

JUSTICE IN JEOPARDY: THE ABA PERSPECTIVE

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When we discuss merit selection, we are, in truth, discussing the very definition of judicial independence and how it can be accomplished in an age that our Founding Fathers could not have possibly envisioned. In 1780, nearly a decade before the United States Constitution was ratified, the Commonwealth of Massachusetts adopted a constitution of its own, which in large part was drafted by John Adams.¹ It says:

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.²

Those are more than just words; they are enduring principles that should guide us, even today. As we consider our extraordinary and unique history, we know that those principles have faced, and will continue to face, challenges that threaten a fair legal process. As we all know, the drafters of the Constitution specifically separated our government into three, co-equal branches to prevent the excessive accumulation of power by the legislative, executive, or judicial branches.³

Alexander Hamilton understood the inherent challenge for our courts in this organization of government. In Federalist Paper No. 78, Hamilton wrote that the judiciary “is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.”⁴

“Judicial independence is critical to sustaining our democratic form of government, established by the U.S. Constitution”⁵ and state constitutions. “Judges must have the ability to make decisions to protect and enforce the rights of the [P]eople—including the rights of the minority against the tyranny of the majority.”⁶ Without those rights, as defended by our courts, authorities could kick down a door whenever they choose, record conversations on phones and computers at a whim, or prevent peaceful political demonstrations. When a judge makes a decision, it should be made without fear of intimidation or

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1. LEONARD W. LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY 307-08 (1995).

2. MASS. CONST. pt. 1, art. XXIX.

3. 16A AM. JUR. 2D *Constitutional Law* § 239 (2012).

4. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

5. Wm. T. (Bill) Robinson, *Why We Need an Independent Judiciary*, HUFFINGTON POST (Dec. 14, 2011, 5:00 PM), http://www.huffingtonpost.com/um-f-bill-robinson/why-we-need-an-indepen/_b_1149531.html.

6. *Id.* See also James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 463-66 (1999).

retaliation.⁷ It should be respected and enforced by the legislative and executive branches.⁸ In return for its confidence, the public expects that the judiciary will not be unduly swayed by outside influence.⁹ This is personal for me. I litigate and try cases for clients. I want a judge who will make decisions in each case based on the proven facts and the applicable law. The judge hearing my case—indeed hearing every case—should be guided by these principles.

As important as an independent judiciary is to the rule of law and our constitutional republic, public trust and confidence are equally so.¹⁰ Without them, democratic institutions would become increasingly non-functional and potentially irrelevant.¹¹ We know that some Americans have lost faith that our system is just and fair.¹² They have the perception that certain judges are controlled by special interests, the wealthy, and the powerful.¹³ Some Americans believe that judges are unconcerned about the rights of racial, ethnic, and political minorities.¹⁴ Alternatively, people believe that our courts are too tolerant of those of a different color or creed.¹⁵

Some candidates in this campaign season are taking advantage of this lack of public trust to advance their own political agendas.¹⁶ Abolish courts, ignore

7. See ROBERT A. KATZMANN, *COURTS & CONGRESS* 3 (1997).

8. See, e.g., Francisco R. Angones, *Protecting Our Independent Judiciary*, 82-MAY FLA. B.J. 8, 8 (2008).

9. See Sandra Day O'Connor, *Judicial Independence and 21st Century Challenges* (2011), in *BENCHER* (July/Aug. 2012), available at <http://home.innocourts.org/news/featured-bencher-article-judicial-independence-and-21st-century-challenges.aspx>; see also Robinson, *supra* note 5.

10. See Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT'L L. 102, 117-18 (2005) (recognizing the importance of perceptions of justice to the proper functioning of any legal system).

11. O'Connor, *supra* note 9, at 10; Robinson, *supra* note 5.

12. Anthony V. Curto, Op-Ed., *No Justice for All—How Our Civil Justice System is Failing Americans*, FOX NEWS (Aug. 10, 2012), www.foxnews.com/opinion/2012/08/10/no-justice-for-all-how-our-civil-justice-system-is-failing-americans/.

13. E.g., Matt Cantor, *Special Interests Control Our Judges*, NEWSER (Oct. 31, 2011, 4:59 PM), <http://www.newser.com/story/132213/special-interests-hold-sway-in-judicial-elections-adam-cohen.html>; Adam Cohen, *Judges Are for Sale—and Special Interests Are Buying*, TIME (Oct. 31, 2011), <http://ideas.time.com/2011/10/31/judges-are-for-sale-and-special-interests-are-buying/>.

14. See, e.g., ALFRED P. CARLTON, JR., *JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY* 60 (2003), available at www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf; Elizabeth Neeley, *Racial and Ethnic Bias in the Courts: Impressions from Public Hearings*, 40 CT. REV. 26, 29 (2004).

15. See, e.g., Panel Discussion at the Nat'l Conference on Public Trust and Confidence in the Justice System, *Public Opinion of the Courts: How It Has Been Formed and How We May Reshape It*, 24 CT. REV. 46, 51 (1999), available at <http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3%20Crier.pdf> (panelist Lawrence Dark stated, "I was stunned so many white people said that they saw racial bias in the system.").

16. See Newt 2012 Staff, *Bringing the Courts Back Under the Constitution* 27-28 (Oct. 7,

rulings, impeach judges—these are just a few of the ideas the nominees for president have suggested to win over voters during this primary season.¹⁷ Judges are largely unresponsive to candidate claims that our courts are “grotesquely dictatorial,”¹⁸ or when the candidate says he would consider dispatching U.S. Marshals to round up judges to testify before Congress.¹⁹

“The judiciary is not a powerful interest group. Courts cannot raise money or marshal voters. Our courts are easy targets because judges do not respond to these attacks. Nor should they.”²⁰ As you all may know, this is not the first time the judiciary has faced these kinds of attacks. At the turn of the nineteenth century, Jeffersonian Republicans tried to impeach Supreme Court Justice Samuel Chase because they disagreed with his decisions.²¹ Thirty years later, Jacksonian Democrats sought “to control and, in some cases, defy state and federal courts.”²² Even later in history, President Roosevelt made a public warning that he was willing and able to pack the Supreme Court if he continued to receive resistance to his policy agenda from the Court.²³ Then, there were the threats to remove justices or ignore rulings from the Warren Court, often accompanied by threats of violence,²⁴ and let’s not forget the wave of virulent criticism against judges accused of “judicial activism” just fifteen years ago.²⁵

With that historical perspective in mind, one could argue that our courts will be at risk time and time again depending on the political winds in state and

2011) (unpublished manuscript), available at <http://www.newt.org/sites/newt.org/files/Courts.pdf>.

17. See, e.g., James Huffman, *Will Newt Neuter the Courts?*, DEFINING IDEAS (Jan. 26, 2012), <http://www.hoover.org/publications/defining-ideas/article/106386> (discussing former presidential candidate Newt Gingrich’s opinions on the judicial system); Naureen Khan, *Santorum: Abolish Courts that Are too Powerful*, NAT’L J. (updated Jan. 6, 2012, 10:37 AM), <http://www.nationaljournal.com/2012-presidential-campaign/santorum-abolish-courts-that-are-too-powerful-20120105>.

18. Nia-Malika Henderson, *Newt Gingrich Says U.S. ‘Courts Have Become Grotesquely Dictatorial,’* WASH. POST (Dec. 15, 2011, 10:24 PM), www.washingtonpost.com/blogs/election-2012/post/newt-gingrich-says-us-courts-have-become-grotesquely-dictatorial/2011/12/15/gIQA7pe5wO_blog.html.

19. Michael Ono, *Gingrich: Activist Judges Should Be Arrested*, ABCNEWS (Dec. 18, 2011, 8:10 PM), abcnews.go.com/blogs/politics/2011/12/gingrich-activist-judges-should-be-arrested/.

20. Robinson, *supra* note 5. See Editorial, *The Judicial Independence and Accountability Task Force*, 88 JUDICATURE 108, 121 (2004) (“The judiciary is frequently not in a position to respond to unwarranted attacks from another branch or from the public.”).

21. Emily Field Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressure on State Judiciaries*, in CARLTON, *supra* note 14, at app. E, p. 2.

22. CARLTON, *supra* note 14, at 2.

23. *Id.* at 2-3.

24. *Id.*

25. See, e.g., Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 155 (2003) (discussing a Free Congress Foundation program implemented in the mid-1990s in opposition to judicial activism).

federal governments. The American Bar Association's goal—and that of everyone who believes in America's exceptional, constitutional design for its Government—is to preserve our Founding Fathers' vision of the judiciary as the third, non-political branch and the one safe haven Americans have to resolve a dispute: our courts.²⁶ As Justice Sandra Day O'Connor said so eloquently, "In our system, the judiciary, unlike the legislative and the executive branches, is supposed to answer only to the law and the Constitution. Courts are supposed to be the one safe place where every citizen can receive a fair hearing."²⁷ Courts are supposed to be the one safe place, and yet we are increasingly seeing judicial elections that are focused on specific issues, ranging from abortion to product liability or school funding.²⁸

The message to the electorate is sometimes this simple: pick me, and I will make rulings that reflect your views regardless of the facts of the case. That message is antithetical to the principles of judicial independence, impartiality, and the rule of law. Then there are the issues that arise once a judge is elected. In *Caperton v. A.T. Massey Coal Co.*,²⁹ a 2009 Supreme Court case, the Court dealt with the issue of judicial recusal and campaign finance.³⁰ It dramatically demonstrated how litigants question whether they will receive impartial treatment when a judge hearing the case has received campaign contributions from the opposing party or its counsel.³¹ The amount involved in *Caperton* was extraordinary, but even much smaller contributions can make an opposing party in a case understandably lose confidence and trust in the justice system and give rise to a perception of dependence.³² Yet, a judge running for election or re-election will naturally turn to the legal community for support.

The ABA has guidelines for the recusal of judges and a policy for merit selection.³³ Although these are two different issues, they are linked: these policies limit the impact, and perceived impact, of political contributions on the outcome of cases.³⁴ Image has much to do with how the public respects our

26. *ABA Mission and Goals*, A.B.A., http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited Sept. 9, 2012).

27. Sandra Day O'Connor, Op-Ed., *Take Justice Off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9, available at <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html>.

28. See Adam Liptak, *Judges Mix with Politics*, N.Y. TIMES, Feb. 22, 2003, www.nytimes.com/2003/02/22/nyregion/judges-mix-with-politics.html?pagewanted=all&src=pm.

29. 556 U.S. 868 (2009).

30. *Id.* at 884, 887 (discussing an appellate court judge's failure to recuse himself when a party had donated \$3 million to his election campaign).

31. *Id.* at 889.

32. See *Judicial Disqualification Based on Campaign Contributions*, AM. JUDICATURE SOC'Y 7 (last updated Mar. 8, 2012), [http://www.ajs.org/ethics/pdfs/Disqualification Contributions.pdf](http://www.ajs.org/ethics/pdfs/Disqualification%20Contributions.pdf).

33. CARLTON, *supra* note 14, at 70.

34. See Elaine E. Buckle & Jeffrey Cole, *Thoughts on Safeguarding Judicial Independence: An Interview with Justice Sandra Day O'Connor*, 35 NO. 3 LITIG. 6 (2009) (quoting Sandra Day O'Connor listing merit selection and stronger recusal rules as to ways to engender an independent judiciary).

courts.³⁵ That is partially why we expect judges to uphold the highest ethical standards. For many years, the ABA has supported merit selection of judges and encouraged the use of commissions to evaluate credentials and professional qualifications of prospective appointees.³⁶

There are three important reasons for this policy, “First, the administration of justice should not turn on the outcome of [a] popularity contest[.]”³⁷ Second, the “appointment reduces the corrosive influence of money . . . by sparing candidates the need to solicit contributions from individuals and organizations with an interest in the cases the candidates will decide as judges.”³⁸ And third, the rising cost of these campaigns could discourage qualified candidates from running at all, especially as it relates to a diverse bench.³⁹ While the ABA prefers that judges not stand for election at all, we respect that individual states value citizen participation in making decisions about the judiciary.⁴⁰

Judges should be free from improper political influence, but they also should be accountable to the public for fairly and responsibly fulfilling their responsibilities.⁴¹ That is why the ABA also prefers retention elections over contested partisan races when states choose to retain elective systems.⁴² In keeping with the ABA’s goals of improving our profession, eliminating bias, and advancing the rule of law, in 2000, the House of Delegates approved a set of model standards for the selection of state judges,⁴³ and in 2003, the House approved a clearly enunciated set of principles to “ensure judicial independence, accountability and efficiency.”⁴⁴

The standards and principles were conceived with the input of ABA members, bar associations, judges, and other interested organizations and are intended to help guide states as they consider a transition toward a merit

35. Kevin M. LaCroix, *Justice Kagan at the University of Michigan Law School*, LEXISNEXIS CMTYS. SEC. L. BLOG (Sept. 13, 2012, 9:11 AM), www.lexisnexis.com/community/corpsec/blogs/corporateandsecuritieslawblog/archive/2012/09/13/justice-kagan-at-the-university-of-michigan-law-school.aspx.

36. CARLTON, *supra* note 14, at 70.

37. *Id.*

38. *Id.*

39. *Id.* at 70-71.

40. See Steve Brown, *American Bar Association Offers New Guide for Choosing State Judges*, CNSNEWS (July 7, 2008), <http://cnsnews.com/news/article/american-bar-association-offers-new-guide-choosing-state-judges> (“While the ABA prefers appointment . . . ‘Americans by and large prefer an elected to an appointed system.’”).

41. CARLTON, *supra* note 14, at 71.

42. A.B.A. COMM. ON THE 21ST CENTURY JUDICIARY, PRINCIPLES AND CONCLUSIONS AUGUST 2003 (2003), in CARLTON, *supra* note 14, at app. A, p. 2.

43. A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, STANDARDS ON STATE JUDICIAL SELECTION, at iv (2000), available at <http://www.lwvohio.org/assets/attachments/file/standards%20on%state%20Judicial%20selection.pdf> [hereinafter A.B.A. STANDARDS ON STATE JUDICIAL SELECTION].

44. See CARLTON, *supra* note 14, at app. A.

system.⁴⁵ The standards, which recognize that the American public is the most important constituency and consumer of the judicial system,⁴⁶ “address two main questions: what are the qualifications needed for a state judge and what is the best method to assess those qualifications[?]”⁴⁷ These standards find common ground between the ABA’s long-standing preference for merit selection and the appointive and elective processes in many states, but clearly this is an ongoing debate. For example, the Arkansas Bar Association created a task force to study reform of the judicial election process.⁴⁸ Pennsylvania also is considering whether to switch to a merit selection system.⁴⁹ Additionally, a proposal to give the Florida governor more say over judicial nominations died during the 2012 legislative session.⁵⁰

“No one claims that judges [and the selection systems we have in place] are infallible. . . . [A]ppellate courts within the judiciary, and a [process] of checks and balances . . . among the branches” exist, in part, for this reason.⁵¹ Further, “[w]e can, and should, pursue a thoughtful conversation about how to further improve and strengthen our judicial system,” and we can do it “without denigrating individual judges,” courts, or their decisions.⁵² To paraphrase former California Supreme Court Justice Joseph Grodin: we do not want, and we cannot allow, judges to be seen as simply legislators in robes.⁵³

While we will learn much from this Symposium about the current challenges facing the judicial selection process and strategies for its future, we must also address the underlying reality that there “is a pervasive lack of civics awareness in this country, going back at least two generations. . . . [W]orse [yet], the next

45. See, e.g., *Judicial Selection*, MO. BAR 12-13, http://members.mobar.org/pdfs/about/judicial_selection.pdf (last visited Dec. 4, 2012).

46. A.B.A. STANDARDS ON STATE JUDICIAL SELECTION, *supra* note 43, at 2.

47. *Id.* at iv.

48. See *For the Public*, ARK. BAR ASS’N, http://www.arkbar.com/pages/for_public.aspx (last visited Nov. 29, 2012).

49. See Kaleena Laputka, *Merit Selection: The Right Path for Pennsylvania*, CHOOSE JUDGES ON MERIT (Sept. 24, 2012, 2:02 PM), www.judgesonmerit.org/2012/09/24/merit-selection-the-right-path-for-pennsylvania/; see also Robert Speel, Op-Ed., *It Seems Foolish to Elect Appellate Court Judges*, PATRIOT-NEWS (May 20, 2011, 4:16 AM), http://www.pennlive.com/editorials/index.ssf/2011/05/it_seems_foolish_to_elect_app.html.

50. Katie Sanders, *House Won’t Hear Revised, Crist-Friendly Bill Giving Scott More Power over JNCs*, TAMPA BAY TIMES (Mar. 7, 2012, 4:52 PM), <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/house-wont-hear-revised-crist-friendly-bill-giving-scott-more-power-over-jncs>.

51. Robinson, *supra* note 5. See, e.g., *Methods of Judicial Selection*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/methods/removal_of_judges.cfm?state= (last visited Nov. 29, 2012) (discussing how states have established procedures for removing judges from the bench).

52. Robinson, *supra* note 5.

53. JOHN L. DODD ET AL., *THE CASE FOR JUDICIAL APPOINTMENTS*, at part II(3) (Jan. 2003), available at www.fed-soc.org/publications/detail/print/the-case-for-judicial-appointments.

generation of voters may know even less about what our courts do and why they are so essential in protecting fundamental rights and liberties [for] our citizens.”⁵⁴ Such ignorance could have a much more damaging and lasting impact on the future of our judiciary and its selection processes.

“Right now, civics is one of the lowest priorities in” our nation’s schools.⁵⁵ The No Child Left Behind Act of 2001 mandates that schools “test students on reading and math knowledge.”⁵⁶ The law

ties test scores to federal education dollars. If it is tested, as is the case with reading and math, it is taught—to the detriment of other subjects, such as civics. It is a sad commentary about our country that the federal government—of the people, by the people—has put civics on the endangered species list.⁵⁷

In 2011, the Fordham Institute released a report card on state standards for the teaching of history.⁵⁸ Twenty-eight states scored “D’s” or below on that report card.⁵⁹ Around the same time, *Newsweek* polled Americans using the U.S. citizenship test.

Almost forty percent of Americans failed the test[,] and . . . Americans did very poorly on the questions related to law and our legal system. Two-thirds, for example, did not know that the Constitution is the supreme law of the land. The fact is, the next generation of voters is more likely to know the [first and last] names of the three judges on [the television show] *American Idol* than know [the names of] three Supreme Court justices. A large percentage polled cannot name the Chief Justice of the United States.⁶⁰

54. Wm. T. (Bill) Robinson III, Keynote Address at the 2011-2012 Bellwood Lecture (Sept. 14, 2011), *Against Any Winds That Blow: The Special Role of the Judiciary in Protecting Rights and Securing the Rule of Law*, 48 IDAHO L. REV. 73, 83 (2011) [hereinafter Robinson, Keynote Address]. See *An Independent Judiciary*, 1997 A.B.A. COMM’N ON SEPARATION OF POWERS & JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY 62 (July 4, 1997), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/indepenjud.athcheckdam.pdf.

55. Robinson, Keynote Address, *supra* note 54, at 83.

56. *Id.*

57. *Id.* (internal footnote omitted); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 20 U.S.C. §§ 6311(a)(1), (b)(1)(C) (2006). See *The Dangerous Consequences of High-Stakes Standardized Testing*, NAT’L CTR. FOR FAIR & OPEN TESTING (Dec. 17, 2007, 1:50 PM), <http://www.fairtest.org/facts/Dangerous%20Consequences.html>.

58. JEREMY A. STERN & SHELDON M. STERN, FORDHAM INST., THE STATE OF STATE U.S. HISTORY STANDARDS 2011, at 12 (Feb. 16, 2011), available at http://www.edexcellencemedia.net/publications/2011/20110216_SOSHS/SOSS_History_FINAL.pdf.

59. *Id.*

60. Robinson, Keynote Address, *supra* note 54, at 83-84 (citing Andrew Romano, *How Dumb Are We?*, NEWSWEEK (Mar. 20, 2011, 10:00 AM), <http://www.thedailybeast.com/newsweek/>

An electorate ignorant about its own history and unaware of the historical struggle for freedom in this country has little interest in defending the institution that protects that freedom—our courts, one of the three co-equal branches of government.

The ABA urges every lawyer to participate in volunteer programs that teach our children about our national character.⁶¹ Thanks to the work of the ABA Commission on Civic Education in the Nation's Schools, teachers and lawyers have resources, including a dynamic "Civics and Law Academy" curriculum, to help them make meaningful connections with students.⁶² As a nation, we need our schools to educate the next generation of voters about the history we share. Our democracy and the rule of law will thrive with the informed leadership of future generations. As officers of the Court, it is our responsibility and our duty to uphold these principles.

The drafters of our Constitution were defined by the monuments they built. Will we be defined by the ones we destroy? Let's stand up for one of our most precious monuments—our judiciary—as a place of integrity and independence. Our liberty depends on it.

2011/03/20/how-dumb-are-we.html). See also Wm. T. (Bill) Robinson III, *Justice in Jeopardy: The Real Cost of Underfunded Courts*, 27-SUM. CRIM. JUST. 4 (2012); Steve Pendlebury, *Most Americans Can't Name Any Supreme Court Justices*, AOL NEWS (June 2, 2010, 4:27 PM), www.aolnews.com/2010/06/02/most-americans-cant-name-any-supreme-court-justices/; Michelle Croteau & Robyn Hagan Cain, *FindLaw Survey: Most Americans Can't Name Supreme Court Justices*, FINDLAW BLOG (Aug. 23, 2012, 12:02 PM), http://blogs.findlaw.com/official_findlaw_blog/2012/08/findlaw-survey-most-americans-cant-name-supreme-court-justices.html.

61. See, e.g., *ABA Commission on Civic Education in the Nation's Schools*, A.B.A., http://www.americanbar.org/groups/civics/about_us.html (last visited Sept. 25, 2012).

62. *Id.*