker joined the unanimous opinion.⁷ Conservatives immediately went on the attack, led by Bob Vander Plaats, a Sioux City businessman who had lost in the Republican gubernatorial primary⁸ during which he made opposition to same sex marriage a centerpiece of his campaign, seeking to impeach the judges

See also, Stuart Taylor, Jr., Why Trump’s Assault on the Judiciary Is the Most Dangerous Thing He’s Done, Politico, June 07, 2016 (online at <http://www.politico.com/magazine/story/2016/06/donald-trump-2016-judge-gonzalo-curiel-attack-213946>).

³ Id.

⁴ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 968, 558 US 310, 402, 175 L. Ed. 2d 753, 845 (2010). See, Mira Gur-Arie and Russell Wheeler, Judicial Independence in the United States: Current Issues and Relevant Background Information, Guidance for Promoting Judicial Independence and Impartiality, 133 (2002)(online at Federal Judicial Center website, <http://www2.fjc.gov/content/judicial-independence>). In his dissent, Justice Stevens predicted the effect on judicial races, stating

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

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

⁵ 536 U.S. 765 (2002).

⁶ Justice Barbara J. Pariente and F. James Robinson, Jr., DRI’s Commitment to Fair and Free Courts, online at https://sddla.com/uploads/DRI_s_Commitment_to_Fair_Free.pdf.

⁷ 763 N.W.2d 862 (2009).

⁸ Todd E. Pettys, Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices, 59 KANSAS LAW REVIEW 715, 729 (2011).

with support from a coalition of pastors.⁹ Despite opposition from attorneys, former judges and the Institute for Legal Reform (an affiliate of the U.S. Chamber of Commerce),¹⁰ the three judges were defeated in the next retention election.¹¹ “After a strong and well-financed campaign by socially conservative groups, voters in Iowa in November removed three sitting State Supreme Court justices who had participated in 2009’s unanimous ruling permitting same-sex marriage.”¹² Conservatives in Iowa even went a step further, threatening “a bill calling for the impeachment of the court’s four other justices whose terms were not up for renewal.”¹³

In a similar vein, litigation over funding of Kansas Schools caused a showdown between the Republican Governor Sam Brownback and Republican controlled legislature and the Kansas Supreme Court after a three judge district court panel found “beyond question” that the state’s system of funding schools was unconstitutional “because it provided inadequate funding and distributed money unfairly.”¹⁴ The state appealed, and the Supreme Court scheduled oral argument. In his State of the State address, Governor Brownback challenged the Court, stating “[t]his is the people’s business, done by the people’s house through the wonderfully untidy—but open for all to see—business of appropriations...” which he contrasted with the “unaccountable, opaque” decision-making of the Kansas Supreme Court.¹⁵ After the Court upheld the panel’s decision in *Gannon v. State of Kansas*,¹⁶ holding the State’s funding of schools unconstitutional,¹⁷ “[t]he legislature and the governor’s response was to pass and sign a law that

⁹ Id.

¹⁰ Id. at 726.

¹¹ Id. at 716-17.

¹² Editorial, Impeachment as Intimidation, New York Times, January 12, 2011, A22 (Online at http://www.nytimes.com/2011/01/12/opinion/12wed3.html?rref=collection%2Ftimestopic%2FSameSex%20Marriage%2C%20Civil%20Unions%2C%20and%20Domestic%20Partnerships&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=search&contentPlacement=5&pgtype=collection).

¹³ Id. Threats to pass bills allowing the impeachment of judges aren’t limited to state legislatures. See, Marc O. DeGirolami, Congressional Threats of Removal Against Federal Judges, 10 Tex. J. on C.L. & C.R. 111 (2004-2005)(online at http://scholarship.law.stjohns.edu/faculty_publications).

¹⁴ Lincoln Caplan, “The Political War Against the Kansas Supreme Court,” The New Yorker, February 5, 2016 (online at <http://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court>). See, *Gannon v. State of Kansas* is at 2013 WL 146092 (Dist. Ct. Shawnee Cty, Kansas, Jan. 11, 2013)(Decision of three judge panel).

¹⁵ Id. The Kansas Legislature began “reducing education funding” in 2009 “in the wake of a national economic recession” and the funding reductions continued through 2012. *Gannon v. State of Kansas*, 298 Kan. 1107, 1117, 319 P.3d 1196, 1206 (2014). The school funding battle in Kansas continues. Governor cut funding for schools and higher education after the state missed revenue projections in January 2015. Bryan Lowry, “Gov. Sam Brownback cuts funding for schools and higher education,” The Wichita Eagle, February 5, 2015 (online at <http://www.kansas.com/news/politics-government/article9351788.html>).

¹⁶ 298 Kan. 1107, 319 P.3d 1196 (2014).

¹⁷ The Kansas Supreme Court held:

14. Under the facts of this case, the district court panel correctly held the State established unconstitutional, wealth-based disparities by withholding all capital outlay state aid payments to which certain school districts were otherwise entitled under K.S.A.2012 Supp. 72–8814(c).

15. Under the facts of this case, the district court panel correctly held the State established unconstitutional, wealth-based disparities by prorating and reducing supplemental general state aid payments to which certain school districts were otherwise entitled under K.S.A.2012 Supp. 72–6434 for their local option budgets.

Gannon, 298 Kan. at 1107, 319 P.3d at 1213.

stripped the State Supreme Court of administrative power over lower state courts. And then to pass and sign another law that stripped the state’s entire court system of funding if any court struck down any part of the previous law.”¹⁸ Despite heavy opposition, “[a]ll five justices up for retention in Kansas held onto their seats...despite a high-profile effort to unseat four of them by the state Republican Party, as well as substantial spending by an outside group that targeted them for a controversial ruling in a death penalty case.”¹⁹

In 2004, a first time Republican candidate, Brent Benjamin, bested a sitting Supreme Court justice, Warren McGraw, in West Virginia. The election, described as “enormously contentious,”²⁰ featured negative advertising criticizing Justice McGraw for his vote in a case which Benjamin and third parties supporting his candidacy said allowed the work release of a convicted sex offender.²¹ The so called “soft on crime” ads, “[f]requently relying on ominous music and voiceovers — and sometimes using racially charged imagery,” are another common tactic in judicial elections. “The vast majority of television ads attacking candidates seek to portray them as “soft on crime.” “In the 2013-14 election cycle, 82 percent of ad spots attacking candidates discussed criminal justice issues. Of the negative criminal justice-themed ads that cycle, all but one attacked candidates for judicial decisions they had made — focusing either on particular decisions or their criminal justice records as a whole. The remaining ad attacked a candidate for his representation of a criminal defendant as a lawyer.”²²

¹⁸ Id. The Kansas funding saga continued. On remand from “*Gannon I*,” the three judge district court panel “based upon early [statutory] enactments and the State’s representations concerning its commitment to resolve the inequities outlined by this court, ... initially determined that the State had complied with *Gannon I*’s equity directive during the ongoing 2014 legislative session by fully funding the capital outlay state aid and supplemental general state aid formulas as then existing. But the panel retracted its determination after the 2015 legislature amended those funding formulas for fiscal year 2015 (that had begun July 1, 2014) and repealed the existing school funding system, i.e., the School District Finance and Quality Performance Act (SDFQPA)—including the 2015 revised aid formulas—for fiscal years 2016 (beginning July 1, 2015) and 2017 (beginning July 1, 2016).” *Gannon v. State*, 303 Kan. 682, 684–85, 368 P.3d 1024, 1029 (2016)(*Gannon II*). The panel “properly concluded the State failed to cure the inequities affirmed to exist in *Gannon I*.” Id., 303 Kan. at 686, 368 P.3d at 1030. A similar election battle is brewing in Oregon, where proponents of charter schools are spending heavily to defeat a sitting justice Jim Brunner and Steve Miletich, Bill Gates, Others Donate Nearly \$1M to Defeat Supreme Court Justice Wiggins, *The Seattle Times*, October 26, 2016, updated Nov. 4, 2016. Online at <http://www.seattletimes.com/seattle-news/politics/bill-gates-others-donate-1m-to-defeat-supreme-court-justice-wiggins/>.

¹⁹ Kansas Justices Survive Anti-Retention Campaign Focused on Controversial Death Penalty Ruling, Brennan Center for Justice, Nov. 16, 2016, online at <https://www.brennancenter.org/press-release/spending-outside-groups-judicial-races-hits-record-high-secret-money-dominates>.

²⁰ Allan H. Loughry, II, Don’t Buy Another Vote: I Won’t Pay for A Landslide 201 (2006).

²¹ The case was *State v. Arbaugh*, 215 W. Va. 132, 595 S.E.2d 289 (2004). After losing the election, Warren McGraw sued Blankenship and others for libel. The action was dismissed by the Kanawha County Circuit Court. *McGraw v. Blankenship*, 2005 WL 5396032 (W.Va.Cir.Ct.), 33 Media L. Rep. 2454 (Kan. Cty. Circuit Court, July 25, 2005)(circuit court order). A similar ad, citing reversal of a child pornography conviction, was run to defeat a sitting Oregon Justice, suggesting he was soft on crime. See, Brunner and Miletich supra n. 15. “Soft on crime” ads are a common tactic in partisan judicial races. Kate Berry, How Judicial Elections Impact Criminal Cases 3 (Brennan Center for Justice, 2015)(online at http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf.) . “Empirical studies across states, court level, and method of election find that proximity to re-election makes judges more punitive — more likely to impose longer sentences, affirm death sentences, and even override life sentences to impose death. Without reform, terms of incarceration and executions will continue to be determined, in part, by the decision-maker’s proximity to re-election.” Id. at 13.

²² See, Kate Berry, supra n.3.

The election of Justice Benjamin in West Virginia gained further notoriety when he participated in the appeal of *Caperton v. A.T. Massey* where the Court, by a 3-2 vote reversed a \$50 million verdict for a coal operator against Massey.²³ Massey's President, Don Blankenship, had formed and funded a third party to support Benjamin's candidacy. "In addition to contributing the \$1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost \$2.5 million to 'And For The Sake Of the Kids,' a political organization formed under 26 U.S.C. § 527."²⁴ Plaintiffs sought certiorari, challenging Justice Benjamin's refusal of a motion to recuse, arguing

...Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant's contempt.²⁵

The United States Supreme Court reversed the opinion of the Supreme Court of Appeals of West Virginia, stating "[w]e find that Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—'offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'... On these extreme facts the probability of actual bias rises to an unconstitutional level."²⁶ In a speech at the American Bar Association Summit on How to Preserve A Fair and Impartial Judiciary, Justice Sandra Day O'Connor commented "[i]t just doesn't look good...West Virginia cannot possibly benefit from having that much money injected into cases."²⁷

²³ "In August 2002 a West Virginia jury returned a verdict that found respondents A.T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of \$50 million in compensatory and punitive damages." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 129 S. Ct. 2252, 2257, 173 L. Ed. 2d 1208 (2009).

²⁴ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873, 129 S. Ct. 2252, 2257, 173 L. Ed. 2d 1208 (2009).

²⁵ *Id.*, 556 U.S. at 882, 129 S. Ct. at 2262, 173 L. Ed. 2d 1208 (2009).

²⁶ *Id.* In 2016, Justice Benjamin was defeated in an election again marked with third party expenditures. See, *Buying Time 2016 - West Virginia*, Brennan Center for Justice, September 16, 2016, online at <https://www.brennancenter.org/analysis/buying-time-2016-west-virginia>).

²⁷ James Podgers, O'Connor on Judicial Elections: "They're Awful. I Hate Them," ABA Journal, May 9, 2009, online at http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s/.

For pure politics, other than judicial elections, criticism of the judiciary ranges from the statements of politicians decrying the “tyranny” of the unelected judiciary,²⁸ to groups like J.A.I.L., an acronym for Judicial Accountability Initiative Law, self-described as “a single-issue national grassroots organization designed to end the rampant and pervasive judicial corruption in the legal system of the United States.”²⁹ J.A.I.L. advocated for legislation setting up special Grand Juries with “the power to strip those judges of their protection of judicial immunity who are the subject of complaints for criminal acts, and to investigate, indict, and initiate criminal prosecution of wayward judges.”³⁰

Judges and Safety: Judge Joan Lefkow

Judges have been threatened and in some cases attacked. The murders of Federal District Court Judge Joan Lefkow’s husband and mother by an unsuccessful litigant were a tragic example.³¹ Suspicion immediately fell upon Matthew Hale, who headed a white supremacist group and was an unsuccessful litigant before Judge Lefkow. At the time of the murder, Hale was in federal prison awaiting sentencing after he was convicted of previously soliciting Judge Lefkow’s assassination.³² Ultimately, it turned out that the murder was committed by a Wisconsin man, Bart Ross, whose civil rights lawsuit claiming doctors at the University of Illinois-Chicago Hospital and its clinic had disfigured him, was dismissed by Judge Lefkow. Ross killed himself when pulled over by police, leaving a suicide note confessing to the murders.³³

On March 25, 2005, the United States Judicial Conference adopted a resolution after the murders “call[ing] upon leaders of the United States Department of Justice and of the United States Marshals Service (whose primary responsibility is the security of members of the federal

²⁸ There are many examples of this rhetoric. In April 2005, the wake of the Terry Schiavo case, Texas Senator John Cornyn was quoted as saying “I wonder whether there may be some connection between the perception in some quarters on some occasions where judges are making political decisions yet are unaccountable to the public, that it builds up and builds up and builds up to the point where some people engage in, engage in violence.” Joan Humphrey Lefkow, *Judicial Independence, Judicial Responsibility: A District Judge’s Perspective*, 65 WASH. & LEE L. REV. 361, 363 (2008). That same summer, House Majority Leader Tom DeLay made similar remarks in a speech to evangelicals, stating “Almost all of the great moral and social issues of our time are decided not by the voters but by an unelected, unaccountable and often arrogant judiciary. We call that effort judicial tyranny.” *Id.* Commenting on these statements, then Justice Sandra Day O’Connor noted that DeLay criticized the courts over a statute applied exactly as written and criticized Senator Cornyn, stating “It doesn’t help, she says, when a high-profile senator suggests there may be a connection between violence against judges and decisions that the senator disagrees with.” Nina Totenberg, *O’Connor Decries Republican Attacks on Courts*, NPR Morning Edition, March 10, 2006, online at <http://www.npr.org/templates/story/story.php?storyId=5255712>.

²⁹ J.A.I.L. Website, online at <http://jail4judges.org/>.

³⁰ *Id.*

³¹ David Heinzmann and Jeff Coen, *Federal Judge’s Family Killed*, Chicago Tribune, March 1, 2005(online at <http://www.chicagotribune.com/news/nationworld/chi-0503010123mar01-story.html>).

³² Jodi Wilgoren, *Haunted by Threats, U.S. Judge Finds New Horror*, The New York Times, March 2, 2005 (online at http://www.nytimes.com/2005/03/02/us/haunted-by-threats-us-judge-finds-new-horror.html?_r=0). See also, *Federal Judge’s Family Killed*, supra n. 24. Hale, the founder of the “white supremacist World Church of the Creator, was arrested in January 2003 and charged with soliciting Lefkow’s murder a month after she held him in contempt for continuing to call his church by that name after an appellate court ruled such a use was a trademark infringement.” *Id.*

³³ Francie Grace, *Suicide Note: I Killed Judge’s Kin*, CBS News, March 10, 2005, (online at <http://www.cbsnews.com/news/suicide-note-i-killed-judges-kin/>).

judiciary and their families) to review fully and expeditiously all aspects of judicial security and, in particular, security at judges' homes and other locations away from the courthouse. We also call upon both the legislative and executive branches to provide adequate funding for this essential function.”³⁴ In May 2005, Judge Lefkow addressed the Judiciary Committee of the United States Senate, urging support for home security systems. She sought support for “legislation that prohibits the posting of personal information about judges and other public officials on the Internet without written consent,” describing her discovery that she “was being vilified on the Internet by a white supremacist organization that had a trademark case before me.” She also sought adequate funding for the United States Marshall’s service for security.³⁵

There are certainly other instances of violence against judges, described as “rare but troubling.”³⁶ Further, “[i]n this age of mass communication, harsh rhetoric is truly dangerous. It seems to me that even though we cannot prove a cause and effect relationship between rhetorical attacks on judges and violent acts of vengeance by a particular litigant, fostering disrespect for judges can only encourage those that are on the edge, or the fringe, to exact revenge on a judge who ruled against them.”³⁷

Funding and the Courts

On a broader level, and certainly not to be addressed in depth here, are issues of judicial funding. In his 2013 Year-End Report on the Federal Judiciary, Justice Roberts noted “[a]t the top of my list is a year-end report that must once again dwell on the need to provide adequate funding for the Judiciary.”³⁸ The need to fund the administrative functions of the courts, from the clerks’ offices in the district, appellate and bankruptcy courts in the federal system to the probation and pretrial service and their state counterparts, which cannot be funded by fees alone. Federal and state judicial salaries can present challenges, in times of tight budgets, to attracting the best and brightest to the bench. When the legislature disagrees somehow with the judiciary, a la Kansas, it can be easier to justify a lack of funding, although the “purse string” relationship between the legislature and courts in both the federal and state constitutional schemes is part of the system of checks and balances. A related and oft debated subject is compensation for judges, which affects the ability to attract lawyers to the judiciary and to retain judges. The need for adequate judicial compensation has been an almost yearly topic of the annual address of the Chief Justice of the United States Supreme Court, and many organizations have long supported

³⁴ Report of the Proceedings of the Judicial Conference of the United States (March 15, 2005)(online at www.uscourts.gov/file/3766/download).

³⁵ Testimony of Judge Joan Humphrey Lefkow, United States District Judge, Northern District of Illinois, Before the Judiciary Committee of the United States Senate at 1, May 18, 2005, online at Chicago Tribune website <http://www.chicagotribune.com/news/nationworld/chi-050518lefkowstatement-story.html>. Judge Lefkow also authored a thoughtful law review article on the subject. See, Joan Humphrey Lefkow, Judicial Independence, Judicial Responsibility: A District Judge’s Perspective, 65 WASH. & LEE L. REV. 361, 363 (2008).

³⁶ Vossekuiil, Bryan; Fein, Robert; Borum, Randy; and Reddy, Marisa, "Preventing targeted violence against judicial officials and courts," Mental Health Law & Policy Faculty Publications (2001), online at http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1011&context=mhlp_facpub).

³⁷ Testimony, *supra* n. 32, at 3.

³⁸ Chief Justice’s 2013 Year-End Report on the Federal Judiciary, <https://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>.

it.³⁹ The current drive for more efficient handling of cases by judges, requiring more “hands on” management further accentuates the need for adequate staffing and funding of the courts.⁴⁰

Rising to the Defense

Judges are limited, if not prohibited, from speaking in their own defense, particularly where the criticism arises from a pending action. Analyzing the criticism by candidate Trump of Judge Curiel, one commentator noted:

Under the ABA’s Model Code of Judicial Conduct, Rule 2.10(A), “a judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court. . . .” Rule 2.10(E) qualifies this rule somewhat, providing that “subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter.” But because paragraph (A) requires that that any such response not be “reasonably expected” to “affect the outcome” or “impair the fairness” of a matter, the range of permissible responses is less than clear.

Further, the California Code of Judicial Ethics, California being the state where Judge Curiel presides, restricts judicial response more absolutely than does the ABA Model Code. California includes neither the “might reasonably be expected” qualifier, nor the option of a response to media allegations, either directly or through a surrogate. Instead, in California, “[a] judge shall not make any public comment about a pending or impending proceeding in any court. . . .” Cal. Code of Judicial Ethics Canon 3(B)(9).⁴¹

Bar associations, both voluntary and mandatory, have stepped up to the task of defending judges. In 2008, the American Bar Association’s Standing Committee on Judicial Independence prepared and published a guide entitled “Rapid Response to Unfair and Unjust Criticism of Judges,”⁴² which states,

The Bar has a special responsibility to ensure that judges remain highly respected leaders of our legal system and communities. Serious inaccurate or unjustified criticism should be answered

³⁹ Judicial Compensation: Our Federal Judges Must Be Fairly Paid, American College of Trial Lawyers, Approved by the Board of Regents, March 2007, online at <https://www.actl.com/library/judicial-compensation>.

⁴⁰ In his 2015 annual report, Justice Roberts noted the increased judicial management required by the 2015 amendments to the Rules of Civil Procedure. Chief Justice’s 2015 Year-End Report on the Federal Judiciary, online at <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

⁴¹ Lawrence Pulgram, When Attacks on Judges Go Beyond the Pale, *Litigation*, Volume 43, Number 1, Fall 2016, at 1.

⁴² Available online at http://www.americanbar.org/directories/judicial_independenceclearinghouse/30.html.

through a public information program. We should coordinate activities recommended in this publication with the courts themselves, usually acting through their public information officers. Most importantly, and we cannot emphasize this enough, responses to attacks on the judiciary must be made promptly within the same news cycle to be effective.⁴³

The ABA guide suggests that state and local bar associations form “rapid response teams” which are authorized to determine whether a response is warranted and to make the response in a fair and impartial way.⁴⁴ When an attack occurs, the rapid response team should “consult with the judge for an opinion as to whether there should be a response and then respond in the same news cycle as the attack, without repeating and reinforcing the attack.” *Id.* at 2. Methods of response include letters to the party spreading the attack, letters to the Editor, Op-eds or Editorials, and “in more extreme cases,” the use of Press Conferences. Importantly, one option is to make no response:

No response. The matter presented may contain justified criticism. The matter may be beyond the scope of the Association policy, or be criticism of the merits of the case. The matter may be too political and outside the interests of the Association. After consulting with the judge who is the subject of the unjust criticism as suggested above, you might find that the judge prefers not to have the matter debated in a public forum.

Id. at 3. The defense of judges is consistent with the longstanding approach by the ABA that “the best way to ensure access to justice is to choose judges through nonpartisan appointment with input from citizen commissions. This open process removes the excesses of campaign rhetoric and cash from the selection equation, enabling judges to uphold the Constitution without fear of political retribution.”⁴⁵

In 2004, during the contentious Supreme Court race that led to the election of Brent Benjamin, the Justice at issue in *Caperton v. A.T. Massey*, the Board of Governors of the West Virginia State Bar waded in with a proclamation stating “the nature and tenure of some of the campaigning and advertising for both candidates neither enhances the status of the judiciary or the credibility of the system with the public at large.”⁴⁶ Further, the Resolution explained that lawyers were barred from making false or reckless statements “concerning the qualifications or integrity of a judge... or a candidate for election or appointment to judicial or legal office.” Then State Bar President Charles Love stated “the Bar generally was unhappy with the manner in which the race has been conducted and the concern was that both candidates were transgressing the strictures of the rules and cannons.”⁴⁷

⁴³ *Id.* at 1.

⁴⁴ *Id.* at 2.

⁴⁵ H. Thomas Wells Jr., Preserving a Fair and Impartial Judiciary, 36 Human Rights 1 (Winter 2009)(American Bar Association) (online [here](#)).

⁴⁶ West Virginia State Bar Resolution, quoted in Allen H. Loughry, II, Don’t Buy Another Vote: I Won’t Pay for the Landside (2006).

⁴⁷ *Id.*

The American Association for Justice adopted a policy condemning unfair attacks on the judiciary:

As an association of advocates for Americans who rely on the civil justice system to ensure their rights under the law are protected and enforced, the American Association for Justice condemns any threat to a fair and impartial judiciary. Political attacks on individual judges, including those based on a judge's ethnicity or religious background, jeopardize the fair administration of justice and threaten to undermine the Rule of Law.

The American College of Trial Lawyers, made up of trial lawyers of all stripes, enacted a similar policy, stating "it is the policy of the American College of Trial Lawyers to undertake to address in an appropriate manner threats to judicial independence wherever they manifest themselves."⁴⁸ State Committees of the College are encouraged to engage and issue responses when judges are unfairly attacked.

Final Thoughts

Judicial independence means different things to different people. At the least it refers to the ability of judges to decide disputes impartially despite real, potential, or proffers of favor. It is perhaps most important in enabling judges to protect individual rights even in the face of popular opposition.⁴⁹

All citizens have an interest in a strong, independent judiciary, and lawyers have a special place in its defense. This obligation ranges from not only refraining from criticism that undermines public confidence to speaking out in defense of courts and judges when unjust criticism arises.

⁴⁸ Judicial Independence: A Cornerstone of Democracy Which Must Be Defended, American College of Trial Lawyers, Approved by the Board of Regents, September 2006, online at <https://www.actl.com/library/judicial-independence-cornerstone-democracy-which-must-be-defended>.

⁴⁹ Mira Gur-Arie and Russell Wheeler, Judicial Independence in the United States: Current Issues and Relevant Background Information, Guidance for Promoting Judicial Independence and Impartiality, 133 (2002)(online at Federal Judicial Center website, <http://www2.fjc.gov/content/judicial-independence>).