

JUSTICE IN JEOPARDY

REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY

The recommendations contained within this report do not reflect the official positions or policies of the American Bar Association. The recommendations will be presented to the ABA House of Delegates at its 2003 Annual Meeting for adoption as official policies of the ABA.

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**REPORT OF THE
AMERICAN BAR ASSOCIATION
COMMISSION ON THE 21ST CENTURY JUDICIARY**

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

- The Commission recommends that judicial appointees serve a single, lengthy term of at least 15 years or until a specified age, and not be subject to a reselection process. Judges so appointed should be entitled to retirement benefits upon completion of judicial service**

- The Commission recommends that judges not otherwise subject to reselection, nonetheless remain subject to regular judicial performance evaluations, and disciplinary processes that include removal for misconduct**

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American Bar Association

Commission on the 21st Century Judiciary Justice in Jeopardy

Executive Summary

The judicial systems of the United States at the beginning of the 21st Century remain unparalleled in their capacity to deliver fair and impartial justice, but these systems are in great jeopardy. Our state courts play a critical role in preserving American freedom and democracy. Almost 100 million cases are resolved peacefully and with relatively little fanfare by some 30,000 state judges each year. Increased political involvement in the judiciary, diminished public trust and confidence in the justice system, and uncertain resources supporting the courts place burdens on the judiciary's capacity to provide fair and impartial justice. Indeed, the escalating partisanship and corrosive effects of excessive money in judicial campaigns, coupled with changes in society at large and the courts themselves, have served to create an environment that places our system of justice, administered by independent and impartial judges, at risk.

ABA President Alfred P. Carlton, Jr., convened the Commission on the 21st Century Judiciary to study, report and make recommendations to ensure fairness, impartiality and accountability in state judiciaries. The Commission held four public hearings, generating over 1,000 pages of testimony, and a national colloquium, attended by over 150 judges, lawyers, law and social science scholars, and members of the public. The hearings and colloquium focused on recent developments in the states that have politicized the judiciary and on demographic trends affecting how courts conduct their business.

The Commission recognizes that effective, independent and impartial judicial systems require the trust and confidence of the public, which must understand and care about its courts. A set of enduring principles underscores the importance of an independent, impartial judiciary to uphold the rule of law in a constitutional, democratic republic. Challenges to these enduring principles are identified. Recommendations serve as a framework for the ABA and the states to address and counteract the developments that are adversely affecting the fair and impartial administration of justice.

Eight enduring principles should be central components to each state's understanding of the role of the judiciary as a co-equal branch of government. These principles recognize that judges should uphold the rule of law and be impartial and independent, while possessing the appropriate temperament and character, as well as appropriate capabilities and credentials. Moreover, judges should have the confidence of the public and the justice system should be diverse, reflecting the society it serves. Finally, judges should be constrained to perform their duties in a manner that promotes public trust and confidence in the courts.

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.

These factors and trends contribute to increased politicization of the courts, placing the fair and impartial administration of justice at risk. Increasingly expensive state judicial campaigns focus on narrow issues of intense political interest, contributing to the public's perception that judges are influenced by their contributors. Some of the most partisan and misleading campaign related speech comes in the form of "issue advertising." The viability of judicial ethical standards are at risk, especially in light of recent judicial decisions, including that by the U.S. Supreme Court in *Republican Party of Minnesota v. White*, limiting some ethics rules. The pronounced lack of diversity in the judicial system inhibits public trust and confidence in the courts, as do apparent trends in the relationships between courts and legislatures that too often have been problematic, manifested by attempts to cut the judiciary's budget, curb court jurisdiction, remove judges from office, and constrain courts' constitutional interpretations.

Thirty-one recommendations address the challenges threatening state courts at the beginning the 21st Century. The first set of recommendations is designed to preserve the judiciary's institutional legitimacy by enhancing judicial qualifications, training, evaluation, ethical standards and diversity. The second set of recommendations is designed to improve judicial selection by encouraging appointment of judges who serve for long terms with limited opportunity for reselection while offering a number of alternatives for jurisdictions that continue to elect and retain judges. The final set of recommendations is designed to promote an independent judicial branch that works effectively with its coordinate branches of government.

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. Fundamental to this unique role of the courts is the necessity for the judiciary to be distinct from the other two branches of government, functioning independently to ensure an effective role in the American tradition of a republican form of government. The differences unique to the judiciary, manifested in ethical restrictions on judges, judicial selection methods, and the nature of the judicial process, are vital aspects of maintaining balance among the branches of government. With the promulgation of a comprehensive set of recommendations, the Commission on the 21st Century Judiciary provides a call to action that will maintain independent, impartial state judiciaries, functioning as effective, co-equal branches of government, for generations to come.

American Bar Association Commission on the 21st Century Judiciary

I. ENDURING PRINCIPLES

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

II. 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, that continuing judicial education should be required for all judges, and that state appropriations should be sufficient to provide adequate funding for continuing judicial education programs.
- Congress should fully fund the State Justice 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.
- Active promotion of 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 judges and court administrators speaking in schools and other community settings.
- The continuation of problem-solving courts as a means to promote public confidence in the courts.

III. IMPROVING JUDICIAL SELECTION

A. 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 a single, lengthy term of at least 15 years or 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.

B. Alternative Recommendations on 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.

IV. 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 courts.

REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY

“the common task in which we [the bench and the bar] are all engaged – the great and sacred task – the administration of justice”

Justice Benjamin Cardozo

Chair’s Introduction

The thirty thousand state court judges who constitute the judicial branches of our fifty states conduct 98% of the country’s legal business. Each state’s judiciary has the function of providing able and impartial administration of the state’s justice system and ensuring justice for all who come before its courts. The trust and confidence of the public are essential to the success of the judiciary.

In recent years state judiciaries have been the subject of several professional surveys to determine how they are viewed by the public. As might be expected the results are in some respects positive, some negative and occasionally inconsistent.

Given the far flung, diverse nature of the fifty states, it is inappropriate to generalize; however, a closer look at these surveys as well as more recent developments suggest that trust and confidence in our judicial systems are on the wane and apathy and dissatisfaction are on the rise, more so in some states than others. Unless checked and addressed, the ability of the state judiciaries to fulfill their constitutional obligations in a democratic republic will be in jeopardy, with deleterious effects for the American system of justice and experiment in self government.

Our tasks are to identify the factors contributing to these trends, suggest ways to improve the current environment in which courts operate, and draw attention to the ramifications if we do nothing.

We have taken our tasks seriously, devoting many hours and much attention, guided by and taken advice from many persons with broad expertise and experience.

Despite the fact that the American system of justice remains the model for emerging democracies around the world, our exercise over the past few months reveals that there are storm clouds gathering that jeopardize the American judiciary's role as the template for establishing judicial organizations.

- Whatever its historic rationale there can no longer be justification for contested judicial elections accompanied by “attack” media advertising that require infusions of substantial sums of money. These contested elections 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 those with partisan influence.
- Present and anticipated state and municipal budget deficits have and will continue to impact adversely allocations to the judiciary resulting in reduction or even elimination of core judicial services.
- Within communities of color—that together will comprise a majority of the American people by the middle of this century—concern that they receive unequal, inferior treatment in the courts is compounded by a lack of confidence due to the lack of diversity throughout the judiciary. The perception of two forms of justice-- one for the wealthy and one for the poor -- is widespread.

Unless promptly addressed, one witness colorfully suggested that “Equal Justice Under Law” should be sandblasted from the Supreme Court Building.

- Other constituencies are distrustful of the judicial system especially in jurisdictions that have become magnets for tort litigation as they perceive the playing field as not level.
- The politics of crime imposes intense pressure on judges to decide criminal matters in a manner which satisfies popular expectations.
- Judicial branches are increasingly viewed by Legislative and Executive branches as impediments to policy implementation rather than as a partner, a coequal branch of government, in doing the people’s business, with negative impacts for allocation of adequate resources.
- There is a growing concern that the courts are not meeting the public’s expectations in areas involving domestic relations, family violence, juvenile justice and substance abuse.
- There is political opposition to support structural changes in the judiciary that would increase economical and efficient judicial administration.

These trends provide cautions and concerns to which we must devote attention and resources – intellectual and financial. 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.

The required ingredients for “able and impartial” administration of justice are qualified judges knowledgeable as to their roles and responsibilities and adequate resources supported by the coordinate branches of government to allow the judiciaries to meet, if not exceed, public expectation. It may be that these questions attract the most attention when addressing the problems affecting the judiciary.

But they are not the only issues that must be addressed in this area. The ABA’s commitment to supporting judicial independence over the past few years reflects just how broad attention to these issues must be. President N. Lee Cooper convened the ABA Special Commission on Separation of Powers and Judicial Independence, which issued its report on July 4, 1997. Although focusing on the federal judiciary, the Commission noted that the challenges faced by the state judiciaries far outstripped those affecting the federal courts. Based at least in part on this assessment, President Jerome J. Shestack appointed a special committee on judicial independence, which had an immediate impact by encouraging ABA policy to assist those judges who found themselves on the wrong end of personal vindictive that impugned the trust and confidence of the public in the judicial branch. The response to this initiative from the states reflected the depth of concern about challenges to judicial independence at the end of the 20th Century.

The Association’s commitment to these issues was strengthened when this special committee was transformed into a standing committee and President Philip S. Anderson appointed Alfred P. Carlton, Jr., as chair. During the next three years, this Committee, undertook important work, including the development of Standards for State Judicial Selection and a seminal proposal for public financing of judicial campaigns.

These projects contributed to legislative proposals around the country to improve judicial selection processes, including the 2002 enactment in North Carolina of the nation's first full public financing law for judicial campaigns.

During this time, other improvements were encouraged. The ABA Model Code of Judicial Conduct was amended to limit bad effects from judicial campaigns upon recommendations from the ABA Task Force on Lawyers' Political Contributions. President Anderson convened symposia that encouraged new thinking about judicial independence and public trust and confidence in the justice system. Indeed, in cooperation with the League of Women Voters, the Conference of Chief Justices and the Conference of State Court Administrators, the ABA under President Anderson participated in a national conference addressing weaknesses in the public support for the justice system.

Our work builds on these past experiences but is necessarily forward looking. President Carlton, in convening this Commission, advised us on more than one occasion to be bold, to think creatively, and not to be timid. The commission members, and their helpful advisory committee, represent a variety of viewpoints, including those of lawyers, judges, legal scholars, legislators, business executives, and citizens. Our experiences are diverse but our commitment is singular and focused: to identify the enduring principles of an independent judiciary and the circumstances that are diminishing these principles and to recommend strategies to preserve an environment that is true to the ideals of Adams, Hamilton and other Founders for an independent judiciary in a democratic republic.

Our able reporter, Professor Charlie Geyh, commissioned experts in several aspects of state judiciaries who provided us with excellent "white papers" that both gave us extensive background and prepared us for our first hearing, which was held in Detroit a week following the 2001 ABA Annual Meeting. We have proceeded from there –

meeting regularly, challenging each other and devising new ideas. We held three additional public hearings in three other disparate regions of the country – Philadelphia, Portland (Oregon), and Austin. We heard from more than 25 witnesses, ranging from state chief justices, law school deans, law and politics scholars, citizen advocates, corporate general counsel, plaintiff trial attorneys, judicial ethics administrators, bar association presidents and others. The transcripts of these hearings encompass more than 1,000 pages. We invited and received submissions from many others interested in our proceedings and ABA staff provided literally thousands of pages of studies, reports, and other resources. The Commission was most well informed, from its collective experiences and the perspectives shared with us by those who participated in its many activities. Our collective thinking has been refined by a colloquium focusing on draft findings and recommendations, where those interested enough to travel to Raleigh, N.C., probed and examined the intricacies of the commission’s draft report. The final report is better for that experience in the marketplace of ideas.

Our approach has been shaped by obvious but perhaps often overlooked aspects of efforts to improve the administration of justice in the state courts. We know that no system of judicial selection has yet been devised that is either criticism-free or free from potential political manipulation. We know that no system of justice will be able to satisfy the aspirations of all those citizens who are touched by a goal of equal justice under law. Yet we strive to do the best we can with the resources that are available. Our examination of how this is occurring at the beginning of the 21st Century has been hopefully broad and thorough.

Perhaps we can summarize the objective of those interested in improving the environment for equal justice under law by noting that the goal is to attract able, qualified persons for judicial office and to provide a climate for their continuance in judicial office that shields them from improper, outside influences. It is noteworthy that the founding fathers, most

notably Adams and Hamilton, found little bases for debate as to a selection and tenure mechanism that would attract able and qualified persons, choosing presidential nomination and Senate confirmation with “good behavior” - basically lifetime tenure. Elections came into play in states in the early 19th century and debate has ensued ever since over the relative merits of the “best” means to select judges, with the result that there are varied and hybrid systems in place in states throughout the country and today there is agitation, if not organized initiatives, for change in many states.

If we were writing on a clean slate, based on what we now see in how judicial campaigns have come to be conducted and in light of the Supreme Court’s recent decision in *Minnesota Republican Party v. White*, and its impact on the future, judicial elections would gradually be abandoned. Rather, in the 21st Century a preferred system of state court judicial selection would be a “commission-based appointive” system with components that are set forth in the report that follows.

But we write not on the clean slate but in recognition of the varied approaches of the citizens of the 50 states through their Constitutions have dealt and continue to deal with the conundrum of judicial selection. We offer recommendations as to changes in various existing election methodologies and urge that efforts to improve how judicial elections are conducted must continue, such as the trend to nonpartisan campaigns and the use of public financing mechanisms, in the face of difficulties to eliminate the use of judicial elections. Any selection system should be accompanied by a sound code of judicial ethics accompanied by effective, enforced judicial disciplinary procedures.

What follows is an effort to sound a warning bell. Our collective experiences confirm that the American judiciary is special, a work in progress to accomplish what had not been done before by ensuring that independent and impartial judges are motivated by the law

rather than by fear or favor. Our collective examination confirms that the American judiciary is at risk, its capacity to provide impartial decision making as an independent branch sanctioned by the federal and state constitutions threatened by partisan and financial exigencies that are infiltrating a system based on the rule of law. As these trends in American life and law can be identified at the beginning of the 21st Century, it is time now to expend leadership to maintain a feature that is as indispensable to American life as any other American institution – the uniquely independent American judiciary.

Edward W. Madeira, Jr.
May 1, 2003
Philadelphia, Pennsylvania

JUSTICE IN JEOPARDY
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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. This report explores the serious challenges that confront our judicial systems in the 21st Century, and seeks ways to address them. The focus on problems that our judiciary faces should not obscure the Commission's enormous sense of pride in and commitment to our system of justice generally and our judicial systems in particular, which remain second to none in the world. It likewise should not be construed to impugn the dedication, integrity or capabilities of the extraordinary women and men who are elected or appointed to serve our nation as judges. And in dwelling on the distance we have yet to travel, we must not forget the practicing lawyers who have brought us this far through their work in state and local bar associations, their support, financial and otherwise, for qualified judges and judicial candidates, and their simple devotion to protecting and preserving an independent and impartial judiciary.

In short, ours is a great judiciary, and our goal is to make certain that it remains so. It is in that spirit, we must report that all is not well. Although our judicial systems have served us long and admirably, they are systems in serious jeopardy. They are being jeopardized by the corrosive effect of money on judicial election campaigns, in which some 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 a series of perceived improprieties: 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.

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 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.¹ 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

¹ EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 91-107 (1999).

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.²

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 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 by 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.

The fourth and final source of dissatisfaction that Pound discussed, related to “causes lying in environment of our judicial administration.” Here, Pound called specific

² *Id.* at 54-59.

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.” 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."³ Our judicial 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

³ Chambers v. Florida, 309 U.S. 227, 241 (1940).

judiciary serves. Once these principles have been enumerated in Part I of this Report, in 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:

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.

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 (in addition to other objectives) 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.

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.

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 makes 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 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

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

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.

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 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 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 cannot long endure.

Principle 7: The judicial system should be racially diverse and reflective of the society it serves

Principle 7 follows naturally from principle 6. 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 faith in the judiciary, it is a problem that must be addressed. Principle 5 underscored the importance of a judge's qualifications and credentials, while principle 6 emphasized the need for public trust and confidence in the judicial system. 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. Our judiciary and the judicial system (including judges, clerks, staff, lawyers and juries) should reflect the diversity of the society in which we live. If they do not, the legitimacy of the courts and the judicial system will be called into question with increasing frequency.

Principle 8: 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 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 eighth 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 Principles 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 to the “structure or affairs of government,”⁴ 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. Moreover, to the extent that judges are asked to uphold the rights of the politically unpopular and are subject to intense criticism when they do, this additional pressure that judges bear may be part of the price we pay for the rule of law. 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.

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.

⁴ THE AMERICAN HERITAGE DICTIONARY 960 (2d Coll. Ed. 1982).

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 judicial independence.”⁵ 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.”⁶ 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.⁷ 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.⁸ It bears emphasis that our intent is not to

⁵ G. Alan Tarr, *State Judicial Selection and Judicial Independence* 10 (see appendix).

⁶ Robert Kagan, et al, *The Business of State High Courts, 1870-1970*, 30 STAN L. REV. 121, 155 (1977).

⁷ Elizabeth Norman, Jacob Daly, *Statutory Civil Rights*, 63 MERCER L. REV. 1499, 1499-1500 (2002).

⁸ 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”).

criticize these developments as deleterious, but to describe the confluence of events that have contributed to the political pressure under which our courts operate.

Explanations for this trend are many, varied, and sometimes contradictory: some attribute it to lawyers who have encouraged litigation into controversial arenas.⁹ Others point to judges and their alleged propensity toward greater judicial activism.¹⁰ 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.¹¹ And still others explain the development in terms of a “law explosion” in which legislatures have expanded the range of statutory remedies available to litigants.¹²

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 “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

⁹ See, e.g. WALTER OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

¹⁰ See, e.g. MAX BOOT, *OUT OF ORDER* (1998); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjorn Vallinder, eds) (1995)

¹¹ Warren Burger, *Using Arbitration to Achieve Justice*, 40 *ARB. J.* 3, 5 (1985).

¹² 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).

guidance in many areas of law previously left to the federal constitution.”¹³ 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.¹⁴

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.

Our essential point here is not normative, but descriptive. Whether these recent developments reflect a salutary change in which state courts are protecting rights too long neglected, or a troubling one in which those courts are overstepping traditional bounds, is well beyond the scope of our report. Rather, our point is simply 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*

¹³ Emily Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciaries* 3 (see appendix).

¹⁴ See also William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

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.”¹⁵ The Center adds, that “[i]n response, states established two-tiered appellate court systems.”¹⁶ As of 1958, only thirteen states had established intermediate appellate courts.¹⁷ Today, they are in place in forty-one states.¹⁸

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.¹⁹ 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.²⁰ 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.²¹ 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.

¹⁵ National Center for State Courts, *Examining the Work of the State Courts*, 2001 at 76.

¹⁶ *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).

¹⁷ 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).

¹⁸ Peter Murray, *Maine’s Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME L. REV. 43 (2000).

¹⁹ Victor Eugene Flango, Nora Blair, *supra* note 17 at 84.

²⁰ 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).

²¹ *Id.*

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.” 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 judicial campaigns in those jurisdictions. Heated campaigns of the past decade 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.”²²

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.”²³ More recently, a national survey commissioned in 2001 by the Justice at Stake Campaign asked whether the term “political” accurately described judges, and 76% responded that it described them “well” or “very well.”²⁴

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

²² Testimony of James Bopp, August 21, 2002 at 234. In light of the enduring principles that we have developed to guide the 21st century judiciary, it all but goes without saying that we do *not* believe that judges do or should “make law” as legislators do. Our point is limited to one of public perception.

²³ State Bar of New Mexico & Admin. Office of the Courts, Community Survey of Lawyers and the Legal System, §16 at xi (1997).

²⁴ Campaign, National Survey of American Voters:
<http://faircourts.org/files/JASNationalSurveyResults.pdf>

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 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 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.”²⁵

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.”²⁶ 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,”²⁷ and putting judges in such a position complicates considerably the principles that a judge should be independent, impartial, and uphold the rule of law.²⁸

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

²⁵ Stephen Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 166 (1997).

²⁶ See note 24 *supra*.

²⁷ Bright, *supra* note 25 at 166.

²⁸ 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.²⁹ 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 Bell³⁰ indicates “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 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.

²⁹ 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.

³⁰ Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence* (see appendix).

- 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.³¹

- 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 “coddling criminals,” and he vowed to “alter” the judicial selection system to favor tough-on-crime judges.³²

Civil cases: Consultants Carl Tobias and Andrew Spalding report to the Commission³³ that in several jurisdictions, corporate defendants and their lawyers have been alarmed by a concentration of recent tort cases filed in a small group of counties in a handful of states that have yielded “spectacular” punitive damages awards. More generally, court decisions on issues of tort reform and defendants’ liability in products and medical malpractice cases have occupied center stage in a number of judicial races. These decisions have prompted segments of the business community to lobby more aggressively for tort reform legislation. A number of states have responded by passing

³¹ 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.

³² *Tough on . . . Judges?*, ANCHORAGE DAILY NEWS, August 16, 2002.

³³ See appendix.

tort reform legislation, the constitutionality of which has then been challenged, often successfully. That, in turn, has prompted the plaintiffs' trial bar and the business community to redirect their attention toward judicial campaigns. 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.

- 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.”³⁴

Additional constitutional and statutory issues: Consultant Emily Van Tassel³⁵ 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 Justice 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).³⁶

b. Judicial races are becoming more expensive

One natural consequence of judicial elections becoming more competitive 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

³⁴ Susan Finch, *Court Races Linked to Ecological Battles*, NEW ORLEANS TIMES-PICAYUNE, October 31, 2000.

³⁵ See appendix.

³⁶ Thomas Suddes, *Editorials and Forum*, CLEVELAND PLAIN DEALER, May 6, 1998 at 11B.

by 61% between 1998 and 2000 alone.³⁷ 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 \$431,000.³⁸

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.³⁹ It bears emphasis however, that there is tremendous variation among the states in campaign spending, with candidates in some states spending little or nothing.⁴⁰ 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, on the one hand, and the business community on the other.⁴¹ 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.⁴²

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

³⁷ Deborah Goldberg, Craig Holman & Samantha Sanchez, *The New Politics of Judicial Elections*, available at http://bennancenter.org/resources/resources_books.html#ji, at 4.

³⁸ *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.

³⁹ Goldberg, Holman & Sanchez, *supra* note 37.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Kevin McDermott, *Lawyers Give Big to Judges’ Campaigns*, ST. LOUIS DISPATCH, September 9, 2002.

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.⁴³ 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:

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.⁴⁴

c. The public believes that judges may be 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;

⁴³ Testimony of Thomas Gottschalk, November 22, 2002 at 184-96.

⁴⁴ Testimony of Joseph Tomain, August 21, 2002 at 163.

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.

We should caution against making too much of these statistics. For example, one might assume that the lawyers who make contributions to the campaigns of supreme court justices would typically be state supreme court litigators, but that does not appear to be the case. In Michigan, for example, lawyers constituted 23% of all contributors, but 80% of those lawyer-contributors never appeared before the court during the eight years under study. Studies in Illinois and Wisconsin have yielded comparable results. And while 89% of the cases coming before the Michigan Supreme Court featured at least one participating contributor, the contributors participating in litigation before the court together comprised only 4.5% of all contributors to the campaigns of court members (and contributed only 6.2% of all funds).⁴⁵ Finally, there is no evidence to demonstrate that contributing to a judicial campaign increases the contributor’s likelihood of success in cases before the court.⁴⁶

A perception problem nonetheless remains. 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

⁴⁵ See Samantha Sanchez, *Campaign Contributions and the Michigan Supreme Court* (March 27, 2003).

⁴⁶ Dawson Bell, *Good News About Judicial Fairness Gets Overlooked*, (May 25, 2002).

compromised by the need to raise campaign money to successfully run for office.”⁴⁷

Seventy-six percent of respondents in the Justice at Stake survey believed that campaign contributions exert some, or a great deal of influence on judicial decisions.⁴⁸ 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.”⁴⁹

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.⁵⁰ 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.⁵¹ 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.⁵² 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.”⁵³ 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

⁴⁷ Harris Interactive, *A Study About Judicial Impartiality* (August 2002).

⁴⁸ *See* note 24, *supra*.

⁴⁹ *Id.*

⁵⁰ T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE CLEVELAND PLAIN DEALER, February 15, 2000 1A.

⁵¹ *See*, Report and Recommendations of the Task Force on Lawyers’ Political Contributions, Part Two, American Bar Association, July 1998, at Appendix Seven, pp. 124-126.

⁵² Steve Neal, *State Needs Fairer Way to Pick Judges*, CHICAGO SUN-TIMES, September 4, 2002.

⁵³ *Take Partisan Politics Out of Justice System*, THE SANTA FE NEW MEXICAN, June 20, 2000.

campaign contributions influenced judicial decisions “very significantly” or “fairly significantly.”⁵⁴

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.”⁵⁵ 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, “[T]here’s a perception that if you contribute money, there’s a payback down the road.”⁵⁶ 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.”⁵⁷ 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.”⁵⁸

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

⁵⁴ 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).

⁵⁵ *Keep Judges Out of Politics*, KANSAS CITY STAR, November 18, 2002.

⁵⁶ Michael Olesker, *To Candidate, Contributions May Seem to Tip Justice's Scales*, BALTIMORE SUN, August 29, 2002.

⁵⁷ Steve Sebelius, *Tipping the Scales of Justice*, THE LAS VEGAS REVIEW-JOURNAL, May 30, 2002.

⁵⁸ 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.”⁵⁹

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.⁶⁰

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.”⁶¹ Although the campaign backfired and Resnick won reelection easily, Dean Joseph Tomain told the

⁵⁹ Testimony of Thomas Moyer, August 21, 2002 at 107.

⁶⁰ REPORT OF THE ABA COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001).

⁶¹ Testimony of Bill Burges, August 21, 2002 at 194.

Commission that he found the experience quite troubling. The negative advertising, which “more than impl[ie]d 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.”⁶²

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.⁶³ 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.”⁶⁴

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.”⁶⁵

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 questions are of central importance in judicial campaigns. The information voters receive

⁶² Testimony of Joseph Tomain, August 21, 2002 at 163.

⁶³ Testimony of Dennis Archer, August 21, 2002 at 18.

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

⁶⁵ Wayne Hoffman, *Task Force to Look at Role of Money in Judicial Campaigns*, IDAHO STATESMAN, June 8, 2002.

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,⁶⁶ and as much as 80% of the electorate unable to identify the candidates for judicial office.⁶⁷

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 not vote in the supreme court races on the same ballot.⁶⁸ There is thus an obvious relationship between voter knowledge, voter apathy and the extent to which judicial elections can promote meaningful judicial accountability.

⁶⁶ 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).

⁶⁷ *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").

⁶⁸ Testimony of Reginald Turner, August 21, 2002 at 83.

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.⁶⁹ 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.”⁷⁰ Although this conclusion is not free from doubt,⁷¹ it is corroborated by other studies.⁷²

f. The recent decision of the United States Supreme Court in Republican Party of Minnesota v. White, 536 U.S. 765 (2002), 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 cases,⁷³ take positions that appeared to commit them on issues that may come before the court,⁷⁴ appear at political functions,⁷⁵ or make promises of conduct in office.⁷⁶ This may help to explain why so much of the negative, case-specific advertising in judicial races

⁶⁹ American Bar Association, *Perceptions of the U.S. Justice System* (1999).

⁷⁰ *Id.* at 10.

⁷¹ 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.

⁷² American Bar Association, *Perceptions of the U.S. Justice System* at 7-8 (1999).

⁷³ ABA Model Code of Judicial Conduct Canon 3(B)(9).

⁷⁴ ABA Model Code of Judicial Conduct Canon 5(A)(3)(d)(ii).

⁷⁵ ABA Model Code of Judicial Conduct Canon 5(A)(1)(d).

⁷⁶ ABA Model Code of Judicial Conduct Canon 5(A)(3)(d)(i).

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 particularly victims of the process. They need to be allowed to participate . . . fully.⁷⁷

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.”⁷⁸

⁷⁷ Testimony of James Bopp, August 21, 2002 at 243-44.

⁷⁸ Testimony of Bill Burges, August 21, 2002 at 207.

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.”⁷⁹

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 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

⁷⁹ Testimony of Thomas Moyer at 119.

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.”⁸⁰

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 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

⁸⁰ *Justice Should Be Blind: Must It Be Silent As Well?*, IDAHO STATESMAN, September 19, 2002.

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 new to our national experience. Nor is it to suggest that they 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 courts."⁸¹ 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

⁸¹ Testimony of Roger Hartley, November 1, 2002 at 115, 116.

to the victims and their families.” The note identified him as chairman of appropriations, and was interpreted by one newspaper as a budgetary threat.⁸²

- 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.⁸³

- 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.⁸⁴

- 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 animus there that motivates that,”⁸⁵ 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.⁸⁶

- 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

⁸² Lisa Getter, Mitchell Landsberg, *Decision 2000/America Waits*, LOS ANGELES TIMES, November 16, 2000 A21.

⁸³ Matthew Mosk, *Legislative Antagonism to Courts Intensifying*, THE WASHINGTON POST, March 27, 2000 B01.

⁸⁴ Aviam Soifer, *Legislators Seek to Undermine State’s Separation of Powers*, BOSTON HERALD, October 13, 2002.

⁸⁵ Testimony of Andru Volinsky, September 27, 2002 at 136.

⁸⁶ *As Shaheen Plans are Foiled, Some Judges Fallout of Favor*, BOSTON GLOBE, May 2, 1999.

redistricting case. A Democratic Senator acknowledged that the cuts were not unrelated to the judge's decision.⁸⁷

- 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.⁸⁸

- 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."⁸⁹

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.

⁸⁷ Scott Mooneyham, *State Budget Keeps Judiciary Cuts*, THE NEWS & OBSERVER, June 20, 2002.

⁸⁸ 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).

⁸⁹ Adrian Walker, *A Matter of Justice*, BOSTON GLOBE, July 25, 2002.

- 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.⁹⁰

- 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.⁹¹

- 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.⁹²

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 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."⁹³

⁹⁰ 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.

⁹¹ *Removing Trump Card: Judicial Reform Not Up to Judges*, MANCHESTER UNION LEADER, April 30, 2001.

⁹² *The Governor's Attack on the Judges*, THE NEW YORK TIMES, A-14, Feb 3, 1996.

⁹³ Ross Sneyd, *Senators Seek to Open Retention Process*, Associated Press, Feb. 10, 1999.

- 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.⁹⁴

- 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.⁹⁵

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.

- 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.⁹⁶

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

⁹⁴ Shirley Elder, Supreme Court Controversies Have Staying Power, BOSTON GLOBE, June 24, 2001.

⁹⁵ "Senator Ready to Impeach Judges" CASPER (WYOMING) STAR-TRIBUNE, June 9, 2001.

⁹⁶ Associated Press, *Lawmakers Want to Curtail New Jersey's Supreme Court's Power*, TRENTON TIMES, December 12, 2000.

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 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.”⁹⁷

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:

⁹⁷ *Some Judges Mull Lawsuit Over Pay Freeze*, THE HERALD NEWS, July 15, 2002.

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.⁹⁸

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."⁹⁹

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,¹⁰⁰ 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.¹⁰¹ 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

⁹⁸ 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).

⁹⁹ *The Case for Raising Judicial Salaries*, *LOS ANGELES LAWYER*, February, 2001.

¹⁰⁰ Testimony of Roger Hartley, November 1, 2002 at 118-19 (discussing the courts' unique disadvantages in securing adequate funding from legislatures).

¹⁰¹ *The Price of Justice*, *ABA JOURNAL E-REPORT*, May 10, 2002.

legislature.”¹⁰² 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.”¹⁰³

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 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.¹⁰⁴ 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.¹⁰⁵ 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

¹⁰² John Hanna, *Supreme Court’s Budget Order Alters Balance of Power in Government*, Associated Press, March 17, 2002.

¹⁰³ 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.

¹⁰⁴ NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 76 (2001)

¹⁰⁵ *Id.* at 11.

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 significant opposition on the basis of a sentence he imposed in a single case.¹⁰⁶

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

¹⁰⁶ R. Bruce Dold, *Judges Up for Election Walking a Delicate Tightrope*, CHICAGO TRIBUNE, October 23, 1998, N27.

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.”¹⁰⁷

- 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 judges felt under pressure to raise money for their campaigns during election years, as compared to 36% of high court justices.¹⁰⁸

- 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.”¹⁰⁹

- 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

¹⁰⁷ *Consumer Coalition Calls on State Officials to Investigate Corporate Efforts to Intimidate and Oust Judges*, October 2, 2002 (press release).

¹⁰⁸ <http://faircourts.org/files/JASJudgesSurveyResults.pdf>

¹⁰⁹ *Id.*

it had gotten worse (although as compared to trial judges, a higher proportion of high court justices thought it was “much” worse), and 7% of whom thought it had gotten better.¹¹⁰

- 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 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 won an action in federal district court, relying on *White* in support of the proposition that an ongoing disciplinary proceeding investigating his campaign related conduct violates his first amendment rights.¹¹¹

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

¹¹⁰ Id.

¹¹¹ *Spargo v. New York State Commn. On Judicial Conduct*, 244 F.Supp.2d 72 (NDNY 2003); see, Andrew Tilghman, *Ethics Probe Targets Judge*, TIMESUNION.COM, October 19, 2002.

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. Without disputing that, until very recently, the rate of civil filings generally has followed a longstanding upward trajectory, it is worthy of note that tort filings specifically have bucked this trend, declining by ten percent between 1991 and 2000.¹¹² 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 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.¹¹³

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.¹¹⁴

¹¹² NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS, 1999-2000: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 26 (2001).

¹¹³ 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).

¹¹⁴ NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS (2001).

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 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.”¹¹⁵ 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

¹¹⁵ NATIONAL CENTER FOR STATE COURTS, *TRENDS IN THE STATE COURTS* 30 (2001).

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?¹¹⁶

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 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.¹¹⁷

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

¹¹⁶ Testimony of David Tevelin, September 27, 2002 at 212.

¹¹⁷ *Id.* at 214.

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 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.¹¹⁸ 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.¹¹⁹

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

¹¹⁸ See note 24, *supra*.

¹¹⁹ National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (1999).

lawyers polled believe that “very much” racial bias exists in the justice system; and 55% of white lawyers believe “some” racial bias exists.¹²⁰

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 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. This both explains and justifies the need for a diverse judicial system as the seventh principle for the 21st century judiciary, as discussed in Section I of this Report.

Among the 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.¹²¹ 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.¹²² Bryan Stevenson, Executive Director of the Equal

¹²⁰ Terry Carter, *Divided Justice*, A.B.A. J. 43 (February 1999).

¹²¹ 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).

¹²² *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.

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 that has unlimited peremptory strikes . . . [W]e still have cases where the majority of black counties, African American defendants are tried by all-white juries that involved 24 or 26 peremptory strikes being used.¹²³

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 and the Alabama Court of Criminal Appeals.”¹²⁴

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.

[W]e also 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 the year 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. And, of course, as these trends continue, the kind of political reforms many of us even thought possible become less and less viable.¹²⁵

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

¹²³ 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.

¹²⁴ Testimony of Bryan Stevenson, at 28.

¹²⁵ *Id.* at 52.

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.¹²⁶

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

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.¹²⁷

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.¹²⁸

Where experienced minority lawyers are relatively scarce, it becomes increasingly important that legislatures and governors in states using merit selection systems make

¹²⁶ Testimony of John Bonifaz before the ABA Commission on Public Financing of Judicial Campaigns, November 17, 2000, at 162-63.

¹²⁷ Testimony of Lisa Chang, September 27, 2002, at 104-05.

¹²⁸ Testimony of Suzanne Townsend, November 1, 2002, at 43-44.

conscious efforts not to overlook the qualified minority candidates who *are* available for judicial posts, as this can exacerbate public perceptions of exclusion.¹²⁹ It is also clear that these governors must be alert to the racial make-up of the judicial nominating 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.¹³⁰

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.¹³¹

¹²⁹ 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.

¹³⁰ See Malia Reddick, Merit Selection: A Review of the Social Scientific Literature, 106 DICK. L. REV. 729, 730-32 (2002).

¹³¹ Testimony of Malcolm Robinson, November 22, 2002, at 101-03.

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 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.¹³²

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.”¹³³ 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.”¹³⁴

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

¹³² Testimony of Constance Rice before the ABA Commission on Separation of Powers and Judicial Independence, February 21, 1997 at 244-45, 248-49.

¹³³ Testimony of Lisa Chang, September 27, 2002, at 94.

¹³⁴ Testimony of Patricio Serna, November 1, 2002, at 32.

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 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.”¹³⁵

Stephen Bright offered the Commission 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.¹³⁶

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

¹³⁵ Testimony of John Bonifaz, before the ABA Commission on Public Financing of Judicial Campaigns, November 17, 2000 at 166-68.

¹³⁶ Testimony of Stephen Bright, November 22, 2002 at 177, 179.

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 “trial judge” is increasingly becoming a contradiction in terms as fewer cases go to trial in state or federal courts.¹³⁷ 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 rolls 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 1989.¹³⁸ 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

¹³⁷ Hope Viner Samborn, *The Vanishing Trial*, ABA J. 24 (October 2002).

¹³⁸ Symposium, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 FORDHAM URB. L. J. 1790, 1805 (2002).

and is credited with setting off what Chief Judge of New York Judith S. Kaye has called “the quiet revolution called problem-solving justice.”¹³⁹ The idea has been extended beyond drug courts to encompass dozens of specialized areas of concern, including: mental illness, domestic violence, as well as numerous “quality-of-life” crimes such as prostitution and shoplifting.

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.¹⁴⁰

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

¹³⁹ Judith S. Kaye, *Problem-Solving Courts: Keynote Address*, 29 FORDHAM URB. L.J. 1925, 1928 (2002).

¹⁴⁰ See testimony of Greg Berman, September 27, 2002, at 179-80.

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.¹⁴¹

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.¹⁴²

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

¹⁴¹ Quoted in Greg Berman, What is a Traditional Judge Anyway? Problem-solving in the State Courts, 84 JUDICATURE 78, 80 (2000).

¹⁴² Greg Berman and John Feinblatt, *Problem-solving Courts: A Brief Primer*, 23 LAW & POLICY 9, 9-10 (2001).

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 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.”¹⁴³

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.¹⁴⁴

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, a lack of public confidence in the justice system, especially within communities of color. It is therefore understandable that

¹⁴³ Aubrey Fox, panelist, Eleventh Annual Symposium on Contemporary Urban Challenges, *What the Data Shows*, 29 *FORDHAM URB. L. J.* 1827, 1843 (2002).

¹⁴⁴ 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?"¹⁴⁵

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

In *The Federalist Papers*, Alexander Hamilton remarked that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the

¹⁴⁵ Testimony of Greg Berman, September 27, 2002, at 183, 186.

Constitution, because it will be least in capacity to annoy or injure them.”¹⁴⁶ Unlike the political branches, the judiciary possesses neither the sword nor the purse. The courts are dependent on Congress for their funds and on the President to execute their orders, which ensures that the judiciary cannot 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 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 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 discussion of judicial selection. The Commission believes, however, that the importance of a well-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

¹⁴⁶ THE FEDERALIST PAPERS, No. 78.

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 highly 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.

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.¹⁴⁷

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.¹⁴⁸ 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.

The Commission likewise believes that judicial selection commissions should be constituted with an eye toward achieving diversity within the judicial system, which, as discussed in Part I of this Report, is the seventh of eight enduring principles that ought to guide the 21st century judiciary. As elaborated upon below in its discussion of recommendations related to diversifying the judicial system, the Commission believes

¹⁴⁷ 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.

¹⁴⁸ 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.

that diversification of judicial selection commissions is instrumental to achieving greater diversity of the judiciary itself.

The Commission recommends that the judicial branch take primary responsibility for providing continuing judicial education, that continuing judicial education be required for all judges, and that state appropriations be sufficient to provide adequate funding for continuing judicial education programs

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. This objective can only be met if all judges participate in continuing judicial education programs and have an obligation to do so. 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.¹⁴⁹ For that reason, the Commission recommends that the judicial branch take primary responsibility for providing judicial education services to the judges of the state, and that the states adequately fund such programs. The New York State Judicial Institute and the National Judicial College are but two examples of how judicial education can be provided.

¹⁴⁹ 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.

The Commission recommends that Congress fully fund the State Justice Institute

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 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.¹⁵⁰ 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 therefore recommends that the SJI be

¹⁵⁰ Testimony of David Tevelin, September 27, 2002 at 202, 209.

fully funded, for reasons including but not limited to the important role it plays in furthering judicial education.

The Commission recommends that the states fully fund the National Center for State Courts

The National Center for State Courts is the single most important source of information and analysis on state court operations in the United States. The Commission has depended heavily on National Center reports, questionnaires, data, and the assistance of NSCS personnel in the preparation of this report. Anyone who does serious research or writing on the state courts relies upon information that the National Center provides. Even more important, perhaps, anyone who is concerned about the role of the courts in the 21st Century and is committed to improving their performance depends on National Center data, research and analysis for guidance. Much of the funding for the National Center for State Courts comes from the states themselves. The Commission therefore recommends that states fully fund the National Center. As many states confront fiscal crises across the country, and legislatures look for ways to trim state budgets, the Commission seeks to emphasize the enormous contribution that the National Center makes relative to the modest contribution of dollars needed to underwrite its operations.

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 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.¹⁵¹

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.¹⁵² 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-

¹⁵¹ *Sizing Up State Judges*, DES MOINES REGISTER, October 4, 2000.

¹⁵² Seth Andersen, *Judicial Retention Evaluation Programs*, 34 Loy. L.A. L. Rev. 1375, 1379 (2001).

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 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.”¹⁵³ 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,

¹⁵³ Cindi Ross Scoppe, *Evaluations Show Toal, Other Judges Doing a Pretty Good Job*, THE STATE, January 2, 2001.

impartiality and the rule of law. There are, however, other means to promote accountability that the Commission supports and seeks to enhance.

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.¹⁵⁴

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 all but 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

¹⁵⁴ See, *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Spargo v. New York State Commn. on Judicial Conduct*, 244 F. Supp.2d 72 (N.D.N.Y. 2003); see also, 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).

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.”¹⁵⁵

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,¹⁵⁶ 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

¹⁵⁵ Matthew Eisley, *Voters in Dark about Judges’ Ethical Records*, RALEIGH NEWS & OBSERVER, October 14, 2002.

¹⁵⁶ 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.¹⁵⁷

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 Justice System

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.

¹⁵⁷ *Id.* at 246-47.

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 that 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 that members of the legal profession expand their use of training and recruitment programs to encourage minority lawyers to join their firms, to include them fully in firm life, and to prepare them for pursuing careers on the bench following their years in practice

Diversity among the ranks of legal professionals is critical not only to the perception of inclusiveness, but also to its reality. It is imperative that the legal profession aggressively assumes a leadership role and approaches diversification with conscious, persistent, and zealous commitment.

To be sure, minority lawyers should be actively recruited to join established firms, but that is only the beginning. For generations, firms have made it their business to train, mentor, and acculturate new recruits, to the end of grooming them for partnership and beyond, including careers on the bench. The practicing bar needs to appreciate, however, that for young minority lawyers—who may perceive themselves (and be perceived) as outsiders thrust into an unfamiliar environment—special efforts need to be

taken to communicate the message that firm training and mentoring processes are there for the benefit of *all* firm lawyers, including them. For that reason, Commission advisor Bernard F. Ashe has written that lawyers “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.”¹⁵⁸

The Commission recommends that states with commissions to evaluate the qualifications of judicial aspirants strive to diversify those commissions and sensitize them to the need to assess qualifications more flexibly and inclusively

Some Commission witnesses expressed the concern that for judicial aspirants of color, appointive systems can be a closed door: they do not know where to begin, who to contact or how to initiate the process. To a significant extent, this problem is addressed by the preceding recommendation: if minority lawyers, to no less an extent than their majority counterparts, come to enjoy the benefits of training, mentoring and inclusion in the life and politics of the profession, they will be equipped with the tools they need to secure judicial office regardless of the method by which judges are selected. In states that appoint their judges with the assistance of nominating commissions, however, additional steps can be taken to promote diversification of the bench more actively.

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,

¹⁵⁸ Bernard F. Ashe, *Racial Progress in the New Millennium—A Different Shade: Mentoring and Outreach, Not Buzzwords*, 11 EXPERIENCE 2, 21 (Winter 2001).

¹⁵⁹ See Malia Reddick, note 130, *supra*, at 740-42 (2002).

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 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 that 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.

¹⁶⁰ *Id.* at 740-41.

¹⁶¹ *Id.* at 731-32.

Integral to communicating the message that judicial office is available to minority lawyers, is the nominating commission's appreciation for the need to assess the qualifications of all judicial aspirants with sensitivity. Some seemingly neutral indicia of a meritorious candidate may inadvertently exclude minority lawyers who lack such indicia for reasons that have little bearing on their qualifications for judicial office. Thus, for example, Brennan Center Deputy Director Deborah Goldberg reported to the Commission on a nominating commission that had evaluated applicant credentials with reference to their securities litigation experience—a practice area traditionally dominated by white males. Our point is not to suggest that nomination commissions should abandon traditional criteria for evaluating candidate qualifications; our point is simply that traditional criteria can be freighted with traditional biases that nomination commissions should avoid by examining candidate qualifications with greater flexibility and sensitivity.

The Commission recommends that lawyers and judges participate in an aggressive outreach effort to encourage minority enrollment in colleges and law schools

Diversity efforts within the bench and bar can only be so successful without a qualified pool of diverse law school graduates. African-American and Hispanic lawyers comprise only 4% and 3% respectively of lawyers in the United States—far below their representation in the general population. The percentage of minority lawyers who occupy leadership positions within the profession is lower still.¹⁶² 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

¹⁶² 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.

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.”¹⁶³

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.”¹⁶⁴

The state of the law regarding race-conscious admissions policies is currently before the U.S. Supreme Court. Although that decision may affect the *manner* in which state institutions are permitted to improve minority enrollment, it should have no bearing on their continuing commitment to do everything within their constitutional power to create a student body that reflects the diversity of the society that college and law school graduates serve. Regardless of the Supreme Court's decision, then, 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 have to go even to high schools, because there's a disproportionate dropout rate amongst minorities.”¹⁶⁵ 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 active promotion of a representative work force and diverse court appointments

¹⁶³ Testimony of Patricio M. Serna, November 1, 2002, at 25-26.

¹⁶⁴ See Elizabeth Chambliss, *supra* note 162, at 1.

¹⁶⁵ Testimony of Patricio M. Serna, at 26.

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 databases, approaching minority colleges, and contacting minority professional associations," as important outreach efforts in this regard.¹⁶⁶

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."¹⁶⁷ 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,"¹⁶⁸ 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.

¹⁶⁶ 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.

¹⁶⁷ Foreword, *Translations of Commonly Used Court Phrases*, American Bar Association Judicial Division (1998).

¹⁶⁸ *Translations of Commonly Used Court Phrases*, American Bar Association Judicial Division (1998).

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.

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.¹⁶⁹ Yet as the Conference of State Court Administrators has noted, and this Commission strongly agrees, “States would benefit 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.”¹⁷⁰

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

Among people of color recently surveyed, 77% believed that “Juries are the most important part of our judicial system.”¹⁷¹ 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.”¹⁷²

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

¹⁶⁹ 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.

¹⁷⁰ Conference of State Court Administrators, *White Paper on State Court’s Responsibility to Address Issues of Racial and Ethnic Fairness*, at 6, National Center for State Courts, Government Relations Office (2001).

¹⁷¹ *Perceptions of the U.S. Justice System*, note 69 *supra*, at Table 6.

¹⁷² Conference of State Court Administrators, *White Paper on State Court’s Responsibility to Address Issues of Racial and Ethnic Fairness*, at 4.

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 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, the importance of juries, and the relevance of judicial independence and accountability to the role courts play in American government. It likewise creates a duty on judges and court personnel to treat jurors with fairness and respect, because for many people, jury service will be their only point of interaction with the justice system.

The Commission recommends that courts engage and collaborate with 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 become involved with civic organizations and primary and secondary schools, speaking at school and organization events 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. The ABA Judicial Division Judges Network is an example of judges reaching out to their communities. As problem-solving justice becomes increasingly pervasive, the importance of these outreach efforts will only become greater.

The Commission encourages the continuation 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 achieve promising results in the areas of crime, substance abuse, juvenile delinquency and family law. Our Commission, however, has not been created for the purpose of developing strategies to improve the enforcement of substantive law. We have been asked to explore ways in which a politicized judiciary may be made less so, and to that end, 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 call upon judges to further modify 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 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 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.”¹⁷³ Although we might not go quite that far, it is fairly said that there is no perfect selection system.

¹⁷³ Paul Carrington and Adam Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 471 (2002).

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, recognizing that one size does not fit all and that our preferred system of selection may not be as well suited as other alternatives for adoption in some states. We will then present additional recommendations to improve other selection systems in states that are unprepared to adopt our primary recommendations.¹⁷⁴

1. The Preferred System of Judicial Selection

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

- The Commission recommends that the governor 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**

¹⁷⁴ The Commission was unanimous in its view that our recommendations should be sequenced so as to better meet different needs of different states with flexibility. And the Commission was virtually unanimous that the sequence we present here was optimal.

- **The Commission recommends that judicial appointees serve a single, lengthy term of at least 15 years or until a specified age and not be subject to a reselection process. Judges so appointed should be entitled to retirement benefits upon completion of judicial service**

- **The Commission recommends that judges not otherwise subject to reselection, nonetheless remain subject to regular judicial performance evaluations, and disciplinary processes that include removal for misconduct.**

The American Bar Association has long supported appointive-based, or so-called “merit selection” systems for the selection of state judges, 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, 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.

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 also 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.

The Commission did, however, consider another possibility: legislative

confirmation of gubernatorial appointments. Requiring that judges be approved by an independent commission and *both* political branches of government could conceivably increase public confidence in the judges at the point of initial selection and serve as a form of prospective accountability that reduces the need for resort to more problematic reselection processes later. A majority of the Commission ultimately decided, however, not to recommend legislative confirmation as a component of its preferred selection system. The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states has led the Commission not to recommend such an approach.

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 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.

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. Thus, for example, the issue arises in states that delegate the task of judicial reselection to legislatures, whose enactments judges are to interpret, and if unconstitutional, invalidate. 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 remained flexible as to the optimal length of a judge’s term of office. 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. In either case, however, it is important that states take pains to preserve judicial retirement benefits, because judicial office will lose its appeal to the best and brightest lawyers if judges are obligated to conclude judicial service before their retirement benefits vest.

If states opt for a single term, 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. 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.

In earlier recommendations, the Commission urged that systems of judicial discipline be actively enforced, and that regular and comprehensive judicial evaluation programs be instituted. These recommendations are critically important to ensuring accountability in a system that does not rely on reselection processes. All states have procedures for judicial removal, typically including but not limited to those subsumed by the disciplinary process.

The Commission believes that judges must be removable for cause, to preserve the institutional legitimacy of the courts. It is beyond the scope of this report to describe in detail the nature and extent of “for cause” removal. By way of general guidance, however, the Commission points to the enduring principles discussed in the first part of this report. An overriding goal of our system of justice is to uphold the rule of law. Judges should never be subject to removal for upholding the law as they construe it to be written, even when they are in error, for then the judge’s decision-making independence—so essential to safeguarding the rule of law in the long run—will be undermined. On the other hand, we do not want judges who are so independent that they

are utterly unaccountable to the rule of law they have sworn to uphold. Thus, judges who disregard the rule of law altogether by taking bribes or committing other crimes that undermine public confidence in the courts, should be removed. One could reach a similar conclusion with respect to judges who, despite the best efforts of nominating commissions to weed out unqualified candidates, manifest an utter lack of the competence, character or temperament requisite to upholding the law impartially.

2. Alternative Recommendations on Systems of Judicial Selection

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,¹⁷⁵ 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.

For states that cannot abandon reselection processes altogether, the Commission recommends that judges be subject to reappointment by a credible, neutral, non-partisan, diverse deliberative body

States reluctant to relinquish control over judicial reselection can reduce the risk that judges will lose their tenure for reasons detrimental to judicial independence and impartiality by delegating the task of reappointing judges to the same commissions that are to assist in the process of initial selection. A Commission-based reselection process, such as that used in Hawaii, may be better suited than contested or retention elections to

¹⁷⁵ Thomas Phillips, *When Money Talks, the Judiciary Must Balk*, THE WASHINGTON POST, April 14, 2002 at B2 (quoting Professor Roy Schotland).

evaluating judicial performance with reference to incumbents' competence, diligence character and temperament, and without regard to the popularity of the judges' rulings.

For states that cannot 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 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 qualifications are approved by a merit-selection commission. Typically, merit selection systems require appointed judges to stand for retention elections after a term of years. The Commission's preferred method of judicial selection embraces all aspects of traditional merit selection systems, except the retention election feature. 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 traditional 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.¹⁷⁶

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

¹⁷⁶ 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.

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 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 have been 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.¹⁷⁷ 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.¹⁷⁸

For 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.¹⁷⁹ At our Portland, Oregon hearing, the Honorable Gerry Alexander,

¹⁷⁷ Call to Action: Statement of the National Summit on Improving Judicial Selection, January 16, 2001.

¹⁷⁷ Testimony of Morris Overstreet, November 22, 2002 at 77-78.

¹⁷⁷ Testimony of Joseph Tomain, August 21, 2002, at 168.

¹⁷⁸ Testimony of Morris Overstreet, November 22, 2002 at 77-78.

¹⁷⁹ Testimony of Joseph Tomain, August 21, 2002, at 168.

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 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.¹⁸⁰

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. We therefore share the views of the state Chief Justices who, in their call to action following a summit meeting on judicial selection concluded:

State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates. Congress should provide a free mailing frank to any voters' guide sponsored by a state or local government.¹⁸¹

For states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities

¹⁸⁰ Hearing before the ABA Commission on Public Financing of Judicial Campaigns, January 27, 2001 at 113-16.

¹⁸⁰ *Call to Action*, 34 Loy. L. A. L. REV. 1353, 1357 (2001),

initiate a dialogue among affected interests, 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.¹⁸²

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."¹⁸³ 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

¹⁸² Testimony of Thomas Gottschalk, November 22, 2002 at 196.

¹⁸² *Id.* at 226 (statement of Robert Peck).

¹⁸² *Id.* at 222 (testimony of Thomas Gottschalk).

¹⁸² *Id.* at 226 (statement of Robert Peck).

¹⁸² *Id.* at 222 (testimony of Thomas Gottschalk).

¹⁸² *Id.* at 226 (statement of Robert Peck).

¹⁸² *Id.* at 226 (statement of Robert Peck).

bilateral steps that could be taken there.”¹⁸⁴ 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.

For 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 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

¹⁸⁴ *Id.* at 222 (testimony of Thomas Gottschalk).

encountered in the previous election cycle.¹⁸⁵ 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.¹⁸⁶ 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 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.

¹⁸⁵ Testimony of Dennis Archer, August 21, 2002.

¹⁸⁶ See <http://www.constitutionproject.org/ci/standards.pdf>.

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, 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.¹⁸⁷

For states that retain contested judicial elections and do not adopt systems of public financing, the Commission recommends that states impose limits on contributions to judicial campaigns

In states that continue to finance elections through private contributions, the perception that judges are influenced by their contributors is exacerbated to the extent that contributions are permitted in amounts large enough to foster such perceptions. The ABA has recently amended the Model Rules of Judicial Conduct to require that a judge

¹⁸⁷ See REPORT OF THE ABA COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001).

recuse himself in cases where a lawyer or litigant has contributed to the judge's campaign in excess of a specified amount. In addition, however, the states should impose caps on contributions to judicial campaigns, and establish maximum contributions at a level that will reduce the appearance that judges are dependant on or beholden to any one individual, interest group, law firm or corporation.

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.

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."¹⁸⁸

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, 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.

¹⁸⁸ David Hudson Jr., *Courts' Cash Crunch*, *ABA J. E-REPORT*, January 24, 2003.

The Commission recommends the establishment of standards for minimum funding of judicial systems

State courts must be adequately funded. The fair and impartial administration of justice is a priority of the highest order. Protecting and preserving that system requires adequate funding for judgeships, staff, facilities and jury trials. 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. "Minimum funding standards" as that phrase is used here, does not mean setting minimum dollar amounts for state appropriations to the judicial branch. Rather, it means isolating the core functions that a judiciary and the judicial system must perform and the critical services it must provide, for the benefit of lawmakers confronting hard choices when crafting state budgets. In times of fiscal austerity, all branches of government must make sacrifices; minimum funding standards can assist judges and legislators in establishing the floor below which state budgets must not go if the judicial system's core mission is to be preserved.

The Commission notes that some research and writing has been devoted to the issue of adequate court funding.¹⁸⁹ To date, however, no comprehensive effort has been

¹⁸⁹ See, e.g. INSTITUTE FOR COURT MANAGEMENT, COURTS AND THE PUBLIC INTEREST: A CALL FOR SUSTAINABLE RESOURCES (May 2002).

undertaken to explore minimum funding standards that the Commission recommends here.

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 non-transferable 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.¹⁹⁰ 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 request before it is acted upon by state legislature, 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

¹⁹⁰ 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."

one item to another.¹⁹¹ The net effect is to invite micromanagement, or worse—retaliatory budget cuts of particular line items, as discussed in Part II of this report. To the extent that states preserve line itemization as a means to preserve the judiciary’s financial accountability, the burden on courts can be reduced if they are authorized to transfer funds among approved line items.

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. 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. State judge pay ranges often fall below that of many state and local officials; in California, for example, trial judges are paid less than many county sheriffs and district attorneys.

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

¹⁹¹ Hearing of November 1, 2002 at 148-49 (statement of Hon. Margaret Marshall).

the political branches.¹⁹² Washington is not the only state to employ a salary commission of this kind. Some twenty states currently employ salary commissions of some kind, of which nine have the power to issue binding recommendations, unless affirmatively disapproved.¹⁹³

The Commission regards this as a very promising avenue to explore. The ABA Standing Committee on Judicial Independence is currently developing a detailed salary commission proposal, and the Commission supports the Standing Committee in its efforts.

The Commission recommends that states 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 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 create opportunities for regular meetings among representatives from the three branches of government, to discuss issues of mutual concern. Such meetings can take a variety of forms: states may constitute tri-

¹⁹² Testimony of Hon. Gerry Alexander, November 1, 2002 at 169-72.

¹⁹³ JANICE FERNETTE & MARY PAT BERKENBAUGH, JUDICIAL COMPENSATION COMMISSIONS (National Center for State Courts 1994).

branch commissions to improve court operations; one branch of government may host periodic conclaves; state law schools may host periodic conferences; and individual judges may simply reach out to their local legislators. The ABA Standing Committee on Judicial Independence is seeking to establish a model for this kind of interbranch activity, and the Commission encourages these efforts.

APPENDIX 1

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
Article I. 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
The Justice at Stake Campaign

APPENDIX 2

STATEMENT OF PRINCIPLES REGARDING MICHIGAN JUDICIAL CAMPAIGNS

We, the undersigned, agree that judicial campaigns should be conducted in a manner that encourages public trust and confidence in the justice system. Accordingly, we agree that judicial campaigns, whether conducted on behalf of candidates for judicial office or by others interested in the election of particular judicial candidates, should adhere to the following practices:

- (1) criminal conduct shall not be attributed to a judicial candidate (unless consistent with the ruling of an official regulatory or judicial body);
- (2) racial or ethnic bias shall not be attributed to a judicial candidate (unless consistent with the ruling of an official regulatory or judicial body);
- (3) immoral conduct shall not be attributed to a judicial candidate (unless consistent with the ruling of an official regulatory or judicial body);
- (4) knowing misrepresentations about a judicial candidate are not appropriate subjects for an advertisement about the judicial candidate; and
- (5) professional or judicial misconduct shall not be attributed to a judicial candidate directly or by inference (unless consistent with the ruling of an official regulatory or judicial body).