

THE NEWSROOM GUIDE TO JUDICIAL INDEPENDENCE

An Initiative of The Constitution Project

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THE “NEWSROOM GUIDE” TO JUDICIAL INDEPENDENCE

In the era of the 24-hour news cycle, reporters face unprecedented challenges. Particularly for journalists who cover government and political beats, obtaining the backstory behind the headlines often requires a luxury you don't have: time.

The Constitution Project is in the business of researching, analyzing, finding consensus, and educating the public on legal and government issues. We convene bipartisan blue-ribbon committees of experts, who live and breathe the issues of our ongoing initiatives.

One of those initiatives, our Courts Initiative, is dedicated to promoting "judicial independence." We believe judicial independence can only be achieved when judges have the freedom to make decisions according to the law, without regard to political or public pressure, which allows them to protect the basic rights of individuals and decide cases fairly. To raise awareness of this issue, the Constitution Project produces publications on the subject, we post surveys and information about the issue on our Web site, and now we offer another resource.

We've created this *Newsroom Guide* to provide reporters with our members' experience and expertise. It provides a variety of material designed to help you in your reporting: historical information on judicial independence, related court cases, quotes from lawmakers, a glossary of terms, a chart detailing judicial selection methods in each state and U.S. territory, and leads to organizations and people who are valuable resources for reporters. It also includes anecdotal examples of problems and solutions around the country, designed for journalists to cut and paste into their stories. Throughout the *Guide* are hyperlinks to online information and resources, appendices, and other aids to obtaining information quickly when on deadline.

INTRODUCTION

What is Judicial Independence?

"*Judicial independence*"¹ is the principle that judges should reach legal decisions free from any outside pressures, political, financial, media-related or popular. Judicial independence means judges must be free to act solely according to the law and their good-faith interpretation of it, no matter how unpopular their decisions might be. It means judges need not fear reprisals for interpreting and applying the law to the best of their abilities. An independent judiciary is a cornerstone not only of our justice system but of our entire constitutional system of government.

However, such independence must also be balanced by *judicial accountability*. Judges are required by their oath of office and canons governing their conduct to perform their duties accurately and ethically, according to the rule of law. If they fail to do so, two major remedies exist: one for judicial error and the other for judicial misconduct. If a judge errs in deciding a case, the decision may be appealed. At both the federal and state levels, parties may appeal unfavorable decisions on the basis of some inaccuracy, such as factual error or misapplication of the law. If a judge engages in misconduct, disciplinary options exist. Federal judges only hold their offices "during good behavior," and Congress may impeach and remove federal judges for certain types of misconduct. States have their own judicial disciplinary bodies (some an arm of the state's highest court, others an independent governmental entity) that investigate and discipline state judges for misconduct. At the state level, an array of sanctions is available, from modest censure to removal from the bench and referral for criminal prosecution.

In our constitutional system of government, an independent judiciary serves two goals. First, it enables the judges to make impartial decisions. Second, it keeps the other political branches in check. Scholars tend to divide judicial independence into two distinct but intertwined varieties: *decisional* and *institutional*. *Decisional independence* refers to a judge's ability to render decisions based only on the facts of each case and the applicable law, free of political, ideological, or popular influence. *Institutional independence* distinguishes the judiciary as a fully co-equal branch of government, separate from the legislative and executive branches.

To understand just how prized and rare a circumstance true judicial independence is, just look abroad. The American recipe of judicial independence is relatively rare. It requires a full-fledged judicial branch on an equal footing with other branches of government, that has the power to review the constitutionality of laws enacted by the other branches, and whose judges cannot be removed from office at the whim of displeased litigants or public officials. American federal and state judges and judicial scholars regularly travel to other

¹ Definitions of terms in bold can be found in **Appendix B** at the end of this Guide.

parts of the world, particularly where democracies are emerging, to help nations understand how an independent judiciary operates and how to establish one.²

Why Does Judicial Independence Matter?

And in today's climate, judicial independence is perhaps more important — and perhaps more imperiled — than ever before. In the aftermath of September 11th and the subsequent “war on terrorism,” individuals’ legal rights have become jeopardized to a degree unprecedented in recent memory. Such changes include governmental actions that purport to strip courts completely of their jurisdiction over particular cases, divest courts of the power to review certain actions by the legislative and executive branches, and deny individuals the right to a trial that adheres to the guarantees of the Constitution.

Not only is the institutional independence of the judiciary threatened, but the independence of individual judges is jeopardized as well. Judges are being increasingly pressured to reach politically popular verdicts, particularly in the most unpopular types of cases, such as those involving attacks against the United States and its citizens, those involving treason, those involving nationals detained as enemy combatants and prisoners of war, and those involving members of the U.S. military).

Criticism and debate of judicial decisions are a healthy – indeed a vital – part of America’s political and governmental discourse and are protected by the First Amendment. However, if America's judiciary is to remain healthy, vigorously autonomous, and able to perform its constitutional functions without improper influences, it must be immune to attacks that seek to influence judicial decision-making.

Both critics and judges share responsibility for ensuring this immunity. When public officials and policymakers attack judges based upon their rulings in specific cases, particularly when they threaten removal or other forms of censure, they effectively influence future decisions. This undermines the health and standing of an independent judiciary and thus jeopardizes our constitutional system of government itself. Judges also bear certain responsibilities. First, they must promote accountability by ensuring that their professional conduct is above reproach and free of conflicts of interest. Second, they must avail themselves of the rapidly-expanding number of opportunities to educate the public about the judiciary, its role and functions, and how judges perform their constitutional duties and decide cases.

Inappropriate criticism of judicial decisions is just one of the threats to judicial independence. In many states, judges must run for election at some point in their tenure. The electoral process itself and the increasingly vast sums of money judicial candidates must

² The Central Intelligence Agency publishes *The World Factbook*, an index of information about other nations, including each nation’s legal system. Available online at <http://www.odci.gov/cia/publications/factbook/fields/2100.html>, the legal system index, or “field listing,” provides a summary of each nation’s source of law, identifies those that include judicial review, and includes other relevant information, where available. The summaries make clear just how unusual the American commitment to judicial independence actually is.

raise jeopardize judicial independence, in part by creating the appearance of a judiciary beholden to campaign contributors, many of whom are lawyers or litigants who will appear in court before the winner. In addition, in states where judges are elected, the process is by definition political, and escalating activity by political parties and special interest groups in state judicial elections further undermine the public's perception of the judiciary as an independent branch of government. At the federal level and in states where judges are appointed, the increasing politicization of the judicial nomination and confirmation processes jeopardize both decisional and institutional judicial independence. Congress and the state legislatures control the judiciary's budget, and its *jurisdiction* over certain types of cases, including sentencing in some criminal cases; the legislative branch thus can use that authority to threaten judges. Candidates for both state and federal public office often campaign on how they plan to control the judiciary.

As explained by U.S. Supreme Court Justice Stephen Breyer:

The good that proper adjudication can do for the justice and stability of a country is only attainable if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors. Judicial independence provides the organizing concept within which we think about and develop those institutional assurances that allow judges to fulfill this important social role.

Only a truly independent judiciary, free of pressure from, and indebtedness to, political parties, public officials, interest groups, and popular whim, can be truly accountable to the public it serves.

THE ROLE OF THE MEDIA

The media are often the only means by which Americans learn about the judiciary. This includes coverage of newsworthy cases and decisions; explanations of process, procedure, and separation of powers; identities of judicial candidates; and federal nominations and confirmations. Increasingly, it also includes information about judicial misconduct; improper conduct in judicial campaigns; attacks on candidates by interest groups and political parties; and attacks on judicial independence by public officials, interest groups, parties, and even the media themselves. Thus the media bear extraordinary power to affect public perception, and thereby to affect the third branch itself — and thus, they bear a correlative responsibility to ensure that issues affecting the judiciary are covered fully, fairly, and accurately.

Reporting about the judiciary accurately and fairly requires journalists to keep judicial independence in mind when producing a court-related story. Today's media have the ability to get more news and more information to more people more quickly than at any other time in history. Thus, an inaccurate or out-of-context story can misinform an

enormous segment of the population, and can simultaneously generate a backlash against the case, laws, or judge involved, or against the judiciary as a whole, in what is virtually "real time."

Evaluating Judicial Behavior

When reporting on the judiciary and the judicial selection process, journalists should keep in mind the ways that the judiciary differs fundamentally from other public offices:

- Judges are supposed to be responsive only to the rule of law and the Constitution, not to majority will or public, political, or media pressure.
- The judge's role is not that of a politician, nor is her function that of making and keeping promises to constituents or "representing" their interests in cases.
- Attacks designed to intimidate judges, whether from parties before the court, politicians, interest groups, or the media, threatens judicial independence.

Factors to Consider when Endorsing Judges

When endorsing judges, news outlets should understand that judicial candidates traditionally have been unable to give their views on particular subjects, on the grounds that to do so would politicize their candidacy and force them to prejudge issues. In 2002, the U.S. Supreme Court loosened restrictions on what judicial candidates are permitted to say, but they are still barred from making "pledges or promises" as to how they would rule in a particular case. Thus, as a practical matter, it may still be difficult for candidates to give opinions on issues that are likely to come before them in court.

Nonetheless, reporters and editors have considerable information at their disposal when reporting on judicial races or issuing endorsements. Endorsements should review a candidate's temperament, professional expertise and competence, personal integrity, training and background, and other such general traits and characteristics that could qualify or disqualify him or her for service on the bench. In addition, it is appropriate for journalists to ask judicial candidates questions on a whole host of topics that provide insight into the candidates' approach to and qualifications for the job of judging without indicating how they might rule in particular types of cases. Examples of such topics include a candidate's approach to court administration, budget management, and caseload management; her approach to specialized courts and programs, such as domestic violence courts or drug courts; or providing basic explanations in general terms regarding why the law or rules of evidence or procedure may sometimes require judges to render unpopular decisions. The King County Bar Association of Seattle, Washington, has taken the lead in developing examples of informative questions appropriate for the public and the media to ask judicial candidates. This list appears in **Appendix C** at the end of this Guide.

What Judges May Say

Judges' behavior is regulated by canons, or codes, of judicial conduct. Such canons cover a wide array of ethical and practical issues; examples include financial matters, the obligation to remain impartial, restrictions on what judges may say, when recusal from a particular case is required, and many other topics.

Federal judges are subject to the Federal Code of Judicial Conduct, although for U.S. Supreme Court justices, adherence to the Code is voluntary. State judges are subject to the code of conduct applicable in their state. While state codes of judicial conduct vary on some issues, for the most part, they tend to be very similar. This is the case partly because, since 1924, the American Bar Association has promulgated a Model Code of Judicial Conduct that states may use as guidance in drafting their own codes. The Model Code has undergone periodic revision to conform to changes in the law, and in life generally, that alter ethical standards and practices.

With regard to what judges and judicial candidates are permitted to say and do, most states traditionally have used the Model Code as a blueprint for their own canons. Prior to 2002, most states had very similar restrictions, and very little case law existed to challenge or interpret them. Since 2002, however, changes have occurred rapidly, leaving the state of the law in this area unsettled.

Judicial Election Law Before 2002

Prior to the U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, the Model Code and its state versions provided most of the guidance with regard to judicial campaign speech.

ABA Model Code of Judicial Ethics

First developed in 1924, the American Bar Association's Model Code of Judicial Ethics was designed to provide a concise set of standards for judicial conduct that individual states could adapt in developing their own canons. The Model Code has been revised periodically, but from its earliest incarnation, it has contained restrictions on what judicial candidates are permitted to say.

The 1924 version of the Model Code specified that "[a] candidate for judicial position . . . should not announce in advance his conclusions of law on disputed issues to secure class support." Under a 1972 revision, candidates were not permitted to "announce their views on disputed legal or political issues," nor to "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." This so-called "announce clause" was found to be overly broad; the courts recognized that, on a practical level, enforcement would be difficult, and if it were enforced literally, it likely would violate the First Amendment.

In 1990, the ABA thus revised this section again, retaining the ban on "pledges or promises," but replacing the "announce clause" with what has become known as the "commit

clause,” which bars judicial candidates from committing or appearing to commit themselves to rule a certain way in cases that are likely to come before them on the bench. In short, the current version of the ABA’s Model Code prohibits judges from making any public statement that affects the outcome or impairs the fairness of a pending proceeding. Because of this, judges, unlike members of the other two branches or special interest groups, usually cannot take advantage of the media to defend themselves and discuss the specifics of ongoing cases, even while the case is on appeal. When they do so, they jeopardize their own rulings and reputations and risk violating ethics rules governing their behavior.

Republican Party of Minnesota v. White

In 2002, the U.S. Supreme Court decided *Republican Party of Minnesota v. White* (*White*), 536 U.S. 765 (2002), a watershed in judicial election jurisprudence that directly challenged a state’s authority to regulate what judicial candidates may say.³ The *White* case was brought by the Republican Party of Minnesota on behalf of a Republican candidate for the Minnesota Supreme Court, Gregory Wersal. In Minnesota, judicial candidates run in nonpartisan elections, and state law forbids them to seek or accept partisan endorsements or run using party labels. The Minnesota Code of Judicial Conduct also limited what candidates could say in their campaigns, including barring candidates from “announc[ing] their views on disputed legal or political issues.”⁴ Wersal and the state Republican Party sued on the grounds that such restrictions violated Wersal’s First Amendment rights of free speech, and effectively prevented him from mounting a campaign for judicial office.

The U.S. Supreme Court agreed that the Minnesota Code violated judicial candidates’ First Amendment rights. The Court found that, since the state of Minnesota had chosen to select its judges through the process of election, it could not deny candidates the right to participate fully in the electoral process, including campaigning for office by discussing their positions. This decision directly affected the codes of judicial conduct in the nine states with canons that contain an “announce clause” similar to that of the 1972 Model Code: Arizona, Colorado, Iowa, Maryland, Minnesota, Mississippi, Missouri, New Mexico, and Pennsylvania. The 1990 version of

³ Judges traditionally have not been permitted to discuss their opinions publicly about issues that are likely to come before them on the bench, because to do so would indicate one of two things: one, that the judge had in fact pre-judged the case and all others involving similar facts and law (meaning that, regardless of the circumstances of this particular case, the judge would reach the same conclusion in accordance with his or her own personal beliefs), and two, that regardless of whether a judge may indeed be applying the law as scrupulously and as objectively as judges who do not make their opinions known, the public (and those defendants whose cases come before her), knowing of her open support, will not believe that her decisions are indeed objective and based on nothing other than the rule of law. It is this latter scenario that is of great concern to the judiciary and the bar, because it undermines public confidence in the judiciary’s independence, and ultimately, in the judiciary and the justice system as a whole.

⁴ Minnesota did not follow the lead of the 1990 revision to the Model Code in replacing the “announce clause” with the less restrictive language forbidding candidates to commit or appear to commit themselves to rule in particular ways in cases likely to come before them. However, in cases involving such circumstances, the Minnesota Supreme Court began applying that section of the Code as though it were identical to the new, less restrictive version of the ABA Model Code. Nonetheless, the restrictions were still significant.

the Model Code language was found in the canons of more than two dozen other states, and the canons of 41 states contained variations of either the “pledges or promises clause” or “commit clause” language (or both). Three states placed no restrictions on candidate speech other than barring them for making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” One state, Alabama, barred candidates only from discussing “pending litigation.” The Court did not address the constitutionality of the 1990 version, leaving these restrictions intact for now.

Much confusion exists among judges and judicial candidates, disciplinary bodies, and interest groups with regard to the practical effects the *White* decision has had on what candidates may and may not say and do during campaigns. Some judges believe that the case has changed essentially nothing, particularly in those jurisdictions where the “commit clause” is in force, and so refuse to speak publicly on any subject other than their basic professional qualifications for the job and a commitment to the Constitution and the rule of law. Others believe that *White* has given them license to express virtually any opinion on virtually any topic whatsoever. Most judges, however, recognize that the truth lies between these two poles, and are making a good-faith effort to decipher the case law and balance concerns of judicial independence and judicial accountability accordingly.

In fact, the actual holding of *White* appears quite straightforward: *White* simply holds that the “announce clause” violates the First Amendment. Indeed, the *White* decision explicitly declined to address the constitutionality of the “pledges or promises” or “commit” clauses, noting that those questions were not before the court.

As a practical matter, the *White* case has not changed much on the judicial conduct landscape – at least not yet. Codes of conduct now must be explicitly written in the same way that they have been construed since 1990. Judicial candidates still may voluntarily conform to higher standards of conduct than those required by the letter of their jurisdictions’ codes of conduct. Most judges are unlikely to alter their conduct significantly; most appear to prefer not to announce their views on disputed legal or political issues, because they prefer to do everything possible to ensure that they both are and appear to be impartial in every case over which they preside.

Post-White Solutions to Judicial Campaign Conduct Problems

Both voters and reporters frequently criticize judicial candidates for “hiding behind” the “excuse” that they are not permitted to comment on issues likely to come before them on the bench. It is indeed true that many judges regularly refuse to comment on anything other than their qualifications for office. In some instances, this stems from a legitimate concern that such a comment would violate canons of conduct, or that it would appear to indicate a prejudice in favor of a party that would undermine public confidence in the judge’s decisions, no matter how objectively those decisions are based in law. In many instances, however, judges are simply uncomfortable with commenting because they don’t understand what they are and are not permitted to say, and as the outcome of *White*

shows, these guidelines are still unclear. However, this discomfort with public comment often translates to a reluctance to talk to the public or the media about anything – including such topics as the role of a judge, which would help the public to understand why judges decline to comment on certain other topics. As noted earlier, judges are valuable sources on the subject of judicial independence and the role of the judiciary in general, and in the aftermath of *White*, many are increasingly willing to discuss such subjects. Across the country, many court systems now maintain speakers’ bureaus, host reporters’ roundtables, and send judges into schools and other public venues to educate the public.

Requiring a candidate to run for office necessarily also requires him to engage in “campaign activities.” Candidates for non-judicial offices are free to distribute items of minimal monetary value to promote their candidacies and enhance name recognition among the voters. No one seriously alleges that free refreshments at a campaign event, a pen inscribed with the candidate’s name, or even free \$5 coupons for gasoline will “buy” someone’s vote. Their value is *de minimis*, and voters are accustomed to receiving such items from candidates as a matter of course without regarding them as improper attempts to “purchase” their votes. However, the relevant canons of conduct generally bar such “baseline” campaign activities, and in so doing often make it difficult, if not virtually impossible, for judicial candidates to conduct an election campaign without transgressing one or more of the canons. It is clear that judicial candidates may – and should – be held to higher standards than candidates for other offices with regard to their campaign activities. However, jurisdictions that force judges to reach the bench by running for office may need to alter their canons of judicial conduct in ways that permit judicial candidates to mount campaigns that are both ethical and effective.

A recognition of this problem inherent in the judicial election process, combined with the current confusion regarding what judges may or may not say or do and the increasingly expensive, mean-spirited, and agenda-driven character of judicial elections, has convinced members of the bench and bar that new solutions are needed that will pass constitutional muster. An array of potential reforms are being studied in various jurisdictions, but two primary options have already emerged: revision of codes of judicial conduct, and the use of judicial campaign conduct committees.

Code Revision

Leading the code revision effort is the American Bar Association, which in 2003 launched the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. The Commission’s mandate is to adapt the Model Code to the needs and realities of the post-*White* era. The body has been holding public hearings across the country, taking testimony from experts regarding the potential need for changes in the current form of the Model Code. As sections are redrafted, they are made available for public comment. The revisions were presented to the ABA House of Delegates at the 2004 Annual Meeting in August, for a vote on their adoption as official ABA policy. Information on the Commission, hearing dates, current drafts, and other materials are available on the ABA Web site at <http://www.abanet.org/judicialethics/home.html>. A number of states are also at various stages of the code revision process.

Judicial Campaign Conduct Committees

Another method regulating judicial campaign conduct that is increasingly popular is the use of judicial campaign conduct committees. The most effective versions of these oversight bodies are voluntary, non-governmental committees, usually administered by state or local bar associations. Active in a number of states and municipalities, the mandate of such committees varies widely. However, certain traits are fundamental to the missions of most of them: These include accepting and resolving complaints regarding a candidate's campaign materials or speeches; providing a "rapid response" mechanism when inappropriate attacks are leveled at judicial candidates, particularly by third-party interest groups; and educating judicial candidates and the public about the boundaries of acceptable behavior under their state's code of judicial conduct.

The National Center for State Courts (NCSC) has done extensive work on judicial campaign conduct committees and the relevant judicial election law. In 2002, the NCSC established two committees to provide advice and assistance to bench and bar, judicial candidates, oversight committees, and disciplinary bodies across the country. The National Ad Hoc Advisory Committee on Judicial Election Law analyzes existing law and provides guidance to individuals and groups at the state and local level who seek assistance. The National Ad Hoc Advisory Committee on Judicial Campaign Conduct serves a similar function for state and local bar associations and other groups who either administer their own judicial campaign conduct committees or who are interested in establishing one. Both Committees also serve clearinghouse functions, with detailed information available on their respective Web sites. The National Ad Hoc Advisory Committee on Judicial Campaign Conduct also provides contact information for all known conduct committees. Currently, statewide committees exist in Florida, Georgia, Illinois, Louisiana, Mississippi, Nevada, New York, Ohio, and Washington State. Local committees also exist in some states, including California, Florida, New York, Ohio, and Washington.

Additional information is available on the Web sites of the National Ad Hoc Advisory Committee on Judicial Campaign Conduct, at <http://www.judicialcampaignconduct.org/>, and the National Ad Hoc Advisory Committee on Judicial Election Law, at <http://www.judicialectionlaw.org/>.

THE ROOTS OF JUDICIAL INDEPENDENCE

The British Precedent of Abuses

Prior to the establishment of the United States, judges in England and the colonies were appointed by the King and served at his pleasure. The result was a judiciary ripe for manipulation and corruption. Since there essentially was no separation of powers between the executive and judicial branches, judges generally were not at liberty to rule against the king's wishes. To do so meant risking removal from office.

The Framers' Response and the Constitution

In an attempt to avoid the abuses of the colonial judicial system and create a more democratic society, James Madison and the other founders built judicial independence into the Declaration of Independence and the Constitution as a fundamental premise of our tripartite, or three-branch, system of government. In the Declaration of Independence, Thomas Jefferson cited the following behavior by the king among the reasons for seeking independence: "He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

After drafting the Declaration of Independence, the founders adopted the Articles of Confederation, the new nation's first attempt to establish a framework for governance. The Articles of Confederation established methods for adjudicating certain types of cases, and required states to give "*full faith and credit*" to the "Records, acts, and judicial proceedings of the courts and magistrates" of the other states, but did not establish a judiciary.

In 1787, the constitutional convention adopted the U.S. Constitution, and it was ratified by the requisite minimum of nine states in 1788; the Bill of Rights was proposed in 1789, and was ratified by 1791. The Constitution's framers were determined to avoid the sort of tyranny described in the Declaration of Independence. They established three separate branches of government (executive, legislative, and judicial), each with individual responsibilities and each with checks on the powers of the others. Article III of the Constitution states that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." It also mandates that federal judges shall be appointed for life tenure, shall "hold their offices during good behaviour," and "shall receive for their Services, a Compensation, which shall not be diminished during continuance in office." These provisions ensure that judges cannot be removed from the bench or have their salary reduced simply because politicians or citizens disagree with their rulings (unlike many state constitutions, which do not prohibit reductions in judges' salaries). Together, these provisions form the basis of judicial independence.

Landmark Court Decisions on Judicial Independence

Marbury v. Madison

The most famous of these decisions was *Marbury v. Madison*, 5 U.S. 137 (1803), a ruling that has been called "the rib of the Constitution." In an opinion by Chief Justice John Marshall, the Court stated:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . [A] law repugnant to the Constitution is void;

. . . courts, as well as other departments, are bound by that instrument.

Marbury is integral to the history of judicial independence: It was the first case to establish the judiciary's power to review and void the acts of another branch of the federal government. This power, known as judicial review, is an essential element of judicial independence.

Plaut v. Spendthrift Farms Inc.

Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995), an unfamiliar name even to many lawyers, is nonetheless a case of constitutional significance. In *Plaut*, the Supreme Court held that when a court dismissed a case because the applicable *statute of limitations* had expired, Congress could not order the court to reopen the final judgment. In other words, when the courts decide cases, Congress does not have the authority to order them to revisit their decisions.

Cases That Illustrate the Importance of Judicial Independence

Were it not for an independent judiciary, America would be a very different place. Judges have acted courageously to make unpopular decisions throughout our history knowing that, to an extent, they would be protected by the federal or a state constitution. A wide array of constitutional and civil rights have been recognized and upheld only because of an independent judiciary, as the following cases demonstrate:

- *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (overturning the "separate but equal" doctrine and finding racial discrimination in public education to be unconstitutional)
- *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting organized prayer in public schools)
- *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the 14th Amendment requires that the constitutional right to counsel apply to state prosecutions)
- *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that, prior to interrogation, police must clearly advise the suspect of the so-called "*Miranda* warning" - *i.e.*, right to remain silent, right to counsel, etc.)
- *Loving v. Virginia*, 388 U.S. 1 (1967) (nullifying laws prohibiting interracial marriage)
- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (affirming that symbolic speech is protected by the First Amendment)
- *New York Times Co. v. United States*, 403 U.S. 713 (1971) (barring governmental "prior restraint" to prevent publication of the "Pentagon Papers")
- *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing three-pronged test for determining whether a governmental activity violates the constitutional separation of church and state)
- *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a right to privacy that includes a woman's qualified right to terminate a pregnancy)

- *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing "hostile environment" claim for sexual harassment)
- *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding First Amendment right to burn U.S. flag)
- *U.S. v. Eichman*, 496 U.S. 310 (1990) (upholding again, post-*Johnson* and post-Flag Protection Act of 1989, First Amendment freedom to desecrate flag)
- *Romer v. Evans*, 517 U.S. 620 (1996) (overturning state law intended to deny rights to homosexuals as a class)
- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (permitting discrimination claim for same-sex harassment)
- *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning state statutes banning same-sex sodomy)

THE AMERICAN JUDICIARY

How the Judiciary Differs from the Other Two Branches

The judiciary has a purpose that is completely different from, yet complementary to, that of the other two branches. Unlike legislators or elected executives, it is not the job of judges to represent the people. Judges, even when elected, represent the law. The role of the legislative branch is to make the laws. The role of the executive branch is to approve or reject laws passed by the legislature and to administer them. The role of the judiciary is to interpret and uphold the laws made by the legislature and approved by the executive — or to strike them down if they find laws unconstitutional.

The three branches have ways to check each other's power, but, unlike the other two branches, the judiciary has its own built-in correction mechanism. If a party in a case believes a judge has made a mistake, it can appeal the decision to the next level of appellate court. If a judge has made a decision that is fundamentally wrong or does not correctly interpret the law, the higher courts can overturn that decision.

The system is designed to prevent extreme interpretations of the law. Appellate courts serve as a moderating influence by correcting mistakes made by lower courts. The very function of appellate courts also encourages lower courts to adhere to closely to the law and applicable precedents: If a trial court judge knows that an appellate court is likely to reverse a certain decision, she is less likely to stretch the boundaries of the law. In this way, the structure of our courts plays a major role in maintaining judicial independence and checking judicial power. This in turn helps to maintain judicial independence, because the courts are self-regulating; there is less capacity for the other political branches to intervene in their affairs.

The Federal Courts

Article III of the U.S. Constitution created the Supreme Court, but left the creation of lower federal courts to Congress.

Purpose of the Federal Courts

Federal courts hear both civil and criminal cases that involve questions or violations of federal law (those laws passed by Congress) and challenges to the constitutionality of federal and, in certain types of cases, state laws.

Size and Structure of the Federal Courts

In the federal system, trial courts are organized geographically by districts. There are 94 districts with nearly 800 district court judges in the U.S. When parties in the federal system appeal a decision, the case is heard by a U.S. Circuit Court of Appeals. There are 13 federal circuits. Decisions appealed from the Circuit Courts go to the nine-member United States Supreme Court, which can decide which cases it wants to review — and which can also hear cases that originate in state courts. The Supreme Court often selects cases to offer a final interpretation of a law on which two or more Circuit Courts of Appeals have ruled differently. There also are specialized federal courts, such as tax courts, bankruptcy courts, and the U.S. Court of International Trade.

- For additional information about the federal judiciary generally, visit the Web site of the Administrative Office of the U.S. Courts at www.uscourts.gov.
- For information about the United States Supreme Court, visit the Court's Web site at www.supremecourtus.gov.
- To view the current list of vacancies for all Article III judgeships, visit: <http://www.uscourts.gov/vacancies/01.html>.
- To view a summary list of vacancies in the federal courts, visit: <http://www.uscourts.gov/vacancies/summary.html>.
- To view a list of upcoming vacancies in the federal judiciary, visit: <http://www.uscourts.gov/vacancies/futuremenu.htm>.
- To view a current list of "judicial emergencies," visit: <http://www.uscourts.gov/vacancies/emergencies2.htm>.

Selection Process for the Federal Courts

The method for selecting federal judges is largely prescribed by the U.S. Constitution. Judges of the U.S. Supreme Court, the Circuit Courts of Appeal, the District Courts, and the Court of International Trade are nominated by the President of the United States and

confirmed by a majority vote in the United States Senate. Federal bankruptcy and magistrate judges are considered judicial officers of the Federal District Court in whose jurisdiction they preside. Bankruptcy judges are appointed to 14-year terms by a majority of the judges of the Court of Appeals for that particular circuit. Magistrate judges are appointed to eight-year terms by a majority of the currently-active judges of the relevant District Court.

Nominees for the District, Circuit, and Supreme Courts must appear before the Senate Judiciary Committee for a confirmation hearing and win committee approval before receiving a vote in the full Senate. Presidents usually appoint judges who share their political philosophy, and judgeships often are awarded to friends or acquaintances of either the President or a senator from the judge's state, and to key members of the president's party. Thus, even though federal judges are expected to be independent thinkers on the bench, they arrive there through an essentially politicized process and sometimes with a well-known political and legal philosophy. The principles of judicial independence require that judges, once on the bench, do not let these views, or those of the president who appointed them or the members of Congress who backed them, affect their decision-making.

Checks and Balances

The judiciary's power is both checked and balanced by the other branches through constitutional means. As a co-equal branch of government, the judiciary also checks and balances the power of the legislative and executive branches.

Checks on the Federal Judiciary

"***Judicial review***" is the power of judges to determine the lawfulness and constitutionality of legislative and executive branch actions. In the case of appellate judges, it also includes the power to examine decisions made by lower courts. Judges also ensure that the laws and regulations passed or ***promulgated*** by the other two branches are interpreted and applied correctly and consistently. It is important to note that the courts cannot act on any matter unless individuals, organizations, or the government file a case in court.

Checks by the Federal Judiciary

While the Constitution establishes the legal basis for judicial independence, it also contains several provisions that keep federal judges' power and autonomy in check. It delegates to the political branches the power to establish the lower courts, to nominate and confirm judges, and to impeach and remove judges. Within constitutional limits, Congress also has the power to set limits on the federal courts' ***jurisdiction***. Congress also is responsible for funding the federal judiciary's budget, a power that can serve as an effective check on ***judicial administration*** (which may include the number of cases a court is able to hear in a given year, the number of judges assigned to the court, and other administrative matters that can nonetheless affect the outcomes of particular cases, if only by limiting resources so that some cases cannot be heard). Finally, the House of Representa-

tives has the authority to *impeach* federal judges for misconduct that reaches the level of “high crimes and misdemeanors,” as specified in the Constitution. A judge who is impeached by the House and convicted by the Senate may be subject to removal and also possibly criminal prosecution.

Additional Resources for Information on Federal Courts

The Administrative Office of the U.S. Courts maintains a significant amount of information on its Web site that pertains to the federal courts. Among a wide array of other data, this information includes easy-to-read tables, charts, and other graphics that summarize the structure of the courts, the number of authorized judgeships, and the number of judicial vacancies in each circuit.

- To view the number of authorized U.S. District Court judgeships, visit www.uscourts.gov/UFC99.pdf, and scroll to pages 43-44 in the report.
- To view the number of authorized U.S. Circuit Courts of Appeals judgeships, visit www.uscourts.gov/UFC99.pdf, and scroll to page 45 of the report.
- To view the number of District and Circuit Court vacancies as of August 1, 2002, visit www.uscourts.gov/vacancies/judgevacancy.htm.
- To view a map detailing the geographic breakdown of each circuit, visit www.uscourts.gov/links.html.

The State Courts

Ninety-eight percent of all cases are heard in the nation’s state courts, rather than in federal court. While the Constitution’s framers did not explicitly create state courts, they established the federal courts with the knowledge that each state would also maintain its own judicial system, continuing the tradition begun in the colonies. Each state's constitution establishes its court system.

Purpose of the State Courts

The Constitution defines certain matters as specifically within the jurisdiction of federal law. Other matters are “reserved” to the states. As a result, most of the laws that affect people’s lives on a day-to-day basis are passed by their state’s legislature and signed by the state’s governor. Each state must therefore have its own court system to interpret and rule on those laws. As society’s complexity has increased, so has the law’s statutory and regulatory structure at all levels. Thus, citizens are also subject to laws enacted at the municipal level, and state court systems have stratified to accommodate the wide range and types of laws.

Structure of the State Courts

State court systems generally are modeled after the federal system, with local trial courts, mid-level appellate courts and a state high court, known in most states as the “Supreme

Court,” although exceptions exist.⁵ Some states with small populations do not have intermediate-level appellate courts. And just as there are specialty courts (*e.g.*, tax courts, bankruptcy courts, etc.) at the federal level, similar courts handling family, probate, misdemeanor criminal, and other matters exist within many state court systems.

The National Center for State Courts (NCSC), an independent nonprofit organization founded in 1971 by then-Chief Justice Warren E. Burger, serves as a research clearinghouse and provides assistance to state courts. For access to research and information on state court systems, visit the NCSC's Web site at www.ncsconline.org.

Selection Processes for the State Courts

Unlike the federal judicial selection process, which is uniform no matter where a particular judge sits, different states have different methods of choosing their judges. Moreover, the method of judicial selection at the trial, appellate, and high court levels often varies. A common result is confusion among media and the general public when dealing with state judicial selection. States have long grappled with the best ways to choose judges and maintain judicial independence. Currently, about 80 percent of all state judges stand for election at some time during their career on the bench. They either are elected initially or must win a retention vote to stay on the bench or both.

In 44 states, judges at some level are chosen through some form of election, whether contested or retention, partisan or nonpartisan. In some instances, judges in state court systems are chosen through a hybrid of appointive and elective systems; the method used depends upon the type of judgeship. Another hybrid form is a frequent practice in many states: When a sitting judge retires, the chief executive appoints a successor who serves on an interim basis, usually until the next election; the appointee then stands for election for a full term.

See **Appendix A** at the end of this Guide for a chart of U.S. states and territories, accompanied by a complete list of their courts and selection systems.

Merit Selection

As a general matter, American judges in the colonial era were appointed in the tradition of English judges. However, in 1777, New York adopted what may have been the nation's first system of *merit selection* for judges. At the state's first constitutional convention, it established a Council of Appointment for the selection of judges. At its second constitutional convention in 1821, however, New York reverted to a system of gubernatorial appointment and by the middle of the 19th century, New York had followed Mississippi into the vanguard of judicial selection movements, forsaking all forms of judicial appointment for an elective judiciary. These changes heralded a national movement to-

⁵ In Maryland and New York, the state's highest court is called the "Court of Appeals"; in Massachusetts, it is called the "Supreme Judicial Court." New York's court system has another anomaly: Its trial court of general jurisdiction is called "Supreme Court."

ward elective systems of judicial selection, as a populist citizenry lost trust in appointive judiciaries that it perceived as too linked with elitist individuals and institutions.

Toward the end of the 19th century, the shortcomings of contested judicial elections began to emerge. In 1894, New York reverted to a system of gubernatorial appointment for justices of the Appellate Division (although such appointees are drawn only from the ranks of elected justices of the Supreme Court, New York's trial court of general jurisdiction). The Mayor of New York City was similarly empowered to appoint New York City Criminal Court judges. By the early 1900s, leaders of the bench and bar across the country who sought to depoliticize the judicial selection process founded the American Judicature Society (AJS).

AJS's mission was to improve the administration of justice, primarily through support of a new system of judicial selection called "merit selection." Under this method, candidates for judgeships would be nominated by a committee that would examine their experience and credentials. Those chosen for the bench would serve an initial short term, and would then be subject to a *retention election*, in which voters would decide whether the judge should remain on the bench.

In 1940, Missouri became the first state to adopt such a merit selection plan, and, since 1950, the trend in changes in state methods has widely been regarded as moving toward some variant of merit selection. However, these changes are incremental: All but six states still elect judges at some level. Moreover, that trend may be reversing today, as states with merit selection systems increasingly face legislation and ballot referenda that would alter their judicial selection methods to elective systems, whether partisan or non-partisan.

Judicial Elections

In the nation's early years, most state judges across the country were chosen through some form of appointment. However, with the rise of populist sentiment during the first half of the 19th century came a change to elected judiciaries in most states. The public, suspicious of elites, believed that it could have greater confidence in judges chosen by voters than in those appointed by politicians. By the late 19th century, party machines had assumed control of judicial elections in urban areas, leading to a different sort of "appointment" by a different sort of "elite." Judicial elections became elections in name only, because party officials controlled which candidates reached the ballot. Public confidence was again undermined, because voters suspected that elected judges were beholden to the parties that sponsored them. Citizens became less engaged in the selection process and less knowledgeable about the candidates.

Although the trend toward merit selection began in 1912, most states retained judicial elections in some form for at least some offices. The forms of election vary: Some states use classic *partisan elections*; others require judges to run in nonpartisan races; still others, like Michigan, require judges to run in *nonpartisan elections*, but the candidates are chosen at partisan *nominating conventions*. Most of the states that use merit selection

also subject judges to a retention election, in which they are unopposed, and the voters simply decide whether they should be retained in office. Whatever the type of standard selection method used, in many states, judges first reach the bench as interim appointees to fill the uncompleted term of a retiring judge; the appointee then runs for a full term of office at the next election. Finally, Virginia provides one final twist on the elective process. It is the only state where judges are chosen through a truly *republican* form of selection. The Virginia constitution provides that judges "shall be elected," but by the members of the state legislature, rather than by the public. Candidates "campaign" before legislators, who ultimately vote on the candidates for each open position.

Checks and Balances

Because there are so many methods of judicial selection at the state level, the checks and balances among the branches vary in type and degree from state to state. Where judges are appointed, they may be responsible to the *appointing authority* for re-appointment and are subject to state disciplinary procedures, including *impeachment*. When elected, judges still are subject to disciplinary procedures and must face voter approval to win and keep their seats. They may also be removed for misconduct by an authority designated under state law, usually a judicial disciplinary body or the state's highest court. Two recent cases such occurred in New Hampshire and Massachusetts.

In New Hampshire, the House of Representatives leveled impeachment charges against Supreme Court Chief Justice David Brock and two associate justices. The House impeached Brock on grounds that he had engaged in various forms of improper behavior, but did not impeach the associate justices. The Senate declined to convict Brock. In Massachusetts, justices came under fire for their ruling that the state's law requires recognition of same-sex marriages, in *Hillary Goodridge, et al. v. Department of Public Health*, 440 Mass. 309 (2003). In February 2004, the court also issued a decision called *Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004), which responded directly to the Massachusetts Senate's request for an advisory opinion regarding whether a bill drafted in response to the court's decision in *Goodridge* was constitutional. The court's advisory opinion advised that the bill was likely to be found unconstitutional. Two Democratic state representatives introduced legislation to remove the justices, and other efforts were launched by various individuals, interest groups, and elected officials to remove the four justices who signed the majority opinion. A group calling itself Article 8 Alliance began a statewide petition effort: first, to force removal of the justices through a "*bill of address*," the state's mechanism for doing so; and second, to force the legislature to "defy" the court's ruling.

ISSUES THAT AFFECT JUDICIAL INDEPENDENCE

In recent decades, public concern about judicial independence at both the state and federal levels has increased. At every point along the political spectrum, a growing array of special interests has become increasingly powerful, forcing the courts to handle more and more issues of a divisive nature. Abortion, the death penalty, gun control, drugs, affirmative action, and other controversial subjects now routinely come before judges at every

level. In such cases, judges often will come under fire no matter how they rule. This is not a new situation, but it is increasingly common, as is the pressure on judges' ability to rule independently.

Also, as more issues have ended up in the courts, more money has poured into state judicial elections, dramatically changing their nature and the behavior of judicial candidates. On the federal side, members of Congress and presidential candidates have used the judiciary, i.e., how they would rein it in or what kinds of judges they would appoint, as a campaign issue to raise money and influence voters. And the appointment and confirmation of federal judges has become more politicized in recent years as the two major parties have sought to control the judiciary.

Because they are selected through different methods, because they have different tenures on the bench and because they hear different kinds of cases, federal and state judges face different kinds of issues that can affect their independence. But they also share some of those pressures.

Legislative Oversight

At both the federal and the state levels, the legislative branch wields significant power over the judiciary. For example, Congress controls the size and number of the lower federal courts. The legislative branch also sets judicial salaries, and unlike the U.S. Constitution, many state constitutions do not prohibit decreases in judges' salaries during their tenure. Moreover, Congress and state legislatures (with executive approval) ultimately control the courts' budgets and, within constitutional limits, their jurisdiction. At both state and federal levels, the legislative branch has frequently attempted to control judicial decision-making via threats to reduce court budgets and through stripping the courts of jurisdiction in particular types of proceedings.

Court Jurisdiction

As a general matter, the judiciary is empowered to hear "cases or controversies" stemming from the laws enacted by the political branches of government. This includes resolving disputes under applicable laws; sentencing defendants convicted of violating the laws; challenges to the constitutionality of the laws themselves; and resolving errors or conflicts among laws. At both federal and state levels, legislators occasionally enact laws limiting court jurisdiction to hear certain types of cases. ***Jurisdiction-stripping*** is often used as a political tool to punish unpopular causes or parties, and to prevent courts from issuing decisions that are unpopular with legislators or voters.

Significant constitutional questions – and tensions – are raised by the circumstances surrounding jurisdiction-stripping. These questions include the proper balance between Congress's constitutional powers of judicial oversight and the judiciary's inherent powers as an independent branch of government; the extent to which such congressional action operates as a legitimate check on or improperly infringes upon the judiciary's power; and

the appropriate methods to resolve such tensions, maintaining the proper checks and balances between and the proper separation of the powers of each of the three branches.

Federal Courts

In the past, Congress rarely embarked on wholesale jurisdiction-stripping, although over the years it has taken powers away from the courts. Three examples include the Prison Litigation Reform Act of 1995 (PLRA), the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The PLRA restricts federal court jurisdiction over cases involving prison conditions and prisoner release orders. The other two laws restrict federal court jurisdiction over certain immigration matters. The AEDPA also limits federal habeas corpus relief.

However, there has been a surge in jurisdiction-stripping activity in recent Congresses. During 2004 and 2005, for example, the House of Representatives passed a measure that would prohibit federal courts from hearing challenges to the Pledge of Allegiance. The “Marriage Protection Act,” also passed in the House, would strip federal courts of the power to hear challenges to the Defense of Marriage Act of 1996. The “Constitution Restoration Act” proposed denying federal courts the power to hear cases involving governmental officials’ “acknowledgement of God as the sovereign source of law, liberty, or government” and impeaching judges who exceeded their jurisdiction in this regard. A separate measure proposed allowing Congress to reverse any Supreme Court decision that struck down a law on constitutional grounds. The House also passed a resolution opposing courts’ observance of foreign judgments or laws, and also passed the “Federal Marriage Amendment,” which called for amending the Constitution to define marriage as a union between only a man and woman.

The previous year also witnessed unprecedented congressional hostility toward the courts. Congress passed the so-called Feeney Amendment as part of the PROTECT Act of 2003. The legislation severely limited federal judges’ discretion to determine sentences in criminal cases. It was passed without hearings or any other effort on the part of Congress to seek the views or experience of federal judges, and elicited a strong rebuke from Chief Justice Rehnquist. The legislation also prompted Attorney General Ashcroft to order federal prosecutors to “report” federal judges who issued sentences below the federal sentencing guidelines.

The “war on terrorism” has also created new threats to the courts’ ability to protect civil liberties. The USA PATRIOT Act, among other things, permitted sensitive information about Americans, obtained through grand jury investigations, to be disclosed to intelligence agencies without judicial review and required judges to issue orders compelling production of books, records, or other items based on a “certification of relevance” from law enforcement. Bills introduced subsequently aimed to limit the discretion of judges under the Classified Information Procedure Act and reduce federal habeas corpus review of investigative decisions.

State Courts

Florida

Since 2000, the Florida legislature has introduced a variety of bills to limit the courts' jurisdiction. Most of the bills altered the methods by which judges would be selected, but some proposals would have directly affected the courts' jurisdiction, as well: One bill would have eliminated the distinction between *substantive law* and *procedural rules*, required that all *court rules* conform to *statutes*, and authorized the legislature to *repeal* court rules by a simple majority vote. By effectively stripping judges of their ability to regulate certain procedures that, on some occasions, may actually affect their decisions in certain cases, the legislature could thus control the outcomes of those cases. In addition, the bill would have stripped the Florida Supreme Court of much of its authority to regulate the practice of law, and would have transferred jurisdiction to regulate judicial campaign conduct and speech from the judiciary to the state legislature. The legislature would thus control many of the processes for disciplining lawyers, judges, and judicial candidates. Finally, the bill would have created so-called "super" District Courts of Appeal, with exclusive statewide jurisdiction on issues to be determined by the legislature.

Earlier, the legislature introduced bills to expand the number of justices, permit the governor to appoint the chief justice, and permit the legislature to set rules of *judicial procedure*. The ultimate purpose of these bills was to secure judges who would not render such unpopular decisions — and if the judges were inclined to render such decisions anyway, legislatively-enacted rules of judicial procedure would prevent them from doing so.

Prior to these conflicts, and in response to court backlogs, the legislature had also enacted a law limiting death row appeals; it limited the *petitions* and *amendments* that the Florida Supreme Court could consider and prescribed time limits for rendering its decisions. Governor Jeb Bush described the law as an attempt to "send a message" to the court.

Maryland

In 2000, the Maryland legislature withheld judicial pay raises, as well as \$9 million in funding for the Baltimore court system; it also introduced legislation that would permit the legislature to overrule certain court decisions. Reasons for withholding monies included Chief Judge Robert Bell's reluctance to adopt changes in processing of criminal cases that were advocated by Baltimore Mayor Martin O'Malley, and legislators' dismay over "activist" decisions by the Court of Appeals. In supporting a bill to overrule court decisions, one legislator declared, "We either change their decisions or we change the court."

New Hampshire

Outraged over the New Hampshire Supreme Court's ruling overturning the state's education funding system, Governor Jeanne Shaheen and members of the state legislature drafted constitutional amendments that would reduce or remove the court's oversight of education funding. The governor also submitted a reduced appropriation request for the court system.

Ohio

In 1999, the Ohio Supreme Court overturned two state laws: a 1996 state tort reform statute, on the grounds that it unconstitutionally infringed upon the courts' authority; and legislation establishing the state's school-funding system, also on constitutional grounds. Legislators subsequently threatened a re-examination of the state's *separation of powers*, as well as impeachment and denial of pay raises.

Washington

Unhappy with recent court decisions, state legislators introduced a bill that would have given the legislature the right to overrule the Washington Supreme Court on issues of constitutional interpretation.

Impeachment

All federal judges appointed under Article III of the Constitution have lifetime tenure. They hold office, as the Constitution states, “during good Behaviour” or until they choose to step down. The only way to remove them from the bench is through impeachment and conviction, a two-step process by which federal judges (and also the President, Vice President, “and all civil Officers of the United States”) can be removed from office for “Treason, Bribery, or other high Crimes and Misdemeanors.” Impeachment is comparable to an indictment, and is done by the U.S. House of Representatives. If the House votes for impeachment, the Senate holds a trial, with the Chief Justice of the United States presiding, to determine whether the person shall be convicted and removed from office. Two-thirds of the members present must vote to convict. Former President Bill Clinton was impeached by the House but was not convicted by the Senate.

Over the last century, members of the political branches of Congress have frequently threatened to use impeachment and removal against federal judges with whose decisions they disagree. Despite this pattern of threats, however, Congress has not impeached or removed a judge because of unpopular decisions. During this period, all impeachments and removals of federal judges have been clearly grounded in criminal behavior or official misconduct. Many states also provide for impeachment of judges, although they rarely use this method.

Threats of Impeachment for Political Purposes

While impeachment of federal officials, including judges, is relatively rare, *threats* of impeachment, on the other hand, occur relatively frequently, particularly when members of Congress disagree with a particular decision by a federal judge. Such calls for impeachment are often used to try to influence pending or future decisions in particular types of cases.

From the nation's founding, efforts to impeach judges have at times had a political, rather than a legal, basis. The case of Supreme Court Associate Justice Samuel Chase is a prime example of the danger of political battles affecting the impeachment process. Justice Chase was an ardent *Federalist*, one of the last appointments to the Court by President George Washington. When outgoing Federalist President John Adams tried to pack the court with Federalist judges by creating new judgeships and filling them with Federalists, the incoming Republican Jefferson administration and Congress sought to undo the appointments. In a wholesale effort to rid the courts of Federalists, Jefferson and the Congress attacked Chase, allegedly on the grounds that he had deprived defendants of their constitutional rights and had behaved like an "electioneering partisan." The House impeached him. With Chief Justice John Marshall participating as a defense witness, the Senate failed to convict on any of the eight charges. The result was a reaffirmation, albeit a narrow one, of the judiciary's independence.

Contemporary examples of politically-motivated attacks on the judiciary abound. In 1996, House of Representatives Majority Whip Tom DeLay (R-Texas) and Congressman Bob Barr (R-GA) threatened to impeach judges because of their decisions. A number of members of Congress began issuing lists of federal judges who, they argued, should be impeached for issuing so-called "activist" decisions. Chief among these was then-Senator and Presidential candidate Bob Dole, who declared in a campaign speech that President Clinton had created a "Judicial Hall of Shame." Dole named four judges appointed by Clinton as "members" of that "Hall of Shame," describing them as "an all-star team of liberal leniency." Subsequently, Dole periodically announced new "inductees" to the "Hall of Shame."

Judge Harold Baer of New York was the object of particular scorn. In 1996, an election year, Judge Baer came under fire from both conservative Republicans in Congress and Democratic president Bill Clinton for his ruling in a drug case. In that case police had observed four men loading duffel bags into a car trunk. When they saw the police, the men fled. The police then searched the car without a warrant, and found 80 pounds of cocaine. Baer granted a defense motion to suppress the cocaine as evidence on the grounds that the police did not have reasonable suspicion to search the car. In his decision on that motion, he declared that fleeing the police was not necessarily suspicious behavior in a neighborhood where many residents believe that police have a reputation for violence and corruption.

Infuriated members of Congress called for Baer to resign, and some, including then-Senator and GOP presidential candidate Bob Dole and Representative Tom DeLay, called for his impeachment. Bill Clinton, who had appointed Baer, but who was in the midst of a re-election campaign against Dole, said publicly that he might ask for Baer's resignation if the judge did not reverse his ruling. Baer later granted the government's motion to reconsider his decision, and ultimately reversed it, but said that he did so based on evidence unavailable to him earlier. Baer then was criticized by others for allegedly bowing to political pressure. Ultimately, he recused himself from the case entirely.

Federal Judicial Impeachment Cases

Despite the frequency with which members of the political branches suggest that federal judges have engaged in impeachable conduct, use of impeachment itself is relatively rare. Since 1789, impeachment proceedings have been initiated against 12 judges. Nine other judges resigned before such proceedings were formally instituted. Eleven of the 12 impeachment cases went to trial; four resulted in acquittals and seven in actual removals. The one remaining judge resigned during the impeachment proceedings. The most recent cases of impeachment and removal occurred in 1989, when Judges Alcee Hastings and Walter Nixon were impeached for improper financial dealings and corruption.

A list of judges who were impeached, with brief summaries of the charges and results, are described below:

- *U.S. District Court Judge John Pickering, 1803*: Judge Pickering, of New Hampshire, was charged with four articles of impeachment. Three concerned judicial decisions that were adverse to the federal government's interests in an admiralty case, and thus appeared to have been a direct threat to judicial independence. However, scholars seem to agree that the real reason for the impeachment was found in the fourth article, which charged that he had "loose morals and intemperate habits," presided "in a state of total intoxication," and "frequently, in a most profane and indecent manner," committed blasphemy, "disgraceful to his own character as a judge, and degrading to the honor and dignity of the United States." While Pickering was convicted on all four counts, the consensus appears to be that the fourth article formed the real basis for his removal — and that he was indeed guilty of engaging repeatedly in such conduct.
- *Supreme Court Justice Samuel Chase, 1805*: Chase was charged with eight articles of impeachment, arising out of conduct that allegedly occurred while he served as a District Court judge presiding over cases in Pennsylvania, Maryland, and Virginia. Article I alleged that he deprived a particular defendant of his constitutional rights and prejudiced the jury against him; the defendant was subsequently sentenced to death. Articles II through VI involved the same case, and accused Chase of additional conduct that was prejudicial to the defendant, including impaneling a juror who had declared that he had made up his mind in advance of the trial; refusing to allow testimony from a material witness favorable to the defendant; interfering with the presentation of the case by the defendant's attorney; and procedural irregularities that amounted to unlawful arrest, imprisonment,

and indictment of the defendant. Article VII alleged that he improperly pressured a grand jury "with intent to procure the prosecution" of a particular defendant and effectively ordered the district attorney to find a pretext upon which to prosecute him. Article VIII charged him with engaging in a "political harangue" with "intent to excite the odium" of a grand jury, for the purpose of turning the grand jury and the citizenry "against the Government of the United States," and with behaving generally with the "low purpose of an electioneering partisan." While there appears to be consensus among scholars that Chase's impeachment was motivated by then-President Thomas Jefferson's hostility toward Chase and his Federalist views, they also seem to agree that Chase engaged in the sort of ill-mannered behavior described in the articles of impeachment. Nonetheless (and perhaps because of an awareness that the proceeding originated out of partisan animus), the Senate ultimately narrowly acquitted him on all counts.

- *U.S. District Court Judge James Peck, 1826*: The House brought one article of impeachment against Judge Peck, who sat in Missouri. The article charged that he had overstepped his authority in levying a suspension and prison sentence upon a lawyer for contempt; the lawyer, Luke Lawless, had written an anonymous letter to a newspaper, criticizing Peck's ruling in a case in which Lawless represented one of the parties. The Senate acquitted him by one vote.
- *U.S. District Court Judge West Humphreys, 1862*: Judge Humphreys sat in the Eastern, Middle, and Western Districts of Tennessee. The House brought seven articles of impeachment against Humphreys: Four articles charged him with various acts of sedition, including inciting revolt and rebellion, advocating secession, organizing "armed rebellion" and war, and forcibly opposing federal authority. A fifth article charged him with refusing to hold court, acting as judge of an "illegally constituted tribunal" (*i.e.*, "the district court of the Confederate States of America,"), and causing the arrest and detention of a citizen who refused to pledge allegiance to the Confederate States of America. The sixth concerned confiscation of property and the arrest and imprisonment of other citizens who were Union sympathizers; the seventh concerned the arrest and imprisonment of a Union sympathizer "with intent to injure" him. Despite the fact that the Senate was unable to serve the articles of impeachment upon him, it nonetheless tried and convicted him in absentia, and ordered his removal from office.
- *U.S. District Court Judge Charles Swayne, 1905*: In the first 20th-century impeachment of a judge, the House levied twelve articles against Swayne, who sat in the Northern District of Florida. The first three charged him with falsifying expenses; the fourth and fifth concerned his use of a railroad car and its provisions for himself and his friends; the sixth and seventh charged him with failure to change his residence to that of the district in which he presided, as required by law; and the final five articles charged him with "maliciously and unlawfully" convicting, fining, and imprisoning three separate lawyers for contempt of court. Ultimately, the Senate acquitted Swayne of all charges.
- *U.S. District Court Judge Robert Archbald, 1912*: Thirteen articles of impeachment were levied against Archbald, of Pennsylvania. Articles I, II, III, and VI charged him with improper use of his position to influence various companies and officers with pending litigation, respectively: to enter into a contract with him; to

- agree to a settlement and a subsequent contractual arrangement; to enter a leasing agreement; and to purchase real estate, all to the benefit of Archbald himself. Article IV alleged wrongful *ex parte* communications with a litigant. Articles V, VII, VIII, IX, and X charged him with improper acceptance of gifts (money) from litigants; Article XI alleged improper solicitation and acceptance of money from attorneys appearing before him in court; Article XII alleged that Archbald appointed as jury commissioner an attorney for a litigant; and Article XIII summarized the above offenses, accusing him generally of exercising improper influence to his own profit. The Senate convicted him of five of the articles, including Article XIII.
- *U.S. District Court Judge George English, 1926*: The House charged English, of the Eastern District of Illinois, with five articles of impeachment: Article I accused him of "tyranny and oppression" in disbarring lawyers; forcing public officials to respond to a nonexistent case for the purpose of denouncing them "with profane language"; and threatening two journalists with imprisonment. Articles II and III alleged that he entered into an improper relationship with a fiduciary appointee; Article IV charged him with improperly ordering use, in a bankruptcy proceeding, of a bank in which he had a financial interest; and Article V, much like the first article, alleged abusive treatment of lawyers and litigants. However, the Senate dismissed the case at the request of the House impeachment managers, because English resigned from office six days before his Senate trial was scheduled to begin.
 - *U.S. District Court Judge Harold Louderback, 1933*: Five articles of impeachment were levied against Louderback, of the Northern District of California. Article I charged him with improperly dismissing a *receiver*, improperly appointing a new one, and conspiring to establish a fictitious residence in anticipation of litigation that would involve Louderback himself. Article II alleged "partiality and favoritism" in improperly granting "exorbitant" attorney's fees and improperly appointing fiduciaries and unjustly enriching them. Articles III and IV reportedly⁶ also involved improper appointment and unjust enrichment of fiduciaries. Article V summarized these offenses and charged him with acts that were "prejudicial to the dignity of the judiciary" and that brought "scandal and disrepute" upon his "court and the *administration of justice*." Louderback was acquitted on all counts.
 - *U.S. District Court Judge Halsted L. Ritter, 1936*: Ritter, of the Southern District of Florida, was charged with seven articles of impeachment. The first alleged that he ordered "exorbitant" legal fees, so that a portion could be paid to him; the second charged him with wrongfully forcing a party to continue a proceeding in his court, and then appointing a *fiduciary* pursuant to an arrangement that profited Ritter personally. Articles III and IV charged him with engaging in the practice of law after his appointment to the bench; Articles V and VI charged him with tax evasion; and Article VII summarized the foregoing offenses, charging him generally with bringing "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary." While

⁶ See Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 Tex. Rev. Law & Pol. 117, 140 (1998).

- the Senate acquitted him of Articles I through VI, it convicted him of Article VII. Ritter appealed his conviction on the grounds that the charges in Article VII were not "impeachable offenses" as defined in the Constitution; the U.S. Court of Claims dismissed his appeal, holding that it had no jurisdiction to review impeachment convictions.⁷
- *U.S. District Court Judge Harry E. Claiborne, 1986*: The House charged Claiborne, of Nevada, with four articles of impeachment. The first and second alleged that he failed to report income on his federal income tax returns; the third charged that he was guilty of "misbehavior" and "high crimes," because of his convictions for falsifying those tax returns. The fourth summarized the previous three, and charged that he had "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts." The Senate convicted Claiborne of the first, second, and fourth articles, but acquitted him of the third. He was removed from office and served a federal prison sentence.
 - *U.S. District Court Judge Alcee Hastings, 1989*: Judge Hastings, who, like Judge Ritter before him, sat in the Southern District of Florida, was charged with seventeen articles of impeachment. Article I alleged that Hastings had solicited a bribe from defendants with a case before him; Articles II through XV charged him with perjury in the subsequent criminal case charging him with bribery. Article XVI charged that he improperly disclosed confidential information obtained through a law enforcement wiretap to which he had access as the supervising judge in the case. Article XVII alleged that he undermined public confidence in the judiciary and brought "disrepute" upon the federal courts by maintaining a "corrupt relationship" with an individual involved in the bribery incident; by repeated perjury during his own criminal trials; by fabricating documents and submitting them into evidence at his trial; and by the improper disclosure of confidential information. Hastings was convicted by the Senate of seven charges, including that pertaining to bribery, and he was removed from office. However, he was acquitted of the criminal charges after trial in federal district court. He then appealed the Senate's impeachment conviction, arguing that the full Senate should have heard all proceedings, rather than a 12-member committee; a federal district court agreed and overturned his conviction. The following year, however, the U.S. Supreme Court held in another case that the courts had no jurisdiction to review impeachment verdicts under any circumstances. Despite convicting him, the Senate did not take the additional step of disqualifying Hastings from holding public office; in 1992 he became a member of the U.S. House of Representatives.
 - *U.S. District Court Judge Walter Nixon, 1989*: Three articles of impeachment were leveled against Judge Nixon, who sat in Mississippi. The first two alleged that he perjured himself with regard to discussions he had had and attempts he had made to influence the outcome of a pending case. The third article itemized the false statements involved in each of the previous articles. The Senate convicted Nixon of the first two articles, acquitted him of the third article, and ultimately removed him from office. Nixon subsequently appealed the conviction, arguing

⁷ See *id.* at 141.

that the Senate had violated the Constitution's requirement that it try all impeachment cases by allowing a committee to hear all testimony and report back to the full Senate. After hearing the appeal, the U.S. Supreme Court held that it had no jurisdiction to review impeachment verdicts.

General Congressional Disapproval of Federal Judges

In May 2002, congressional hearings were held on a bill intended to restore lengthy sentences for first-time drug offenders (the U.S. Sentencing Commission, via the Federal Sentencing Guidelines, had previously lowered those sentences). U.S. District Judge James M. Rosenbaum, a federal trial judge from Minnesota, testified on behalf of the federal judiciary. In his testimony, Judge Rosenbaum opposed the bill and argued in favor of judicial discretion to depart from congressional sentencing requirements when the facts and applicable law of a particular case warranted such a departure. (As a practical matter, such “departures,” are nearly always “downward departures.” In the interests of justice, or because of specific mitigating facts in the case, a trial judge may impose a sentence lower than that established by the guidelines for a particular crime, hence the term “*downward* departure.”) Outraged at the prospect of lower sentences for drug offenders, certain Republican members of Congress, as well as the Justice Department, began a review of all of Judge Rosenbaum’s own decisions, with particular scrutiny given to every sentencing decision that was a downward departure from the Federal Sentencing Guidelines. They then *subpoenaed* Judge Rosenbaum, demanding that he defend each of those decisions in congressional hearings. That prospect in turn outraged members of the federal judiciary and laid the groundwork for the recent spate of jurisdiction-stripping efforts.

Around that same time, several members of Congress also formed the House Working Group on Judicial Accountability, with the express goal of fighting so-called “judicial activism” and a hostile “take no prisoners” approach.

Executive Influence

The president and governors wield substantial power over the judiciary. At the federal level and in many states they decide who will sit on the bench, and they can approve or block funding for the courts.

Federal Courts

The Executive branch wields substantial power over the federal judiciary. Most obvious is the president’s authority under the Constitution to appoint federal judges, subject to approval by the Senate. Despite the last decade’s bruising confirmation battles, the Senate still generally affords great deference to a president’s choices for the federal bench. Depending upon the number of vacancies during any given presidential term, this provides the nation’s chief executive with a substantial opportunity to mold the legal and philosophical approaches of the judicial branch by nominating judges whose views are likely to reflect his own. Such influence may have very real consequences for American jurisprudence, since judicial philosophy often plays a major role in many types of judicial decision-making. Some examples include approaches to plea bargains and criminal sen-

tencing; the granting or denial of appeals; permitting certification of classes for class-action lawsuits; approaches to compensatory and punitive damages; approaches to the admissibility of evidence; and interpretation of constitutional protections of individual rights, particularly for disadvantaged or unpopular classes of people.

At least twice in the nation's history, a president has also engaged in "court-packing." The first attempt occurred during Thomas Jefferson's administration, when he attempted to oust Justice Samuel Chase and other political opponents. The second attempt occurred during the 1930s, when the Supreme Court began striking down Franklin Roosevelt's New Deal legislation. Infuriated, Roosevelt embarked on what has become known as the "court-packing plan": He attempted to increase the number of judges on the Court, which would have permitted him to add enough judges in favor of the New Deal to ensure that the legislation would be upheld. However, one of the existing justices changed his voting habits, and Roosevelt abandoned the plan. Congress never voted on it, but the episode has served as an object lesson for generations of students in the importance of maintaining the judiciary's independence from the political branches.

Executive-branch agencies increasingly play a role in affairs that traditionally have been the province of the judicial branch. For example, in the aftermath of the September 11 terrorist attacks, the Department of Justice implemented a new policy permitting eavesdropping by law enforcement on conversations between those detained in the terrorism inquiries and their attorneys, with no need for judicial authorization of the wiretap.

Around the same time, the White House itself also announced that terror-related cases would be diverted from the nation's courts to a *military tribunal*. Under the current *executive order*, the President would decide which detainees' cases should go before this tribunal, and there would be no judicial review of any decision rendered. Since that time, hundreds of foreign nationals have been detained for more than two years without charges or any judicial review at a U.S. military installation at Guantánamo Bay, Cuba. In the current war in Iraq, thousands of Iraqis have been detained at various times without charges or any other proceedings; the same is true of a number of prisoners in Afghanistan in the aftermath of the war there. Both sets of prisoners have been held variously as either *prisoners of war* or *enemy combatants*, both of which have different constitutional standing from ordinary prisoners in the U.S.

However, two detainees were U.S. citizens and filed *habeas corpus* petitions in federal district court. They argued that the Constitution does not permit the federal government to hold them under the same circumstances as foreign nationals designated as prisoners of war or enemy combatants, and that the government must afford them the same rights as ordinary American criminal defendants. Another detainee who was not a U.S. citizen likewise filed suit, arguing that the Constitution provides the non-citizens the right to challenge their detention by means of habeas corpus petitions.

On June 28, 2004, the U.S. Supreme Court issued its decisions in all three detainee cases: *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*. The cases covered a broad spectrum of circumstances: detainees who are foreign nationals, seized on foreign soil

during war; a detainee who is an American citizen, seized on foreign soil during war; and a detainee who is an American citizen, seized on U.S. soil, during what has been called the “war on terrorism,” but not as a part of the American war against the Taliban in Afghanistan, or, indeed, any defined and declared war.

In each case, the federal government argued broadly that the executive branch had sole authority to decide who was to be detained, where, and for how long, and that such presidential authority was not reviewable by any other branch of government. Government lawyers also argued that such presidential authority was inherent in the president’s powers as commander in chief of the armed forces.

State Courts

In the states, governors also frequently exercise a more subtle form of control through what are known as "*interim appointments*": when a sitting judge dies or decides to retire during his or her term of office, the governor has the authority to appoint a successor to complete the unfinished term. Generally, if the successor wishes to retain the seat, he or she must run for the office during the next election. However, the appointed successor, simply by virtue of *incumbency*, maintains an enormous advantage over challengers.

Indeed, in many states, there are tacit "gentlemen's agreements" among the party faithful; that is, a sitting judge who belongs to the same political party as the governor will, upon deciding to retire from the bench, resign the seat a few months prior to the next election. This opens the seat for the appointee of the governor's choice, giving the party an advantage in retaining the seat in the election. As a practical matter, these nominally "elected" judges thus are actually "anointed" judges, chosen by the voters at the virtual direction of the chief executive. Louisiana offers an unusual twist on this system. If a vacancy occurs with more than twelve months remaining in the term, the governor calls a special election to fill the seat. If the seat will be vacant fewer than twelve months, the Louisiana Supreme Court appoints a judge for the interim period only; the appointee is not eligible to run for the office at the end of the interim period.

Litmus Tests

When governors or the president say they will require judges they select to have certain beliefs or be members of a particular political party, it undermines judicial independence. Such litmus or loyalty tests render a judge — if not in reality, then in the public eye — beholden to the executive, or at least not fully independent of that branch.

In one recent example, then Democratic Governor of California Gray Davis, up for reelection, stated publicly in March 2000 that his judicial appointees should share his views. “They are not to be independent agents,” he said. “They are there to reflect the sentiments that I expressed during the campaign.” Davis later issued what has been described as a "retraction" with a written statement declaring: "*Once a judge is appointed, I fully respect the independence of the judiciary as a co-equal branch of government committed to following the law and the Constitution*" (emphasis added).

Such statements undermine public confidence that justice will be blind, and lead to concern that a judge may nevertheless have obtained an appointment only by promising to rule in certain ways. In addition, someone who did not support Davis's gubernatorial campaign might feel that he or she would not be treated fairly by a Davis appointee.

Election Politics

In states where judges are elected, judicial candidates must campaign for office like legislative- and executive-branch candidates. While judicial candidates are subject to greater restrictions on campaign speech and conduct than are candidates for other offices, the elective process still forces them to behave politically. Moreover, some of those restrictions have been greatly weakened in recent years.

Candidates for executive and legislative offices at all levels of government often use unpopular judicial decisions in their election campaigns, vowing to nominate judges who will not render such decisions, or to work to remove judges who do. Such campaign tactics put pressure on judges and judicial candidates to decide cases – and to promise in advance to decide cases – in ways that will achieve particular outcomes, a practice that is antithetical to judicial independence.

Even in states where judges are not elected, and also at the federal level, election politics (*i.e.*, involving elected executive- and legislative-branch officials) still affect judicial independence. The case involving U.S. District Court Judge Harold Baer, described at [X], is illustrative. The Massachusetts Supreme Judicial Court's decision in the *Goodridge* case, discussed above, has likewise sparked an effort at both state and federal levels to bar same-sex marriage. Tactics include direct pressure on judges across the country to issue decisions that would prevent it.

Judicial Selection

The Federal Confirmation Process

In recent years, members of Congress increasingly have begun using the federal judicial **confirmation** process as a way to exert influence over the executive branch, the judiciary, or their colleagues from the other party. Senators now routinely delay and block votes on judicial **nominations** if they disagree with a nominee's politics or past decisions or if they want to extract a political concession from the President or the other side of the aisle.

Beginning in 1994, Senate Republicans blocked or delayed numerous Clinton nominees for what the Clinton administration and Congressional Democrats described as political reasons. Methods ranged from public attacks on the judicial philosophy of nominees to bruising confirmation hearings designed to force nominees to withdraw to the use of "**holds**," or "**blue slips**." Since 2000, Senate Democrats have revived use of the filibuster and other delaying tactics to prevent certain Bush nominees who they oppose on ideological grounds from receiving a hearing. The result of such behavior, by both parties,

has been a substantial lengthening in time from nomination to confirmation. This has affected the ability of the courts to function properly and has threatened judicial independence by weakening the position of the courts and reducing judicial nominees to political pawns.

This heightened politicization is attributable to a variety of factors that fall into two primary but overlapping categories: the long history of bad blood between the judiciary and the political branches of government, which dramatically intensified with the Warren Court's approach to civil rights and other cases, and the rise of interest-group politics.

Interbranch Conflict: A History of Bad Blood

Conflict between the judiciary and the other two branches of government dates back to the nation's founding. Anti-Federalists sought to remove Federalist judges from the bench, and the era was rife with battles over the earliest interpretations of the Constitution. In the 20th century, Franklin D. Roosevelt's notorious "court-packing" plan was an extreme example of threats to judicial independence. The U.S. Supreme Court upheld numerous challenges to Roosevelt's New Deal on states' rights grounds. Furious, Roosevelt announced his plan to add up to five justices to the Court, at a rate of one justice for each existing justice who did not retire by the age of 70½, on the supposed grounds that the federal judiciary was unable to maintain its caseload. The public ultimately rejected such a blatant attempt to assert executive power over the judiciary.

Such tensions worsened drastically two decades later. Accompanying Earl Warren's ascension to the position of Chief Justice in 1953 was a sea change in the Court's handling of certain types of cases. Two years later, the Court began overturning the notorious "**Jim Crow**" laws requiring racial segregation in public accommodations throughout the South. Warren's tenure continued until 1969, and was marked by numerous other highly controversial decisions, including barring organized prayer in the public schools, establishing a right to counsel in state prosecutions, requiring police to issue the so-called "**Miranda warnings**," nullifying **anti-miscegenation laws**, and giving **symbolic speech** First Amendment protection. Such decisions were often wildly unpopular with both politicians and the public. Nevertheless, they laid the groundwork for equally controversial decisions to come in the succeeding decades.

Interest-Group Politics

The second category, the rise of interest-group politics, is related to the first. Beginning largely in the 1980s, the presence of interest groups in legislative- and executive-branch races became common. Frequently, such campaigning spilled into the judicial arena, as groups pushed politicians to curb "**judicial activism**" or to see that certain decisions were overturned. Recognizing an effective campaigning device, political candidates wasted no time in making such pledges.

Subsequent decades saw escalating political activity by political action committees, organized labor, corporate interests, religious groups, and others; vastly increased financial

investments by the two major political parties in all political activity; and increased political activity and financial contributions by private corporations and business groups. Outside interests in the interpretation and application of the laws reached new heights, and these interests understandably turned their attention to the judicial branch.

State Judicial Elections

Because most state court judges face an election at some point in their careers — either to win an initial seat on the bench or to keep that seat after an initial appointment — they face a wider range of pressures and threats to their independence than do judges with life tenure.

Forcing state court judges to run for office also forces them, in many ways, to act like politicians, i.e., they have to raise money, they have to campaign, they have to defend past controversial decisions. Each of these elements has the potential to influence how they behave on the bench, or at least how they are perceived to behave by the public and the people who come before them in court. Surveys repeatedly show that judges worry that participation in election campaigns leads the public to regard them as politicians. They also worry that the public will believe that their decisions, however impartial, are influenced by campaign contributions.

Campaign Speech and Conduct

Most judicial election problems that arise from the candidates themselves involve campaign speech or conduct. Conduct issues may include fundraising and expenditures, inappropriate political activity, or even judicial misconduct generally that does not directly concern the election but occurs or is raised as a campaign issue during the election cycle. However, the most significant campaign conduct issues are inextricably intertwined with campaign speech, and it can be difficult to separate constitutionally-protected campaign speech from campaign conduct that is not protected under the First Amendment. Moreover, not all campaign speech by judicial candidates is necessarily protected by the First Amendment. Various jurisdictions are split on this issue.

Nonetheless, some forms of campaign speech by judicial candidates are readily identifiable as inappropriate, even where they may technically be considered protected speech. Especially problematic are two kinds of judicial campaign speech that can cross the line into actual conduct: improper campaign promises, often called "*signaling*"; and inappropriate attacks on opponents. Immediately below are recent examples of both forms of behavior, as well as related forms of inappropriate conduct.

Florida

- According to the *Jacksonville Times-Union*, Fourth Judicial Circuit Court candidate David M. Gooding “call[ed] himself a ‘commonsense conservative’ who believes in a strict interpretation of the Constitution.” In his campaign, Gooding also alleged that opponent Dan Wilensky had violated judicial election laws by attending a political

event. Wilensky sued Gooding for defamation, charging that Gooding knew when he made the allegation that it was false.

- Incumbent County Court Judge Cheryl Thomas, who is African-American, faced a challenge from Anthony Arena, who was of Latino descent. Thomas was criticized for running a campaign ad that included her photograph and the phrase: “Let’s support our very own on September 10.” Thomas defended the ad by declaring that “our very own” referred to being a Tampa native. However, because challenger Anthony Arena was also a Tampa native, the ad gave rise to charges of bias.
- In 2003, the U.S. Supreme Court refused to hear an appeal from Florida judge Patricia Kinsey of a fine and public reprimand arising out of her 1998 judicial campaign. The Florida Supreme Court levied the \$50,000 fine for what it held was “unethical conduct”: It included campaign statements promising support to crime victims and law enforcement, which the court found demonstrated a “prosecutor’s bias” in her approach to deciding cases, and other inappropriate campaign statements in which she labeled criminal defendants “thugs” and “punks.”
- In 1996, Miami-Dade County Circuit Judge Alan Postman was quoted in a *Miami Herald* article, saying, “No one is buying a judge for \$500. But it could buy you a continuance down the road.” In 2002, defense attorney Diane Ward challenged Postman, and attacked him during the campaign for having made that statement. Ward also alleged that a Dade County Bar Association poll of local attorneys garnered her a “qualified” rating from 75% of the attorneys surveyed, but that Postman received a “qualified rating from only 55%.

Idaho

- John Bradbury, one of three candidates vying for one open position in the Second Judicial District primary, ran on what was described locally as a “populist” platform, openly criticizing judges for allegedly “protecting” each other and failing to do their jobs properly. Bradbury alleged that Supreme Court Chief Justice Linda Copple Trout (who was not his opponent in the race) had participated in decisions in which she had a conflict of interest. He also had ties to a national interest group called JAIL 4 Judges, which advocates the creation of what it calls “Special Grand Juries” to investigate complaints against state judges, and worked to place an initiative on the Idaho ballot that would have provided for such a mechanism. The ballot measure received too little support to be placed on the ballot; Bradbury, however, won the election.

Louisiana

- In the 2002 Republican primary for the 22nd Judicial District Court, challenger Chris Aubert disseminated campaign ads and brochures attacking his opponent, incumbent Patricia Hedges, for her decision to reduce the bond for a defendant charged with hiring a “hit man” to kill his wife; while released on bond, the defendant killed his wife

himself. Aubert's ads also labeled that defendant's attorney as "a friend of and major contributor to Judge Hedges."

- In response, Hedges distributed a campaign brochure entitled "The Temperament and Integrity of Napoleon Aubert," with an image of Aubert's head superimposed on an image of Napoleon Bonaparte's body. In this and other ads, she attacked Aubert for filing "frivolous lawsuits," alleging that he had been sued "five times for misappropriation of funds by multiple business partners." Hedges's campaign literature also alleged that members of Aubert's own family refused to support his campaign. Aubert retaliated with a newspaper ad charging that Hedges had also filed several "frivolous lawsuits," and labeling her campaign ads "childish attacks."
- In early 2004, Roland Belsome won a special election for an open seat on the state's Fourth Circuit Court of Appeal. Belsome labeled opponent Barrie Byrnes a mere "part-time processor of traffic tickets"; Byrnes attacked Belsome's reversal rate as a Civil Court judge. According to local media, both candidates appealed to "racially charged local controversies" in their campaigns.

Minnesota

- First District Court incumbent Karen Ausphaug was challenged by Kevin Quigley. Ausphaug had presided over Quigley's divorce case, causing local observers to speculate that both his campaign to replace her and his public attacks on her were motivated by his dissatisfaction with her decisions in his case. Quigley charged that Ausphaug engaged in excessive absenteeism, neglected her duties, and created an unduly large case backlog. In response to his attacks, Ausphaug filed formal complaints with several state agencies, on the grounds that Quigley made the charges before even requesting her attendance record and data on her case management history.

Mississippi

- Under the guise of defending his own record, Mississippi Supreme Court challenger Jess Dickinson ran a series of television ads attacking incumbent Chuck McRae. One such ad opened over an image of McRae, as the voice-over accused an interest group of having "attacked Jess Dickinson's Christian faith," implying that McRae was behind the interest group and its ad. Dickinson also reportedly continually raised McRae's earlier traffic law difficulties, which were reported in the *National Law Journal*: McRae once was convicted of speeding; had pleaded no contest to a drunk-driving charge seven years previously; and was arrested on a drunk-driving charge four years previously, although that charge was dismissed. Yet another ad described McRae's "attacks" as "lies."
- McRae ran his own ad accusing Dickinson of "not telling the truth" about taking money from special interests; the ad featured a scrolling list of interest groups and corporations that had allegedly contributed to Dickinson's campaign.

New York

- In the 2003 County Court race in Rensselaer County, challenger and North Greenbush Town Justice Nia Cholakis accused incumbent Patrick McGrath of “misusing his office to promote his re-election.” She justified seeking press coverage of her allegations, saying, “This is my only way of dealing with the issue.” McGrath responded: “She can accuse me of anything and all I can do is deny it, so I am kind of stuck between a rock and a hard place.” Until recently, few effective means have existed to resolve the dilemma such circumstances create for both candidates. Since 2002, however, the New York State Bar Association has spearheaded a statewide effort to establish judicial campaign oversight committees that are designed specifically to address such problems.
- In the 2002 Kings County (Brooklyn) Supreme Court elections, controversy arose over the candidacy of Margarita López-Torres, a Democrat and 10-year veteran of the City Civil Court bench and the first Latina ever elected to the Civil Court. For Brooklyn Democrats, the process of obtaining the party’s endorsement customarily begins with contacting the county’s Democratic Party leader, Assemblyman Clarence Norman, and the head of the party’s judicial screening panel, Jerome Karp. When López-Torres contacted each man, she received no response from Norman and only a curt letter from Karp, advising that the screening panel would consider only those candidates whose names it received “upon referral of the County leader” (*i.e.*, Norman). Despite its earlier endorsement of her Civil Court candidacy, the county Democratic Party ultimately refused to consider or endorse López-Torres’s Supreme Court candidacy, and the dispute became public. López-Torres charged that party leaders were withholding their endorsement as punishment for her refusal to accede to their patronage demands: “[It] had nothing to do with my performance as a judge . . . [but] whom I chose to be my court attorney.” She contended that, after she won the Civil Court election, party leaders pressured her to hire their protégées (and one leader’s daughter) as her law secretaries. She also alleged that, when she refused, Norman told her in a phone call, “One day you may want to be a Supreme Court judge and the county would not forget.” Norman, Karp, and other leaders denied the allegations, but investigations have ensued anyway.
- In December, 2002, the Association of the Bar of the City of New York hosted one in a series of conferences entitled “How to Become a Judge.” One panel comprised Clarence Norman and other Brooklyn, Queens, and Staten Island Democratic Party leaders. Their advice to hopefuls for the bench included the following:
 - “[J]oin a political club, become known to party leaders, develop mentors, and make yourself indispensable.”
 - The *New York Law Journal* reported that Staten Island Democratic Party leader John Lavelle “encouraged lawyers to volunteer to help his organization deal with the arcane [*sic*] of election law.” According to Lavelle, party leaders are “very,

very aware' of the contributions volunteer lawyers make," and he advised them to "get known by the party organization."

- Asked about policies prohibiting district attorneys from joining political clubs; Lavelle responded: "[I]f a prosecutor's wife were an active club member, there would be 'credit in that context.'"
- Party leader Thomas Manton of Queens declared that a particular former law secretary's "path to the judiciary" had gotten a "jump start" by becoming "heavily involved as a volunteer" in Manton's own congressional campaign. He added: "'Membership in your local Democratic club is not hurtful at all"; indeed, he admitted that "nomination in Queens is tantamount to election."
- When asked by an attendee why no Republicans were present on the panel, one panelist replied: "When was the last time we had a Republican [elected] in Kings or Queens? Since it's not a circumstance we have to consider, we didn't invite them."
- In Erie County (Buffalo), a 2002 investigative series by two *Buffalo News* reporters uncovered patronage problems involving then-leader of the county Democratic Party G. Steven Pigeon and local judges and judicial candidates. Among other allegations, when an Amherst Town Court Justice decided to run for Erie County Supreme Court, he rented billboard space for campaign advertising. He reported a telephone call from Pigeon, who allegedly said, "Listen, you SOB. Don't you ever involve the public in this process. It's my call. Nobody else's." Another alleged incident occurred during a dispute at a judicial nominating convention; a local Supreme Court justice offered to try to help resolve it, and was allegedly told by Pigeon, "Sit down and shut up, you [expletive deleted]." Pigeon has since been replaced as party leader.
- Byron Town Court Justice Robert A. Crnkovich was censured by the New York State Commission on Judicial Conduct for improperly endorsing a candidate for the Batavia Town Court. Crnkovich recorded a radio advertisement for the candidate, allowed the candidate to use the text of the radio ad in a subsequent print ad, and wrote a letter to the editor of the *Batavia Daily News*, all to endorse the candidate. In each instance, Crnkovich was identified by his title, Byron Town Justice. He acknowledged to the Commission that he was aware at the time that he made the endorsements that the Rules Governing Judicial Conduct barred him from doing so.
- The Commission removed Lockport City Court Judge William Watson from the bench for conduct arising out of his primary campaign. Watson, a former prosecutor, disseminated campaign literature, letters to local newspapers and potential voters, and written responses to media questions that contained inflammatory and misleading assertions and appeared to signal how he would rule in certain types of cases. Among such statements were misleading and out-of-context assertions regarding Lockport's crime rate; he contended that violent criminals, particularly drug dealers, were flooding into Lockport from Buffalo, Niagara Falls, and Rochester, and committing

crimes. In a clear attempt to blame his opponents for the alleged increase in crime, he asked voters to “vote out of office those people who have contributed to the situation in which we currently find ourselves.” He also accused his opponents of tolerating an alleged 400% increase in drug arrests from 1996 to 1998, as well as a 369% hike in trespass arrests, a 151% increase in arrests for criminal possession of stolen property, and jumps of 61% and 56%, respectively, in robbery and burglary arrests. He also urged Lockport Police Department employees to vote for “a judge who will work with the police, not against them,” and “who will assist our law enforcement officer as they aggressively work toward cleaning up our city streets.” The Commission held that removal from the bench was the proper course of action, because at the time he made the statements in question, Watson knew that his statistics and other claims were out of context and/or misleading, and that the Rules Governing Judicial Conduct forbade campaign advertising that would create “the appearance that he would not be impartial as a judge, would not judge cases on an individual basis or upon the merits, and would be biased against criminal defendants.” Watson appealed the Commission’s decision; the Court of Appeals upheld the Commission’s findings, but reduced the sanction from removal to censure, citing Watson’s expressions of remorse and the fact that no allegations existed of improprieties with regard to his decisions or other conduct on the bench.

- Five charges of misconduct were levied against Supreme Court Justice Thomas Spargo, all arising out of his candidacies for and/or tenure on the Town Justice and Supreme Court benches. (The charges ran the gamut, from allegations of campaign conduct violations to campaign finance questions to inappropriate political activity to misconduct on the bench. However, since court cases ensued have specific ramifications for judicial campaign conduct and its regulation, all are discussed here.) The first charge alleged that, as a candidate for Town Justice, Spargo offered coupons to voters for free doughnuts and coffee, as well as coupons for \$5 worth of gasoline; he also bought rounds of drinks, cider and doughnuts, and pizza for public employees, while soliciting their votes. The second charge alleged that, in certain criminal cases, Spargo failed to disclose to the defense that he had represented the campaign of the District Attorney-elect, and at that time was still owed \$10,000 by the campaign. The third charge alleged that, during the Florida recount of the 2000 presidential election, Spargo participated in the Republican Party’s demonstration at Florida elections offices that attempted to halt the recount. The fourth charge alleged that, while a sitting judge, he served as the keynote speaker at a county Conservative Party fundraiser. The final “Supplemental Charge” alleged that Spargo had made payments to consultants of various political parties for *volunteer* services (*i.e.*, with the implication that the payments were a quid pro quo for endorsements and other support from the parties). However, before the Commission had a chance to hear the complaint, Spargo filed suit in federal district court, arguing that the Commission had no jurisdiction, and that in the aftermath of the *White* case, most of the Rules Governing Judicial Conduct applicable to his case were unconstitutional. Normally, a federal court would have abstained until the plaintiff had exhausted all remedies at the state level, but District Court Judge David Hurd refused to do so; instead, Hurd permanently *enjoined* the Commission on Judicial Conduct from enforcing many of the relevant

Rules. The Commission appealed the decision to the U.S. Court of Appeals for the Second Circuit, which found that the district court should have abstained from the case until Spargo had exhausted state remedies, and remanded the case accordingly.

North Carolina

- In announcing his intent to challenge incumbent Sarah Parker for her position on the North Carolina Supreme Court, Court of Appeals Judge John Tyson made public his views on a variety of controversial issues that are likely to come before the court. Among other things, he has declared his support for capital punishment in cases of “aggravated murder”; contended that “marriage is a sacred union between one man and one woman”; and maintained that “our constitutions protect citizen’s rights to keep and bear arms and the rights of criminals should be no greater than the rights of victims.”

Ohio

- Lt. Governor Maureen O’Connor, a Republican candidate for Supreme Court who ultimately won her race, ran a television commercial featuring her wearing a judge’s robe, although she had not served in the bench in seven years. An appeals court panel found that the ad violated the Code of Judicial Conduct, because it implied that she was a sitting judge when in fact she was not.
- Franklin County Court of Common Pleas Judge Deborah O’Neill, who failed in her bid for a seat on the state’s Court of Appeals, filed charges with an Ohio Supreme Court panel alleging that court officials had undermined her candidacy by attempting to make her “look bad.” O’Neill, a Democrat who had been accused of misusing court resources, engaging in personality clashes, and denying due process to litigants, contended that Administrative Judge Michael Watson, a Republican, was behind the charges, which she called “politically motivated.” According to Watson, he asked the Chief Justice Thomas Moyer to intervene and “assign a visiting judge to O’Neill’s cases so she could undergo a psychological evaluation.” He also declared, “If she insists on twisting my good intentions into her strange version of the truth, then so be it. This has nothing to do with politics and everything to do with her behavior.”

Pennsylvania

- In a televised debate, Supreme Court candidates Joan Orié Melvin, a Republican, and Max Baer, a Democrat, sparred over a variety of issues, including mandatory sentencing, the role of judges, and DNA testing. Melvin, who called herself a “strict constructionist,” refused to take public positions on such disputed political issues as abortion and capital punishment, on grounds that they were likely to come before her on the bench. Baer took what have been described as “general positions” on such issues.
- In other public statements, Baer declared, “When asked to announce my position on a general issue . . . I’m going to provide it. I would not have done that two years ago [*i.e.*, prior to the

U.S. Supreme Court’s decision in *Republican Party of Minnesota v. White*].” Melvin’s campaign chair issued a letter advising that Melvin would not take positions on issues likely to come before her on the bench, including such locally-contested issues as abortion, gun control, medical malpractice, and capital punishment. However, she declared that she “welcomes the opportunity to educate the public about her qualifications, judicial record and work ethic.”

- The five candidates in the 2003 Democratic primary in the Pennsylvania Supreme Court race engaged in a public debate in which they spoke openly about their opinions on issues likely to come before them on the court, including abortion and capital punishment. While refusing to take a position on abortion rights, one candidate, Court of Common Pleas Judge James Murray Lynn, contended that scientists could not establish when life begins, and that the government thus should “give the benefit of the doubt to life.” He also declared his support for “gun owners’ rights.”
- During the primary campaign, another Court of Common Pleas judge and Democratic candidate, John W. Herron, admitted that he “has been fielding questions on his positions regarding abortion, the death penalty and merit selection of judges – something he would not have done a year ago [*i.e.*, prior to the U.S. Supreme Court’s decision in *Republican Party of Minnesota v. White*].”

Texas

- Supreme Court candidate Steven Wayne Smith, a sole practitioner with no previous judicial experience, won the 2002 Republican primary race against incumbent and party favorite Xavier Rodriguez and defeated appellate court judge Margaret Mirabal in the general election. However, he received little public support from interest groups known for endorsing Republican candidates: Texans for Lawsuit Reform, the Texas Association of Business, and the Texas Medical Association, all endorsed Mirabal, a Democrat. He likewise received no public support from Governor Rick Perry, reportedly because Smith had accused him of playing “racial politics” in his earlier appointment of Rodriguez to an interim position on the Texas Supreme Court.
- Smith filed a lawsuit in federal district court against the Texas Supreme Court, arguing that Canon 5(1) of the Texas Code of Judicial Conduct violated his First Amendment rights by preventing him from discussing political issues. The federal district court found Canon 5(1) unconstitutional in light of the U.S. Supreme Court’s decision in *Republican Party of Minnesota v. White*. However, Chief Justice Tom Phillips made a public plea to all Texas judicial candidates to follow his lead in signing pledges not to discuss their personal opinions on matters that might come before them as judges. Most complied with Phillips’s request, but Smith refused, repeatedly discussing his views on such matters.
- Among the issues likely to come before the court that Smith addressed publicly were school funding and abortion: He attacked the Texas Supreme Court for its decision

on school financing, and declared that he supported a parental notification requirement before a minor could obtain an abortion.

- Smith was the lawyer who convinced Cheryl Hopwood to file the lawsuit that would become *Hopwood v. Texas*, in which the use of affirmative action in the admissions process at the University of Texas School of Law was overturned on constitutional grounds. Smith made public attacks on the affirmative action, which he ardently opposed, the centerpiece of his judicial campaign; his attacks were so heated that numerous state officials, activists, and experts labeled them racist and argued that he won the election by “playing the race card.”
- Smith attacked opponent Margaret Mirabal on several fronts, distributing fliers that labeled her a “judicial activist” and criticized her decisions. He also filed a defamation suit against Mirabal and her campaign, alleging that she widely disseminated an e-mail message from one of her supporters that described Smith as a “racist” and a “bigot,” and as sounding “a little like a Nazi.” Mirabal responded that she had shown the e-mail message only to her campaign manager and one other person, and had made a conscious decision not to distribute it further. Smith abandoned the lawsuit after the election.

Wisconsin

- Candidates in the 2002 Wisconsin Supreme Court race argued over the propriety of announcing their personal opinions on political issues: Court of Appeals Judge Pat Roggensack criticized his opponent, Circuit Judge Ed Brunner, as a “judicial ‘activist’” for declaring his positions. Roggensack made recusal an issue, contending that Brunner’s public statements “on school choice and abortion mean he won’t be able to impartially decide further cases on those issues and will have to withdraw from those cases.” Brunner responded, “When you run for office, people ought to know who you are. . . . So, is the idea to trick [voters] so you slip onto the court, and then you pop out with your perspective?”

Other Political Activity

Florida

- In Broward County, five County Court candidates were accused of violating the Florida Code of Judicial Conduct by appearing before political clubs. Of those five, four were also accused of donating money to the clubs.
- Challenger Michael Takac accused incumbent Carven Angel of violating Florida’s nonpartisan judicial election law by attending partisan political campaign events. Angel insisted that his campaigning at partisan events did not violate state law, because, he said, “I only attended political meetings that were open to the public.”

- A state judicial panel also investigated incumbent Miami-Dade County Circuit Judge Alan Postman on charges that he solicited campaign contributions from lawyers who appeared before him, although according to Postman, “the probe went nowhere.”

Louisiana

- In early 2004, an Orleans Parish Civil Court judge, C. Hunter King, was removed from the bench for forcing court employees to work on his campaign for re-election.

Michigan

- During the primary campaign, incumbent District Judge Thomas Brennan, Jr., admitted to asking attorneys, while they were appearing in his courtroom, to collect nominating-petition signatures for his planned Court of Appeals campaign.
- Incumbent probate judge R. George Economy authored a letter to the editor of the *Lansing State Journal*, openly endorsing Janelle Lawless, a candidate for another judgeship.

New York

- The Commission also censured Nassau County Supreme Court Justice Ira Raab based on four charges, three of which arose directly out of political activity related to judicial selection. With regard to the first three charges, the Commission found that Raab had paid \$10,000 to the Nassau County Democratic Party machine as “his share” of party campaign expenses; that, while a sitting judge, he had staffed a Working Families Party phone bank for a legislative candidate, for the purpose of building goodwill for a future endorsement from the party; that he had participated in a Working Families Party judicial screening meeting, asking other judicial candidates about their willingness to publicize a party endorsement in their own campaign materials. The final charge involved misconduct on the bench: After an *ex parte* temporary restraining order that Raab had issued was overturned on appeal, he told the attorney who filed the appeal “that he would be on the bench another 11 years, that he had a ‘long memory’ and would remember the law firm's actions and that it was a ‘good thing’ the firm did not practice matrimonial law.” Raab appealed the censure, which was upheld by the Court of Appeals. However, during this same period, additional complaints (unrelated to those for which he was censured) were filed against Raab. The Commission notified him that the new complaints were under investigation, and Raab subsequently resigned from the bench as a result. Although the Commission continued to investigate the complaints, after obtaining Raab’s commitment never again to “seek or accept judicial office or a position as a Judicial Hearing Officer,” it ultimately closed the case without pursuing them further.

North Carolina

- Incumbent Supreme Court Justice Bob Orr was investigated for alleged judicial misconduct. He was accused of attending a fundraiser for fellow Republican Elizabeth

Dole, as well as of endorsing state Republican minority leader Patrick Ballantine at the same fundraiser. At that time, Ballantine was a party to a lawsuit pending before the state Supreme Court, upon which Orr would be called to rule.

- Democratic challenger Bob Hunter was also under investigation for alleged judicial misconduct, stemming from his admission that he earned more than \$400,000 as an estate executor and a business director while he served on the Court of Appeals. At a public candidate forum, Hunter and Orr each accused the other's political party of instigating the respective investigations.

Related Misconduct

Frequently, judges are disciplined for engaging in misconduct, whether on or off the bench, that does not directly involve judicial elections but is either related to the selection process or otherwise affects public confidence in that process. Such misconduct jeopardizes judicial independence, both by undermining public trust in the integrity of the courts and by sometimes providing the mechanism for attacks on the courts by other officials. Each state's judicial disciplinary body handles such incidents; state laws vary widely regarding what information may be released to the public in cases of judicial discipline. In some instances, cases may be referred to state or local authorities for criminal prosecution.

- In 2001, Kings County Supreme Court Justice Richard Huttner, whose name arose in the media's coverage of the Ludwig/Garry fiduciary appointments scandal, was charged with using the influence of his office with regard to litigation involving his co-op board, on which he also served. Despite rules barring sitting judges from engaging in the practice of law, Huttner represented the co-op board in legal proceedings, including a settlement conference. He signed affidavits on behalf of the board urging the courts to rule in the co-op's favor, which were filed by the board's regular attorney during litigation. He also permitted co-op lawyers to invoke his name and his position as a judge in correspondence with the board's opponents in the litigation and with the court involved. Huttner also engaged in conversation with the other party, invoking his position as a judge during the course of the discussion. The Commission on Judicial Conduct noted that Huttner was aware of an Advisory Opinion issued by the Advisory Committee on Judicial Ethics that forbade the very conduct in which he had engaged, in precisely the same context (*i.e.*, membership on a co-op board). Although Huttner ultimately resigned from the co-op board and agreed not to involve himself in the litigation in the future, the Commission censured him for his conduct.
- In January 2002, Kings County Supreme Court Justice Victor I. Barron was arrested and charged with soliciting and accepting a bribe from a lawyer appearing before him in a personal injury case. Barron ultimately pleaded guilty, was sentenced to prison, and was disbarred.
- In June 2002, the Commission on Judicial Conduct determined that another Kings County Supreme Court justice, Reynold N. Mason, should be removed from the

bench for engaging in improper and unethical financial transactions and obstructing the subsequent investigation. Mason appealed; the Court of Appeals upheld the order of removal.

- In April 2003, yet another Kings County Supreme Court justice, Gerald P. Garson, was arrested and indicted on bribery charges in a scandal involving the fixing of divorce cases. The Garson family was deeply involved in Brooklyn Democratic Party politics; numerous other family members hold public office or positions in governmental agencies. A cousin, Michael Garson, is a fellow Kings County Supreme Court Justice. Michael and Gerald were both granted power of attorney to handle the affairs of an aunt, age 92. The records involved in the granting of power of attorney were being investigated as possible forgeries; Michael Garson, who actually handled the aunt's financial affairs, was also investigated for allegedly using funds from her accounts to cover his own financial losses, and was eventually found by a judge to have breached his fiduciary duty to his aunt. When arrested in the bribery case, Gerald Garson informed investigators that a Brooklyn judgeship could be bought for \$50,000. In the course of his negotiations with investigators, he allegedly offered to provide proof of corruption and the name of Ravi Batra surfaced; Batra then filed a defamation suit against Garson. (Batra was also involved in the fiduciary appointments scandal that wracked the city's courts beginning in 1999. Gerald Garson was subsequently convicted of bribery.)
- The Commission on Judicial Conduct also censured Nassau County District Court Judge Michael A. Feichter for conduct related to a complaint that Feichter himself brought to the Commission regarding another judge. Feichter's original complaint stemmed from a controversy over an attempt by the Administrative Judge of Nassau County, a Republican, to avoid appointing an available Democrat to fill a First District vacancy by naming a Republican judge from the Third District; the Democratic First District judge, John Kaiman, sued the Administrative Judge and the county's Board of Judges, charging that they had no discretion under the law to make such an appointment from another district when a judge was available from the district where the vacancy occurred. Feichter then filed a complaint against Kaiman with the Commission; the complaint was dismissed, and Feichter filed a second complaint, which included the following: It alleged that Kaiman's lawsuit was "frivolous," "politically motivated," and without legal merit; it charged that Kaiman lied in his lawsuit for partisan reasons, and that it was filed for the express purpose of furthering his own career and damaging the careers of Republican judges; it cast aspersions upon either Kaiman's "mental capacity" or his alleged inability to refrain from "partisan animosity"; it implied that anyone affiliated "with the Republican Party had better settle quickly" in Kaiman's court and that the Commission's dismissal of Feichter's first complaint created the impression that Kaiman was benefiting from a "back room deal"; and it concluded by charging that, while "[t]he Commission can do nothing about simple-minded partisan political hacks victimizing Republican officials on and off the bench by using a hostile and unprincipled press," it had an obligation to do something about a "sitting Judge (*i.e.*, Kaiman) who behaves in this manner." Feichter was not censured making these comments in private correspondence to the Com-

mission; rather, he was disciplined because he forwarded a copy of the letter in its entirety, without an explanatory cover letter or any request that recipients keep the contents confidential, to 12 state senators and all 89 full-time judges in Nassau County. The Commission concluded: “It is clear that the purpose of the letter was not merely to ask the Commission to reconsider his complaint, but to publicize his vitriolic allegations, which the Commission had already considered and dismissed.”

Judicial Campaign Finance Issues

State court elections, particularly high court contests, have become increasingly like other political campaigns in recent years, largely because of the huge amount of money pouring into campaign coffers. Many interest groups have become exceedingly blunt about the fact that they regard contributions to candidates for a high court as a much more cost-effective way to achieve their agendas than contributing to candidates for legislative offices. The realities of campaign fundraising thus further politicize, at least in the perceptions of ordinary citizens, the one branch of government that is supposed to function free of political influence.

As judicial elections attract increased attention across the country, the races are also becoming increasingly expensive. It is not unusual for either fundraising or expenditures in state high court races to exceed a million dollars. With the rising participation of third-party interest groups in state judicial campaigns, total expenditures from all sources in many state judicial elections now run to the tens of millions of dollars. Moreover, most interest-group spending has a clear agenda driven by the desire to place judges on the bench who will issue decisions sympathetic to that agenda, and most monies are invested in advertising (particularly television advertising) that includes misleading and inappropriate attacks on candidates they oppose.

Although evidence of real corruption is often difficult to find, such corruption does exist in some jurisdictions. Moreover, the appearance that justice is bought and sold is often as damaging as if it were the reality. Practices common to contemporary judicial elections create a perception that contributors are able to buy influence, despite the fact that most elected judges are committed to ensuring that their decisions are based solely on the law and facts of individual cases. Several state judiciaries have endured scandals and the accompanying loss of public confidence because of irregularities, real or perceived, involving judicial campaign contributions.

The recent efforts at federal campaign finance reform that have culminated in the passage of the Bipartisan Campaign Reform Act (BCRA) have led several states (North Carolina, Ohio, Texas, and Wisconsin among them) to consider ways to curb the influence of money in judicial campaigns. Potential changes include public financing of judicial campaigns, heightened campaign disclosure, and changes from elective to merit-based judicial selection systems. Specific targets of these reforms include fundraising by candidates and interest groups; *contribution limits*, whether by capping the amount of donors or by regulating the amount candidates may receive; limits on *expenditures* of funds by candidates and interest groups; forms of campaign finance *disclosure*, including re-

porting of contributions given or received and expenditures made; and *recusal* (the requirement that a judge disqualify herself from hearing a case because her impartiality could be called into question) because of campaign contributions received from a party with a case before the court, or from a party's lawyer or law firm.

Immediately below are examples of problems associated with judicial campaign finance issues, including monies raised and spent in some states.

Florida

- In 2002, only one of the 20 incumbent Circuit Court judges had a challenger by the state's May 17th filing deadline; out of a total of 129 judicial seats up for election, only two, including the Circuit Court seat, were contested.
- The campaign for those two contested judicial seats included eight candidates, who collectively spent more than \$415,000 for the primary alone.

Michigan

- While the \$15 million raised by three Republican candidates in 2000's Michigan Supreme Court race dwarfs the amount of the monies raised in that court's 2002 elections, the numbers were still significant. The two Republican incumbents, Elizabeth Weaver and Robert Young, raised a total of \$800,000, compared with \$40,000 raised by their Democratic challengers.
- In his campaign literature and television ads, Ingham County Judge Richard Ball pledged to accept no money from political action committees. The *Lansing State Journal* subsequently reported that he had accepted \$1,500 in contributions from two PACs. When a reporter asked him about the discrepancy, Ball responded: "I'm not into hypocrisy if I can avoid it."

Mississippi

- In 2002, the three candidates for the state's one Supreme Court race raised more than \$1.88 million. Jess Dickinson, the winner of the election, raised more than \$1 million of that total.

New York

- The *New York Daily News* conducted a number of investigations into allegations of patronage, misconduct, and campaign finance problems in Brooklyn's judicial selection processes. The newspaper found that, from 1998 to 2002, the committees of numerous Brooklyn judges "contributed almost \$22,000 to Norman's Assembly reelection account, the Brooklyn Democratic Party he controls or his local political organization, the Thurgood Marshall Democratic Club." Some of the specific examples cited by the *Daily News* are listed below.

- In 1998 and 1999, Victor Barron donated \$3,400 to the Kings County Democratic Party or to Norman's own re-election committee.
- From 1998 to 2001, former Civil Court Judge and current Supreme Court Justice Joseph Bruno spent almost \$3,000 on numerous expenditures on behalf of the party and Norman's campaign for re-election.
- In 1999, Supreme Court Justice Lewis Douglass spent a total of \$1,875 over the course of five contributions to either the party or Norman's re-election campaign.
- The *Buffalo News* investigation also discovered similar problems with patronage and judicial campaign contributions and expenditures. Despite the fact that New York's Rules Governing Judicial Conduct bar judges from raising money for candidates other than themselves, and from contributing to other candidates' races, Erie County judges across party lines were doing exactly that, under pressure from party leaders. The judicial candidates also paid \$7,500 apiece in "fees" to cover "costs" of the judicial nominating conventions, despite the fact that the costs were actually only some \$200. In turn, local judges pressured lawyers who were likely to appear in the courtrooms to donate to their candidacies to help defray these costs.
- According to the reporters, unopposed candidates who ran on both the Democratic and Republican Party lines still raised and spent thousands of dollars in each campaign. In relative terms, Erie County had what were consistently the most expensive Supreme Court races in the state. One example included a judge who raised and spent \$75,000, despite the fact that he was unopposed; among his other expenses was the salary of a hired "campaign director" who was the roommate of the local party chair.
- Local party chairs utilized a loophole in the Rules Governing Judicial Conduct that barred judicial candidates from donating to other candidates' campaigns: It permits judicial candidates to purchase tickets to political dinners. Party leaders withheld endorsements for extended periods of time, while continually pressuring judicial candidates to "buy tickets" for these "political dinners"; some of the tickets cost as much as \$5,000 each.

Ohio

- Excluding third-party spending, the four Ohio Supreme Court candidates collectively raised \$6.2 million during the 2002 election. Of that total, Democrats Tim Black and Janet Burnside raised \$1.35 and \$1.2 million, respectively; Republicans Evelyn Stratton and Maureen O'Connor raised \$1.9 and \$1.8 million, respectively.
- In 2004, the Ohio Supreme Court race cost more than \$6.340 million.

- Also in 2004, in conjunction with then Republican state senator Randall Green, the Ohio State Bar Association worked on behalf of legislation that would require donors to judicial campaigns to disclose their contributions.

Pennsylvania

- William Scott, Jr., Chair of the West Chester Democratic Committee, filed a suit stemming from the failed judicial campaign of a Republican candidate. The suit alleged that the Republican Committee of Chester County violated the state Code of Judicial Conduct and applicable state campaign finance law “by funding Nancy Wilkinson’s unsuccessful bid for a newly created district justice seat”; the suit also demanded that the committee “detail exactly how much it spent on Wilkinson’s campaign.” Scott alleged that Wilkinson attempted “to totally bury [her] campaign” in Republican Party finances in violation of state disclosure laws. The case was decided in Wilkinson’s favor on December 6, 2004 (see 863 A.2d 62 (Pa. 2004)).

Interest Groups, Issue Advertising, and Independent Expenditures

In addition to problems with fundraising and campaign conduct, judicial elections spawn other phenomena that is not normally associated with the judiciary, but can undermine judicial independence. One of the most common involves advertising, particularly television advertising. Usually, the most damaging ads are run not by the candidates themselves, but by third parties, including organized political parties and special interest groups. Increasingly, for almost every major issue decided by the courts, such well-funded interest groups apply pressure on the judges, or on the politicians or public who put them in office, to sway the outcome of decisions and to stack the courts with jurists perceived to be friendly to their interests. These forms of advertising, virtually always presented out of context and frequently overtly misleading, inaccurate, and mean-spirited, damage judicial independence and public confidence in the integrity of the courts.

Political Parties

The clearest recent example of political party involvement in judicial campaign advertising occurred in 2000 in the Michigan Supreme Court race. While Michigan’s judicial elections are theoretically nonpartisan, Supreme Court candidates are chosen at the party nominating conventions. Despite the fact that they then appear on a nonpartisan ballot, interest-group advertising and the resultant media coverage ensure that no ambiguity exists regarding a Supreme Court candidate’s partisan affiliation.

In 2000, three incumbent justices were up for re-election: Stephen J. Markman, Clifford W. Taylor, and Robert P. Young, all Republicans. Their campaigns were fiercely opposed by the Michigan Democratic Party; the Michigan Republican party just as fiercely defended the three, and waged its own assaults on Democratic candidates. Ultimately, the two political parties together spent an estimated \$15 million on the three Supreme Court races.

Both parties disseminated a wide array of objectionable advertising. The Michigan Democratic Party distributed literature at an NAACP event falsely alleging that incumbent Robert F. Young, the state's only African-American Supreme Court justice, was a "staunch believer that *Brown v. Board of Education* [the landmark 1954 U.S. Supreme Court school desegregation case] was wrong." In fact, Justice Young's public statements showed that he agreed with the outcome of *Brown*; he disagreed only with the U.S. Supreme Court's reasoning (a position that is not uncommon among a wide array of legal scholars). Justice Young demanded that the party issue a retraction and an apology; he also threatened to sue Michigan Democratic Party Chair Mark Brewer. The Democrats also labeled the incumbents "pro-business," "antifamily," "right-wing extremists." The "antifamily" charge stemmed from the justices acceptance of campaign contributions from the insurance industry and what the Democrats called "big business," and from Democrats' allegations that the three ruled "against Michigan families" in personal injury and other cases.

Television advertising sponsored by the Michigan Democratic Party included commercials that, while humorous in style, amounted to blatant attacks upon the candidates. One such commercial accused the three incumbent justices of being in the pocket of insurance executives; the ad featured three dancing "justices," in barristers' wigs and black robes, in an executive's suit pocket, throwing cash in the air. Another accused them of "hurting Michigan families" via an ad featuring animated trees singing, "Markman and Taylor and Young, oh, my!" (the names of the justices) to the tune of "Lions and tigers and bears, oh, my!" (from *The Wizard of Oz*). The Michigan Republican Party retaliated with its own commercial featuring one of the actors who provided the voice of an animated tree; he appeared in full tree costume, berated himself for his participation in the other ad, and urged viewers to call the three justices to voice their support.

In a separate ad campaign, the state Republican Party attacked Democratic candidate an appellate court judge Thomas Fitzgerald for allegedly giving a "repeat pedophile less than the minimum sentence, just a slap on the wrist." Some local television station executives refused to run the ad on grounds that it was too misleading, in part because a lower-court judge had actually imposed the sentence at issue. The GOP revised the ad, changing "gave a repeat pedophile less . . ." to "let a repeat pedophile off with less . . ." The same ad also called Judge Fitzgerald "soft on crime," and alleged that he voted to reverse criminal convictions 50 times during his ten-year tenure, but without providing such contextual information as the number of criminal convictions upheld, the reasons for the reversals, and whether other judges on the appellate court, including Republicans, had likewise joined opinions to reverse the same convictions.

Businesses and Business-Related Special Interest Groups

The judicial selection process at the state and federal level has become more politicized in recent years largely because of the power of interest groups of all political stripes. Chief among these are groups affiliated with the so-called "business lobby," which tend to support "*tort reform*," including caps on compensatory and punitive damages, and to oppose environmental and other regulations.

An unusual example of such an independent group is StateSource, in Tulsa, Oklahoma. Originally called Howell & Associates, StateSource is a public-relations and lobbying firm that specializes in representing business interests. Among other endeavors, the firm founded a group called Citizens Against Lawsuit Abuse in 1995. In 1996, StateSource followed that venture by founding Citizens for Judicial Review, which it describes as an "effort to provide easy-to-use information for voters on the economic records of state judges," by "produc[ing] scorecards detailing the economic behavior of judges in six states, and distribut[ing] the information to hundreds of thousands of citizens." While StateSource advertises a stable of clients spanning a wide range of businesses, it is now perhaps best known for its work rating state judges according to whether they are "friendly" to business.

In 2000, the U.S. Chamber of Commerce spent millions of dollars to elect "pro-business" judges in Alabama, Illinois, Indiana, Michigan, Mississippi, and Ohio, with mixed results. The U.S. and state and local Chambers of Commerce have also engaged in various ratings and advertising campaigns, and have backed a number of so-called "citizens' groups" that have engaged in significant "issue advertising" in various states' judicial elections. In some instances, these groups are financed exclusively with Chamber monies, and in many states, they are not subject to campaign finance disclosure laws. Voters thus have no way to determine who pays for such ads, nor whether the ads' backers have particular agendas or financial or other interests that are served by supporting or opposing particular candidates. In 2003 and 2004, the U.S. Chamber declared its intent to be active in judicial elections in as many as 20 states, and to spend as much as \$30 million on such issue advertising. However, the organization has maintained a much lower profile over the last two years, and has been secretive about what such "citizens' groups," if any, it has financed during that period.

Below are recent examples of independent expenditures on issue advertising in state judicial elections by third-party interest groups with "pro-business" and related agendas.

Idaho

- Idahoans for Tax Reform (ITR), a nonprofit group whose mission "is to make Idaho the lowest taxed, least regulated, most free state in the nation," endorsed challenger Starr Kelso in the 2002 Idaho Supreme Court race. ITR ran television ads attacking incumbent Linda Copple Trout's decisions and advocating Kelso's election. The ads became the subject of a judicial ethics controversy when some of them included Kelso family holiday snapshots, raising questions as to whether Kelso had worked with ITR to produce the ads, which would have violated state election laws. Kelso and ITR both denied that he had had anything to do with the commercials.
- ITR was also found to have engaged in questionable campaign contribution practices: The group served as a conduit for more than \$173,500 in monies from the Ada County Property Owners Association that were used to finance advertising in the Supreme Court race.

Louisiana

- In a 2004 special election for the Fourth Circuit Court of Appeal, campaign expenditures of the two candidates, Roland Belsome and Barrie Byrnes, are estimated to have reached \$1 million.

Mississippi

- During the 2002 judicial elections, the Business and Industry Political Education Committee (BIPEC), a Mississippi group that advocates “tort reform,” released what it called “voter education guides” to identify “activist” judges and judges who “will practice balance and fairness.”
- Two other “pro-business” groups, Mississippians for a Fair Legal System (M-FAIR) and Mississippians for Economic Progress (MFEP), both of which were backed by the insurance industry, engaged in issue advertising in the 2002 judicial races.
- The U.S. Chamber of Commerce also backed the advertising campaigns of various “pro-business” groups that involved themselves in Mississippi’s Supreme Court and Court of Appeals races, and several commentators alleged that the U.S. Chamber was behind the inflammatory issue ads run by the Law Enforcement Alliance of America (LEAA).
- Local experts widely regarded challenger Jess Dickinson’s campaign as heavily supported (both financially and otherwise) by business, medical, and insurance interests. Incumbent Chuck McRae’s candidacy was similarly considered to be backed by trial lawyers’ groups.

Ohio

- In Ohio’s 2002 judicial elections, third-party interest groups, their identities and agendas concealed by disingenuous names, spent \$5.5 million on issue advertisements. Most did not disclose their contributors, nor did state law require that they do so.
- Citizens for an Independent Court, a political-action committee funded mostly by trial lawyers and unions, spent \$1.2 million on ads supporting Supreme Court candidates Tim Black and Janet Burnside, both Democrats.
- A group calling itself Consumers for a Fair Court spent \$600,000 on ads; the most noteworthy claimed that Evelyn Stratton protected pharmaceutical companies from lawsuits brought by the children of mothers given cancer-inducing drugs such as DES.

- An interest group sponsored by AT&T called Competition Ohio spent \$700,000 on ads implying that Ameritech would double telephone rates and that Evelyn Stratton and Maureen O'Connor would side with consumers on the issue. The Ohio State Bar Association condemned the ad, noting that the rate-hike claim was false, and that even if it were true, a regulatory case of that nature would not reach the Supreme Court in the first place.
- Another group called Informed Citizens of Ohio spent \$2 million on ads supporting Stratton and O'Connor. One ad claimed that personal injury lawyers had spent "\$1 million dollars to attack a Supreme Court Justice," referring to Consumers for a Fair Court's broadsides against Stratton with regard to the drug lawsuits. Another ad, although humorous in style, asserted that Stratton would help protect against frivolous "actual lawsuits" involving a microwaved poodle and a car thief accidentally run over by the car. The cases were in fact fictitious.
- An interest group called Citizens for a Strong Ohio, funded by the U.S. and Ohio Chambers of Commerce and notorious for highly inappropriate and controversial attack ads in the 2000 judicial elections, kept a lower profile in 2002. Nonetheless, the group spent \$1 million promoting the campaigns of Republican judicial candidates.

Oregon

- In 2002, David Hunnicutt, former counsel to an advocacy group called Oregonians in Action, challenged incumbent David Schuman for his seat on the Oregon Court of Appeals. Oregonians in Action opposes state land-use laws, and two years previously, the group had sponsored what became known as Ballot Measure 7, which required the state to compensate private property owners for any reduction in property values caused by state zoning laws or other regulations. At the time that Ballot Measure 7 passed, Schuman was the deputy attorney general who defended the measure in court on behalf of the state; the state lost, and an appeal was pending at the time of the 2002 judicial nominating convention. Some members of Oregonians in Action had filed an ethics complaint against Schuman with the Oregon State Bar, alleging that he did not defend the measure zealously because he was personally opposed to it (the OSBA dismissed the complaint). When Schuman was appointed to an interim position on the Court of Appeals, some group members attacked his appointment as a "reward" from the governor for "losing" the case. When Schuman began his campaign for election to a full term, they launched a concerted attack on his candidacy. Hunnicutt himself does not appear to have played a role in any of the attacks on Schuman; rather, they seemed to be strictly the work of third-party groups who supported Hunnicutt's candidacy and opposed Schuman's on philosophical grounds.
- Other Hunnicutt supporters labeled Schuman a "liberal" who would be bad for Oregon citizens, and attempted to link him with retired Oregon Supreme Court Justice Hans Linde, whom they accused of "weakening" the state's crime laws.

- Other independent groups, including Crime Victims United and the Oregon Republican Party, ran television ads and recorded phone messages in support of Hunnicutt; the ads and messages implied that, if elected, Hunnicutt would be sympathetic to property owners.
- The Oregon League of Conservation Voters disseminated advertising supporting Schuman. The group's mailings expressly attacked David Hunnicutt, accusing him of "pursuing his extreme agenda by challenging incumbent Court of Appeals Judge David Schuman."

Religious and Social-Issue Interest Groups

Religious entities and special interest groups organized around social issues have also taken an increasing interest in judicial elections. Cases involving issues like abortion, gay rights, school prayer, education funding and school vouchers, and gun control frequently generate controversial decisions, with the result that groups concerned with these issues have begun to hold candidate forums, distribute voters' guides, conduct candidate surveys, run advertisements, lobby legislators, and otherwise participate in the judicial selection process.

Also active in these areas are national and state chapters of the Christian Coalition, the evangelical religious organization founded by televangelist Pat Robertson. In 2000, for example, the Christian Coalition of Alabama became heavily involved in the state's judicial elections. The group declared in its newsletter: "A major portion of our Voter Guide this year was devoted to the state's higher courts." The Coalition claims to have hosted three statewide judicial forums; placed voter guides in 5 papers; distributed 1.2 million voter guides (125,000 via direct mail); and made some 130,000 get-out-the-vote calls. The Alabama chapter also circulated questionnaires asking state judicial candidates for their "personal opinions" on "moral, social and economic issues" of particular interest to the Coalition's members. Eleven candidates completed the questionnaires, which included their views on specific issues likely to come before the courts (*e.g.*, abortion, gun control, gambling, and school prayer). According to the Coalition, 10 of the 11 candidates who answered its questionnaire won their races; the only loser reportedly was challenger Alice Martin, defeated by incumbent Sue Bell Cobb.

Abortion has proven to be a particularly galvanizing subject, and groups such as the National Abortion Rights Action League and the National Right to Life Committee often square off over federal judicial nominees, lobbying Senators and mounting public campaigns to support or thwart a nomination. In a 1998 California election, two Supreme Court justices were targeted for defeat in a retention election because of outrage over rulings on whether parental consent is required for a minor to have an abortion. Also in 1998, prior to a retention election, an organization called the Traditional Values Coalition distributed a survey to appellate justices that sought to determine each justice's "judicial philosophy."

In 2002, in the immediate aftermath of the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, Indiana Right to Life sent a questionnaire to judicial candidates across the state. The questionnaires asked judicial candidates to indicate either their support or their opposition to specific political and public policy issues, all of which were highly controversial and generally were likely to come before the courts – issues such as abortion rights, same-sex marriage, and other politically divisive topics. While each question-and-answer combination contained a putative disclaimer to the effect that the answer given recognized the legal obligation to follow the law and precedent, the wording made clear that candidates' answers were expected to demonstrate ideological commitment. Such tactics pressure judges and judicial candidates not only to go on record publicly with their political opinions, but to ensure that both their political opinions and their legal opinions conform to expected public expectations. In this instance, such pressure was greatly increased by the fact that the cover letter accompanying the questionnaire advised candidates that they had a few days to decide whether to answer the questionnaire, complete it, and return it, and that if they did not do so within the brief time allotted, the results would be reported to the media, with specific identifying information, as having refused to answer.

Below are recent examples of independent expenditures and issue advertising by third-party interest groups with agendas devoted to religious, social, political, or other public policy issues.

Florida

- In 2000, elected Miami-Dade Circuit Judge Rosa Rodriguez was at the center of the battle for custody of Elián González, the Cuban child who was rescued after his mother died in an attempt to leave Cuba for the United States. Although the boy's father, still in Cuba, wanted his son and was ready and willing to take custody of him, extended members of his former wife's family, who had immigrated to the Miami area, fought a very heated and public battle to prevent the child from being returned to his father in Cuba. Protestors jammed the Miami streets on a daily basis, demanding that the judge force Elián to remain in the United States in his great-uncle's custody. Members of Congress, other public officials, and media pundits followed suit, publicly pressuring her to reach a decision in favor of the boy's Miami relatives. Rodriguez issued an emergency order granting custody of the six-year-old boy to the great-uncle. The public subsequently learned that, in her previous election campaign, the judge had retained the same political consultant that Elián's great-uncle was then using in his campaign to keep the child in Miami. Despite her knowledge that she had used the same political consultant as one of the parties before her, she declined to recuse herself from the case.

Idaho

- John Bradbury, a candidate in the 2002 Second Judicial District primary, had ties to a national group calling itself JAIL 4 Judges. The group's acronym, JAIL, stands for "Judicial Accountability Initiative Law," and its mission includes placing referenda

on state ballots that would amend state constitutions to provide for what the group calls “Special Grand Juries.” These so-called “Special Grand Juries” would have the power to impose fines and forfeitures against judges, as well as to remove them from the bench. In Idaho, the JAIL measure failed to garner enough support to win a place on the ballot. Bradbury, however, won the election.

- Under Idaho’s system of judicial selection, Magistrate Judge L. Mark Riddoch’s position was subject to an unopposed retention election in 2002. As a result of one of Riddoch’s decisions, denying custody in a case involving a gay parent, he became the subject of a private campaign opposing his retention. Riddoch had ruled that, while a gay Idaho Falls man was entitled to visitation rights with his daughters, he could not have custody of them while he lived with his male partner. Private e-mail messages were sent to Bonneville County voters urging them to oppose Riddoch’s retention of because of the ruling. The source of the e-mail campaign was not disclosed, except for a statement within the message itself saying that it was “originated by private individuals with no connection to any organizations, and without the involvement or endorsement of [the father involved in the custody case].” The father also denied any connection to the effort. Ultimately, Riddoch was retained for another term.

Mississippi

The *National Law Journal* reported that at least ten separate groups inserted themselves into Mississippi’s 2002 judicial elections; collectively, they spent hundreds of thousands of dollars and played an enormous role in the campaign.

- A group calling itself Citizens for Truth in Government (CTG) sponsored the ad that Jess Dickinson alleged “attacked [his] Christian faith.” Dickinson’s advertising falsely implied that the ad was actually run by his opponent, incumbent Chuck McRae. Rather than “attacking [his] Christian faith,” what the ad actually contended was that Dickinson had sued a church.
- CTG also sponsored other ads accusing Dickinson of problems in his business (he owned a bar) and his law practice. They alleged that he had been “sued for hitting a customer in the face with a whiskey bottle and several times for not paying bills,” and that he had misrepresented an incident in which he allegedly was sanctioned and fined by a judge “for a bad faith violation of the rules of professional conduct for lawyers.”
- The Law Enforcement Alliance of America (LEAA) ran ads supporting Dickinson and opposing McRae. The LEAA is a group in Falls Church, Virginia, that opposes gun control and has inserted itself into judicial election campaigns in other states in recent years. The LEAA ads described Dickinson as “[a] friend of law enforcement”; more insidiously, they appeared to commit him to certain types of decisions, declaring that he “strongly supports our right to bear arms, to help keep our families safe,”

“considers the death penalty an important tool,” and “supports our right to bear arms.”

- The same ads by the LEAA misrepresented judicial decisions made by McRae. One ad declared: “When a lawyer took his client’s money instead of paying her doctor bills as promised, Mississippi’s Supreme Court argued [*sic*] disbarment. Only Judge Chuck McRae voted against this disbarment.” Two of the ads focused on a case involving a defendant who appealed his conviction for particularly a heinous crime: “When a 3-year-old-girl was sexually assaulted, hit and drowned . . . Mississippi’s Supreme Court upheld the murderer’s conviction. Only Judge Chuck McRae voted to reverse it.” Both advertisements concluded: No wonder *Reader’s Digest* named him one of America’s worst judges. Chuck McRae, no common sense.”
- The U.S. Chamber of Commerce also openly inserted itself into Mississippi’s 2002 judicial elections. The Chamber staged a news conference to “send a message to Mississippi that the state does not protect the business communities’ rights to due process and will ask the state’s citizens for help in cleaning up a deeply flawed legal system.” The Chamber’s spokesperson declared: “This is the first time we have cautioned businesses about a climate in a particular state.” The organization also argued that “what the national business community thinks is important” for Mississippi, and that it could provide voters with the “best information” about the candidates. While Jess Dickinson was seen as profiting by the Chamber’s efforts, he disavowed them, saying, “This is a Mississippi race for Mississippi judges,” and declared that “outsiders” should not decide its outcome.
- The Chamber had also run a number of television advertisements in the state’s judicial elections in 2000, and had refused to file the disclosure reports required at that time under Mississippi law. The state’s attorney general had filed suit to force the Chamber to disclose its expenditures in the state, and that case was before the U.S. Court of Appeals for the Fifth Circuit during the 2002 judicial races. The Fifth Circuit held that because the Chamber’s ad did not contain the so-called “magic words,” such as “elect” or “defeat,” the group could not be compelled to comply with the disclosure rules.

Minnesota

- A self-described “impromptu citizen’s group” known as the First Judicial District Committee for Judicial Transparency sent a questionnaire to all First District judicial candidates in an attempt to ascertain their political views. A co-author of the questionnaire was Gregory Wersal, the Supreme Court candidate upon whose behalf *Republican Party of Minnesota v. White* was filed; the U.S. Supreme Court’s decision in this case allowed judicial candidates to announce their views on contested political issues. Only one candidate, Nathaniel Reitz, responded to the questionnaire.

Nevada

- A group calling itself the Nevadans' Judicial Information Committee (NVJIC) surfaced in 2004. The NVJIC distributed questionnaires to all major judicial candidates, warning them that a failure to reply by the listed deadline (or to reply at all) would be reported to the media and the public. Using loaded language, one characterized an especially controversial recent decision by the Nevada Supreme Court in a subjective manner, and asked candidates to respond substantively, expressing their agreement or disagreement with the decision. In an attempt to force candidates to respond, the groups also issued what it called a "demand letter" to the Nevada Supreme Court, characterizing virtually all restrictions on judicial candidate conduct as unconstitutional and demanding that the court rescind them. It also has regularly issued public statements accusing the court, the chief justice, and various judicial candidates of denying necessary information to voters, and has accused the chief justice of "threatening" judicial candidates.

Tennessee

- Tennessee voters removed Justice White from the bench in 1996 after a concerted effort to unseat her was waged by the governor and an interest group called the Tennessee Conservative Union (TCU). White was targeted after she joined a Tennessee Supreme Court opinion that *vacated* a death sentence because the trial court had erred in not allowing the defendant to present mitigating evidence. The court's opinion neither freed the defendant nor eliminated the possibility of him receiving another death sentence after reconsideration by the lower court. However, voters responded to the anti-White media campaign by denying her retention. Governor Don Sundquist had actively opposed White's retention. In promising to appoint only judges who supported the death penalty, Sundquist declared publicly, "Should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so."
- After successfully defeating White at the polls, TCU's John Davies told *The Commercial Appeal* of Memphis that the organization next planned to "go after whoever the two were who agreed with Penny White in the Odom case" (*i.e.*, Justices Adolpho Birch and Lyle Reid). However, the TCU later decided not to support the effort to oust Justice Birch. Despite a concerted effort by other groups to defeat him, Justice Birch narrowly won his retention vote. Justice Reid retired from the bench.

Ballot Initiatives and Referenda

Another method increasingly used in some states to attack judicial decisions, circumvent judicial discretion, and undermine judicial independence is the process known as "*initiative* and *referendum*." These are measures that are placed on the ballot for voters to decide directly, rather than through the usual lawmaking process by their elected representatives in the state's legislative and executive branches. Such measures are sometimes

required under state law, when the substance of the measure being proposed requires amending the state's constitution. In other instances, they are simply an end-run around the usual legislative process (although often supported by legislators), when a particular is deemed too unpopular or controversial to be enacted through normal means.

Ballot initiatives and referenda are being used with increasing frequency around the country in an attempt to "correct" what politicians and interest groups see as "problems" with or "mistakes" made by the state's courts. They often include language that would limit or strip courts' jurisdiction entirely in certain kinds of cases (which are usually extremely high-profile and controversial locally). Some are aimed directly at the judges themselves, attempting to change how they are selected or to provide a means for circumventing state constitutional requirements for judicial selection. Oregon's 2002 elections provided a vivid case in point.

Other than the Court of Appeals race, the most volatile issue surrounding Oregon's 2002 judicial elections was not directly related to the existing candidates: Voters were confronted with two ballot measures that would have changed the state's methods of electing judges. The state's ballot in the 2002 elections contained 27 separate ballot measures; of the entire 27, only four were defeated. Among those four were Constitutional Amendments 21 and 22, those involving judicial selection. Their specifics are outlined below.

- Constitutional Amendment 21 would have provided an option on judicial election ballots that would have allowed voters who disliked all of the candidates to vote for "None of the Above." The measure's language provided: "When more votes are cast for the "None of the Above" candidate than for any other, special elections will be held in May and November, until the position is filled with a candidate other than "None of the Above." Numerous state public-interest groups opposed Constitutional Amendment 21, arguing that it would create chaos in the state court system, producing a backlog of cases because of the delay in filling vacancies. Some of the organizations opposed to the measure linked it with the agenda of groups opposed to state environmental regulations, including property-rights interest groups. The measure also would have made it easier to remove judges who rendered decisions that were politically unpopular by circumventing the usual selection and removal processes.
- Constitutional Amendment 22 was labeled the "Judicial Accountability Act." It would have changed the state's method of selecting appellate judges from the existing statewide system to a "districted" system (*i.e.*, the state would be divided into different judicial districts; the voters in each district would elect a candidate to that district's spot on the Court of Appeals and the Supreme Court). This measure was also opposed by many state public-interest groups, who argued that it would limit the voters' ability to select the most qualified candidates to the bench. Again, some of the organizations linked the measure to the agenda of property-rights groups and groups opposed to state environmental laws, because it would have allowed voters in geographic areas of the state where those groups' views were popular to select judges thought likely to rule in accordance with those agendas.

APPENDICES

Appendix A - State Selection Chart

State or Territory	Name of state courts (highest court on top)	Term (if any)	Selection method (election, appointment)	Partisan election / nonpartisan election / no election	Merit retention?	Notes
Alabama	Supreme Court Court of Criminal Appeals and Court of Civil Appeals Circuit Court	6 years 6 years 6 years	Election	Partisan	No	State also has three lower courts of limited jurisdiction (Municipal Court, District Court, and Probate Court). Vacancies on the bench are filled by the governor until a new election is held.
Alaska	Supreme Court Court of Appeals Superior Court	<i>Initial 3 year appointment for each justice/judge</i> 10 years if retention ballot is successful 8 years if retention ballot is successful 6 years if retention ballot is successful	Appointment / Election	Partisan	No	State also has two lower courts of limited jurisdiction (District Court and Magistrate Court). Initial term of office is three years. Retention vote held at first general election more than three years after appointment.
Arizona	Supreme Court Court of Appeals Superior Court	<i>2 year initial appointment</i> 6 years if retention ballot is successful 6 years if retention ballot is successful 4 years if retention ballot is successful	Appointment / Election	Nonpartisan	No	Death penalty cases are automatically appealed directly from the Superior Court to the Supreme Court, and there are two lower courts of limited jurisdiction (Justices of the Peace and Municipal Court).
Arkansas	Supreme Court Court of Appeals Circuit Court	8 years 8 years 6 years	Election	Nonpartisan	No	State also has six lower courts of limited jurisdiction (Court of Common Pleas, Municipal Court, Police Court, County Court, City Court, and Justice of the Peace Court). Vacancies on the court are filled by the governor on a temporary basis.
California	Supreme Court Court of Appeal (6) Superior Court	12 years for initial term and after retention ballot 12 years for initial term and after retention ballot 6 years for initial term and after retention ballot	Appointment / Election	Nonpartisan	No	Death penalty cases are automatically appealed directly from the Superior Court to the Supreme Court.
Colorado	Supreme Court Court of Appeals District Court	<i>Initial 2 years by appointment</i> 10 years by retention ballot 8 years by retention ballot 6 years by retention ballot	Appointment / Election	Partisan	No	State also has four lower courts of limited jurisdiction (Denver Juvenile Court, Water Court, County Court, and Municipal Court).
Connecticut	Supreme Court Appellate Court Superior Court	8 years 8 years 8 years	Nomination by governor, election by general assembly	No election	Yes	The Probate Court is a lower court of limited jurisdiction. The Supreme Court may receive direct appeals of matters within its specific jurisdiction or may transfer any cause to or from the Appellate Court. Judges are selected through a nominating commission for an initial term of eight years and confirmation for re-nomination is confirmed by the legislature.
Delaware	Supreme Court Court of Chancery and Superior Court	12 years 12 years	Appointment by the governor with consent of the State Senate	No election	Yes	State also has four lower courts of limited jurisdiction (Court of Common Pleas, Family Court, Justices of the Peace Courts, and Alderman's Court.
District of Columbia	Court of Appeals Superior Court	15 years 15 years	Appointment through Nominating Commission	No election	Yes	Initial appointment is made by the President of the United States and confirmed by the Senate. Three months prior to the expiration of the term of office, the judge's performance is reviewed by the Tenure Commission, an organization empowered to review and remove unfit judges. Those found "Exceptionally Well Qualified" or "Well Qualified" are automatically reappointed. If a judge is found to be "Qualified" the President may nominate the judge for an additional term (subject to Senate confirmation). If the President does not wish to reappoint the judge, the District of Columbia Nomination Commission compiles a new list of candidates.
Florida	Supreme Court District Court of Appeal Circuit Court	6 years by retention ballot 6 years by retention ballot 6 years by retention ballot	Election	Nonpartisan	No	The County Court is a lower court of limited jurisdiction. Vacancies are filled by the governor. Appointees must stand for retention in the first general election held at least a year after appointment.
Georgia	Supreme Court Court of Appeals Superior Court	6 years 6 years 4 years	Appointment / Election	Nonpartisan	No	State also has eight courts of limited jurisdiction (State Court, Juvenile Court, Probate Court, Magistrate Court, Civil Court, Municipal Court, County Recorder's Court, and Municipal Court). Vacancies are filled by the governor, but the justice/judge must stand for election in the next general election.
Guam	Appeals to the US District Court for the Territory of Guam Superior Court	8 years	Appointment	No election	Yes	Judges are appointed for eight-year terms by the governor.
Hawaii	Supreme Court Intermediate Court of Appeals District Court	10 years 10 years 10 years	Appointment by the governor with consent of the State Senate	No election	Yes	State also has Land and Tax Appeal courts. Cases are assigned to the Intermediate Court of Appeals at the discretion of the Supreme Court. There are two lower courts of limited jurisdiction (Circuit Court and Family Court).
Idaho	Supreme Court Court of Appeals District Court	6 years 6 years 4 years	Election	Nonpartisan	No	Cases are assigned to the Court of Appeals at the discretion of the Supreme Court. There is also a Magistrate Division of the District Court. Vacancies on the courts are filled by the governor.
Illinois	Supreme Court Appellate Court Circuit Court	10 years 10 years 6 years	Election	Partisan	No	Death penalty cases are directly appealed to the Supreme Court.
Indiana	Supreme Court Court of Appeals Superior Court and Circuit Court	<i>2 year initial appointment</i> 10 years if retention ballot is successful 10 years if retention ballot is successful 6 years and 6 years if retention ballot is successful	Appointment / Election	Nonpartisan	No	State also has one intermediate appellate court of limited jurisdiction (Tax Court) and four lower courts of limited jurisdiction (County Court, Probate Court, City Court, and Town Court). Gubernatorial appointment is followed by retention ballot.

Iowa	Supreme Court Court of Appeals District Court	8 years 6 years 6 years	Election	Nonpartisan	Yes	Cases are assigned to the Court of Appeals at the discretion of the Supreme Court. Appointment is by the governor, but the justice/judge must stand for retention in the first general election one year after appointment.
Kansas	Supreme Court Court of Appeals District Court	6 years 4 years 4 years	Appointment / Election	Nonpartisan	No	State also has one lower court of limited jurisdiction (Municipal Court). Appointment is by the governor, but the justice/judge must stand for retention in the first general election one year after appointment.
Kentucky	Supreme Court Court of Appeals Circuit Court	8 years 8 years 8 years	Election	Nonpartisan	No	The District Court is a lower court of limited jurisdiction. Vacancies are filled by temporary gubernatorial appointment.
Louisiana	Supreme Court Court of Appeals District Court	10 years 10 years 6 years	Election	Partisan	No	State also has five lower courts of limited jurisdiction (Juvenile Court, Family Court, Justice of the Peace Court, City and Parish Courts, and Mayor's Court). All of these courts do not allow for jury trials. Vacancies are filled by a special election. Louisiana judicial elections are partisan inasmuch as the candidates' party affiliations appear on the ballot. Two factors, however, lend nonpartisan character to these elections: (1) primaries are open to all candidates; and (2) judicial candidates generally do not solicit party support for their campaigns.
Maine	Supreme Judicial Court Superior Court	7 years 7 years	Appointment by the governor with consent of the legislature	No election	Yes	State also has three lower courts of limited jurisdiction (District Court, Probate Court, and Administrative Court). All of these courts do not allow for jury trials. Merit-based retention is subject to legislative confirmation.
Maryland	Court of Appeals Court of Special Appeals Circuit Court	10 years if retention ballot is successful 10 years if retention ballot is successful 15 years if retention ballot is successful	Appointment / Election	Nonpartisan	No	State also has two lower courts of limited jurisdiction (District Court and Orphans' Court), both of which do not allow for jury trials. Judges are appointed by the governor with consent of the state senate, but the appointees must stand for a retention election one year after appointment.
Massachusetts	Supreme Judicial Court Appeals Court Trial Court of the Commonwealth	Until age 70 Until age 70 Until age 70	Appointment by the governor with consent of the Governor's Council	No election	Yes	Trial Court of the Commonwealth is composed of seven separate courts (Superior Court Department, District Court Department, Boston Municipal Court Department, Juvenile Court Department, Housing Court Department, Land Court Department, and Probate and Family Court Department).
Michigan	Supreme Court Court of Appeals Circuit Court	8 years 6 years 6 years	Election	Nonpartisan	No	State also has five lower courts of limited jurisdiction (District Court, Probate Court, Court of Claims, Family Division of the Circuit Court, and Municipal Court). Nominees for the bench are chosen by political parties.
Minnesota	Supreme Court Court of Appeals District Court	6 years 6 years 6 years	Appointment / Election	Nonpartisan	No	State also has one lower court of limited jurisdiction (Conciliation Division). Vacancies on the bench are filled by the governor. Appointees may run for seats in the general election at least one year after appointment.
Mississippi	Supreme Court Court of Appeals Circuit Court and Chancery Court	8 years 8 years 4 years and 4 years	Appointment / Election	Nonpartisan	No	State also has three lower courts of limited jurisdiction (County Court, Justice Court, and Municipal Court). Vacancies are filled by gubernatorial appointment. Appointees can run for seats in the first general election held more than 9 months after appointment.
Missouri	Supreme Court Court of Appeals Circuit Courts	12 years 12 years 6 years	Appointment / Election	Nonpartisan	No	State also has five lower courts of limited jurisdiction (Circuit Division, Family and Juvenile Division, Associate Division, Probate Division, and Municipal Division). Justices/judges are appointed by the governor and must stand for retention in the first general election after one year of service.
Montana	Supreme Court District Court	8 years 6 years	Election	Nonpartisan	No	State also has three lower courts of limited jurisdiction (Justice Courts, City Court, and Municipal Court). Vacancies are filled by the governor with the consent of the state senate.
Nebraska	Supreme Court Court of Appeals District Court	6 years 6 years 6 years	Appointment / Election	Nonpartisan	No	State also has three courts of limited jurisdiction (Workers' Compensation Court, Juvenile Court, and County Court). Justices/judges are appointed by the governor and must stand for retention in the first general election more than three years after appointment.
Nevada	Supreme Court District Court	6 years 6 years	Appointment / Election	Nonpartisan	No	Supreme Court justices serve 6-year terms, with the exception of 2 justices elected in 1998, who held 2-year terms until they were reelected in 2000. State also has two lower courts of limited jurisdiction (Justice Court and Municipal Court). Vacancies on the bench are filled by gubernatorial appointment. Appointees serve until the next general election.
New Hampshire	Supreme Court Superior Court	Until age 70 Until age 70	Appointment by the governor with the consent of the Executive Council	No election	Yes	State also has two lower courts of limited jurisdiction (District Court and Probate Court). The initial term is seven years. Justices/judges are reappointed by the governor with the advise and consent of the senate.
New Jersey	Supreme Court Appellate Division of Superior Court Superior Court: Law Division and Chancery Division	Until age 70 Until age 70 Until age 70	Appointed by the governor with the consent of the state senate	No election	Yes	State also has three lower courts of limited jurisdiction (Tax Court, which appeals to the Appellate Division; Surrogates; and Municipal Court, both of which appeal to the Superior Court).

New Mexico	Supreme Court Court of Appeals District Court	8 years 8 years 8 years		Election	Nonpartisan	No	State also has four lower courts of limited jurisdiction (Magistrate Court, Probate Court, Municipal Court, and Bernalillo County Metropolitan Court). Death penalty and life imprisonment cases are automatically appealed from the District Court to the Supreme Court. Vacancies are filled by gubernatorial appointment. Appointees may serve until the next general election.
New York	Court of Appeals Appellate Division of the Supreme Court and Appellate Terms of the Supreme Court Supreme Court and County Court	14 years 5 years 14 years		Appointed by the governor with the consent of the state senate	No election	Yes	State also has eight lower courts of limited jurisdiction (Family Court, Surrogate's Court, City Court, Town and Village Justice Court, Court of Claims, District Court, Civil Court of the City of New York, and Criminal Court of the City of New York). All of the lower courts of limited jurisdiction except the Third and Fourth Departments of the City and Town and Village Justice Courts appeal directly to the Appellate Division or the Appellate Terms of the Supreme Court.
North Carolina	Supreme Court Court of Appeals Superior Court	8 years 8 years 8 years		Election	Partisan	No	State also has one lower court of limited jurisdiction (District Court). Vacancies are filled by gubernatorial appointment.
North Dakota	Supreme Court District Court	10 years 6 years		Election	Nonpartisan	No	State also has one lower court of limited jurisdiction (Municipal Court). Vacancies are filled by gubernatorial appointment or special election and appointees may serve until the next general election.
Ohio	Supreme Court Court of Appeals Court of Common Pleas	6 years 6 years 6 years		Election	Nonpartisan	No	State also has four lower courts of limited jurisdiction (Municipal Court, County Court, Court of Claims, and Mayor's Court). The Mayor's Court appeals to the Municipal Court and County Court. All other lower courts of limited jurisdiction appeal to the Court of Appeals. The nonpartisan election follows the party primaries. Vacancies on the bench are filled by gubernatorial appointment and appointees serve until the general election. Ohio primary elections are partisan, but in general elections, party affiliations are not listed on the ballot. Candidates, however, most often run with party endorsements and appear on party slate cards.
Oklahoma	Supreme Court and Court of Criminal Appeals Court of Civil Appeals District Court	6 years if retention ballot is successful 6 years if retention ballot is successful 4 years if retention ballot is successful		Election	Nonpartisan	No	Civil Cases in the District Court are appealed to the Supreme Court and criminal cases are appealed to the Court of Criminal Appeals. The Supreme Court assigns cases to the Court of Appeals. There are also four lower courts of limited jurisdiction (Court of Tax Review, Workers' Compensation Court (both of which appeal to the Supreme Court), Municipal Criminal Court of Record (which appeals to the Court of Criminal Appeals), and the Municipal Court not of Record (which appeals to the District Court). Vacancies on the bench are filled by gubernatorial appointment.
Oregon	Supreme Court Court of Appeals Circuit Court	6 years 6 years 6 years		Election	Nonpartisan	No	State also has four lower courts of limited jurisdiction (Tax Court, which appeals to the Supreme Court; County Court; Justice Court; and Municipal Court, all of which appeal to the Circuit Court). Vacancies are filled by gubernatorial appointment and the appointees may serve until the next general election.
Pennsylvania	Supreme Court Commonwealth Court and Superior Court Court of Common Pleas	10 years 10 years 10 years		Election	Partisan	Yes	Direct appeals from the Court of Common Pleas, in cases involving constitutional, felonious homicide, right to public office, contempt, probate, suppression of a District Attorney, and right to issue public debt matters, and decisions of the Orphans Court Division cases, to the Supreme Court. There are also four lower courts of limited jurisdiction (Philadelphia Municipal Court, District Justice Court, Philadelphia Traffic Court, and Pittsburgh City Magistrates (all of which appeal to the Court of Common Pleas)). Vacancies are filled by gubernatorial appointment with the consent of the state senate until the next general election.
Puerto Rico	Supreme Court Superior Court	Life Life		Appointment by the governor with consent of the Senate	No election	Yes	The Municipal Court is a lower court of limited jurisdiction.
Rhode Island	Supreme Court Superior Court	Life Life		Three to five names selected by the Judicial Nominating Committee are forwarded to the governor. The governor makes the final selection, which must be approved by the legislature.	No election	Yes	State also has four lower courts of limited jurisdiction (District Court and Traffic Tribunal, which appeal to the Superior Court; and Workers' Compensation Court and Family Court, which appeal directly to the Supreme Court).
South Carolina	Supreme Court Court of Appeals Circuit Court and Masters-in-Equity	10 years 6 years 6 years and 6 years		Elected by the State General Assembly (legislative appointment)	No election	Yes	Masters-in-Equity takes references from the Circuit Court. State also has four lower courts of limited jurisdiction (Family Court, which appeals to both the Court of Appeals and the Supreme Court; Magistrate Court; Municipal Court; and Probate Court, which appeal to the Circuit Court). The governor can fill vacancies in terms expiring in one year or less.
South Dakota	Supreme Court Circuit Court	<i>3 years initial appointment</i> 8 years if retention ballot is successful 8 years if retention ballot is successful		Appointment / Election	Nonpartisan	No	The Circuit Court is composed of three divisions (General Circuit Court, Lawyer Magistrates, and Lay Magistrates). Justices/judges are appointed by the governor for a three year term subject to a retention ballot in the first general election thereafter.

Tennessee	Supreme Court Court of Appeals and Court of Criminal Appeals Chancery Court, Circuit Court, and Criminal Court	8 years 8 years 8 years	Election/Appointment	Partisan	No	State also has one intermediate appellate court of limited jurisdiction (Workers' Compensation Appeals Court) and four lower courts of limited jurisdiction (Probate Court, Juvenile Court, General Sessions Court, and Municipal Court).
Texas	Supreme Court and Court of Criminal Appeals Court of Appeals District-level Courts	6 years and 6 years 6 years 4 years	Election	Partisan	No	The District-level Courts are composed of District Court and Criminal District Court. There are also county trial courts of limited jurisdiction (Constitutional County Court, County Court at Law, and Probate Court) and local trial courts of limited jurisdiction (Municipal Courts and Justice of the Peace Courts). Vacancies are filled by gubernatorial appointment with the consent of the state senate. Appointees serve until the next election.
Utah	Supreme Court Court of Appeals District Court	10 years 6 years 6 years	Appointment / Election	Depends	Depends	State also has a lower court of limited jurisdiction (Juvenile Court). Justices/judges are appointed by the governor, but must stand unopposed for retention at a general election within three years of appointment.
Vermont	Supreme Court Superior Court and District Court	6 years 6 years	Appointed by the governor with the consent of the state senate / subsequent terms subject to retention election by the General Assembly	No election	Yes	State also has four lower courts of limited jurisdiction (Family Court, Environmental Court, Probate Court, and Vermont Judicial Bureau Hearing Officers).
Virginia	Supreme Court Court of Appeals Circuit Court	12 years 8 years 8 years	Elected by state general assembly	No election	Yes	State also has three lower courts of limited jurisdiction (District Court, Juvenile and Domestic Relations District Courts, and Magistrates).
Washington	Supreme Court Court of Appeals Superior Court	6 years 6 years 4 years	Election	Nonpartisan	No	State also has two lower courts of limited jurisdiction (District Courts and Municipal Courts). Vacancies are filled by gubernatorial appointment until the next general election.
West Virginia	Supreme Court of Appeals Circuit Court	12 years 8 years	Election	Partisan	No	State also has two lower courts of limited jurisdiction (Municipal Court and Magistrate Court). It appeals to the Circuit Court. Vacancies are filled by gubernatorial appointment until the next general election. Magistrate Court judges serve 4-year terms.
Wisconsin	Supreme Court Court of Appeals Circuit Court	10 years 6 years 6 years	Election	Nonpartisan	No	State also has one lower court of limited jurisdiction (Municipal Court). It appeals to the Circuit Court. Vacancies are filled by gubernatorial appointment until the next general election.
Wyoming	Supreme Court District Court	8 years 6 years	Appointment / Election	Nonpartisan	No	State also has three lower courts of limited jurisdiction (County Court, Justice Court, and Municipal Court). They all appeal to the District Court. Justices/judges are appointed by the governor. A retention ballot is held after the first year.

Appendix B – Glossary of Terms

Amendment – The correction of an error in, or augmentation of, any process, pleading, or proceeding at law. By law, an amendment is either available as a matter of course, by consent of the parties, or upon a motion to the court in which the proceeding is pending.

Anti-Federalist – One who opposes a federally-centralized government. In colonial times, the anti-Federalist opposed the ratification of the United States Constitution, believing that it placed too much power in the federal government.

Anti-miscegenation laws – Laws first enacted as early as the late 1600s that prohibited marriage or cohabitation between persons of different races. Anti-miscegenation laws were especially designed to prevent the marriage between white and non-white persons. By the late 1960s, more than a dozen states had anti-miscegenation laws in their statutes. In November 2000, Alabama became the last state to remove the final traces of its anti-miscegenation law from the books.

Appointing authority – The person or committee who designates, chooses, selects or assigns a judicial officer. Once appointed, the judicial officer may be responsible to the appointing authority for reelection or reappointment.

“Beyond a reasonable doubt” – The highest standard of proof in a criminal case, which means evidence that is fully satisfied, entirely convinced, satisfied to a moral certainty. In other words, facts proven must, by virtue of their probative force, establish guilt.

Campaign disclosure – Information that a candidate must reveal to the public pursuant to federal (and state) election laws. 2 U.S.C. § 434(b). Campaign disclosures are contained in reports periodically filed by election candidates and include both receipt and expenditure information. For example, the names of all contributors and amount of each contribution must be contained in the report as well as the amount of money spent to support the candidate’s operating expenses.

“Checks and balances” – Arrangement under the United States Constitution and the states’ constitutions providing the ability for each branch of government to check the power of the other two branches. Checks and balances assure that the proper separation of powers exists, and that the activities of each branch of government are monitored by the others.

Cloture – A parliamentary procedure that forces an end to debate; specifically, it is used by senators as the only way to end a filibuster in the Senate. More than a simple majority of senators – a minimum of 60 – must vote in favor of cloture for the motion to succeed.

“Compelling state interest” – A term used to uphold state action in the face of attack grounded on Equal Protection or First Amendment rights because of the serious need for such state action. Also employed to justify state action under police power of state.

Confirmation – The approval of a judicial nominee through ratification by the legislature. Typically, confirmation requires the approval by a majority of the members of the legislature of the particular state at issue.

Contribution limits – Limits on monetary donations to political candidates, either by capping the amount given by donors or by regulating the amount candidates receive.

Court rules – Procedural rules that govern a particular court. Court rules must be promulgated in compliance with federal and state law. *See also* definition of “procedural rules,” this glossary.

Decisional independence – Closely tied to the concept of judicial independence, decisional independence specifically refers to a judge’s ability to render decisions without outside influence. Whereas judicial independence encompasses the independence of the entire judicial branch of government, as well as of an individual judge, decisional independence refers to the independence of a particular member of the judiciary in rendering judicial decisions. Specifically, decisional independence requires that all decisions rendered by a judge are based only on the facts and the law and are unaffected by external influences such as political or popular pressures.

De novo – A standard of review used by appellate judges purely for legal questions made by the trial judge in a civil case. Under this standard, the appellate court analyzes the legal issues of the appeal as though it were being presented for the first time, and no deference is given to the trial judge’s decisions. In most cases, this standard of review is rarely used.

Disclosure – The impartation of that which is secret or not fully understood. For example, fundraising reforms have included requiring disclosure of contributions given or received and expenditures made.

“Downward Departures” – Mechanisms by which a sentencing court can legally impose a sentence below the guideline sentencing range. Typically, a judge can permit a downward departure where there are aggravating or mitigating circumstances in the case that warrant a lower sentence.

Due deference – A standard of review requiring appellate judges to give considerable latitude to the trial court’s ruling. An appellate court will only fail to give due deference if the trial judge acted arbitrarily or committed a clear error of judgment.

Enemy Combatants – A term designated by the U.S. government that applies to both citizens and non-citizens who are captured on the battlefield during a time of war, detained indefinitely without charges, and held incommunicado without a hearing or access to counsel. In 2004, the Supreme Court held that the government can give enemy combatant status to U.S. citizens, but that their habeas corpus rights should not be abrogated.

Executive order – An order or regulation issued by the President or some administrative authority under his direction for the purpose of interpreting, implementing, or giving ad-

ministrative effect to a provision of the Constitution, law, or treaty. To have the effect of law, such orders must be published in the Federal Register.

Ex parte – On one side only; by or for one party; done for, in behalf of, or on the application of, one party only. A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.

Expenditures – An expense; in this context, money spent by candidates or interest groups to fund their political campaign.

Ex post facto law – A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. For example, it can provide for the infliction of punishment upon a person for an act done which, when it was committed, was innocent. The U.S. Constitution forbids states to pass ex post facto laws, and most state constitutions contain similar prohibitions.

Federalist – A person who favors a strong centralized federal government. Federalism is a system of government in which power is divided between a central authority in the federal system and constituent political units in the state system. In the 1780s, the Federalist Party strongly advocated the adoption of the United States Constitution.

Fiduciary appointee – A person entrusted to act primarily for another's benefit; the relationship between the appointee and the appointer is in the nature of trust, and the appointee acts as a trustee for the appointer.

Filibuster – Tactics designed to obstruct and delay legislative action by prolonged and often irrelevant speeches on the floor of the House and Senate. Filibusters do not occur in legislative bodies, such as the House of Representatives, in which time for debate is strictly limited by procedural rules. The Senate Rules do not require the speech to be relevant to the topic under discussion.

“Full faith and credit” – Art. IV, § 1 of the United States Constitution, the full faith and credit clause, provides that each state must recognize legislative acts, public records, and judicial decisions of the other states within the United States. Federal courts also must afford final judgments of the state courts the same preclusive affect as those judgments would have in state courts of the state issuing the final judgment. Essentially, the doctrine means that a state court must accord the judgment of a court of another state the same “credit” that it is entitled to in the courts of that state. For example, if a Georgia court issues a final judgment dissolving the marriage between two parties, then every court in every other state also must recognize that the marriage is dissolved. Once the parties obtain a divorce in one state, the parties need not obtain a divorce in every state for their divorce to be recognized by those other states.

“Holds” or “blue slips” – A printed blue piece of paper used by senators, stating a request for withdrawal of a judicial nominee's confirmation from that senator's home state. These holds, or blue slips, serve as a parliamentary tactic to delay confirmation by preventing the nomination from reaching the Senator floor for a vote.

Impeachment – An attack on the credibility or integrity of a judicial officer (or certain other federal officials, as specified in the U.S. Constitution). For example, for federal judges, a written accusation by the U.S. House of Representatives recommending to the U.S. Senate that the judicial officer be convicted and removed from office constitutes “impeachment” of that judge. The written accusation is called Articles of Impeachment.

Incumbency – The status as the present holder of a judicial (or other) office. Incumbency is seen as a tactical advantage in districts where judges are elected because typically an incumbent candidate maintains an enormous advantage over challengers who are not currently positioned in office.

Initiative – The right and procedure by which citizens can propose a law by petition and ensure its submission to the electorate. Some initiatives are required under state law, when the substance of the measure being proposed requires amending the state’s constitution.

Institutional independence – Closely tied to the concept of judicial independence, institutional independence refers to the judiciary’s role as a branch of government that is independent of, and co-equal to, the executive and legislative branches of government. Institutional independence is limited only by our government’s system of “checks and balances.” See also definition of “checks and balances,” this glossary.

Interim appointment – The appointment of a judicial officer to serve temporarily in situations where a judicial post is vacated prior to the natural expiration of the vacating officer’s term. For example, when a judge dies or retires in the middle of his or her term of office, the governor may have authority to appoint a successor to complete the interim period (*i.e.*, the remainder of the term).

“Jim Crow” laws – Laws that mandated segregation of white and black citizens, primarily passed in the late 1800s and early 1900s. Jim Crow laws were most prevalent in the transportation industry, where black passengers on buses, trains, and other methods of transportation were required to sit in designated, “second-class” areas separate from white passengers, who were afforded better seating. Other Jim Crow laws did not mention race but were covertly designed to discriminate against black citizens. For example, literacy tests administered as part of the voter registration process had a disparate impact on black citizens. The United States Supreme Court’s 1896 landmark decision in *Plessy v. Ferguson*, 163 U.S. 5370, implicitly accepted such laws by holding that such so-called “separate but equal” accommodations were constitutional. The Supreme Court finally began to dismantle Jim Crow laws when it outlawed state-sponsored segregation in the 1954 landmark decision in *Brown v. Board of Education*, 347 U.S. 483. The Court’s unanimous *Brown* decision, which was met with much resistance from white citizens, is an excellent example of judicial independence.

Judicial accountability – A corrective measure for situations when a judge fails to perform the duties of his or her profession in an accurate and ethical manner. In some instances, that failure may be that the judge has sacrificed judicial independence due to outside influences. There are primarily two methods of judicial accountability — one cor-

rects judicial error, and the other corrects judicial misconduct. When a judge makes an error in the disposition of a case, the decision may be appealed to a higher court. When the judge is accused of judicial misconduct, various disciplinary options exist, including impeachment in extreme cases.

“Judicial activism” – A concept contrary to the philosophy of judicial independence. Judicial activism occurs when judicial philosophy motivates a judge to depart from strict adherence to legal precedent in favor of social policies or outcomes that are not always consistent with the restraint expected of the judicial branch. Some commentators describe judicial activism as commonly marked by decisions calling for “social engineering,” and in contemporary usage, it usually refers to judges regarded as “liberal.” As a factual matter, judicial activism is characterized by decisions that intrude into legislative and executive roles.

Judicial Administration – Practices, procedures and offices that deal with the management of the system of the courts. Also known as “administration of the courts,” judicial administration has traditionally been concerned with overseeing budgets, selecting juror pools, assigning judges to cases, creating court calendars of activities, and supervising non-judicial personnel. Although administrators are also responsible for ensuring diversity in the court system and providing easier access to the courts for underrepresented people, they are often criticized for limiting resources, thereby negatively affecting the outcomes of particular cases.

Judicial independence – The concept that the judicial branch of government is independent from the other branches of government and from popular opinion. Judicial independence includes the role and ability of judges to act solely according to the law and their interpretation of the law, no matter how unpopular their decisions and actions may be.

Judicial procedure – Rules that govern the procedural aspects of a court proceeding. *See* definition of “procedural rules.”

“Judicial restraint” – A self-imposed discipline by judges in deciding cases. Under the doctrine of judicial restraint, judges are not permitted to rest their decisions on their own personal views or ideas, which may be inconsistent with existing principles of law. For example, the doctrine of judicial restraint dictates that if resolution of an issue in a case effectively disposes of the entire case, then the court should resolve the case based on that issue alone, without unnecessarily addressing any other issues that might have been presented.

Judicial review – The power of judges to determine the lawfulness and/or constitutionality of legislative- and executive-branch actions. For example, a citizen aggrieved by a statute passed by the legislature of a particular state may seek judicial review of that statute in the courts. The power of judicial review, ironically, was determined by the judicial branch itself in the United States Supreme Court’s landmark decision of *Marbury v. Madison*, 5 U.S. 137 (1803).

Jurisdiction – The power of the court to decide a matter in controversy. A court that lacks jurisdiction has no authority to hear a particular case. There are two main types of jurisdiction. “Personal jurisdiction” is jurisdiction over the litigants in the case and usually turns on the residency of the parties and their activities within the state or federal district in which the court sits. “Subject matter jurisdiction” is the court’s statutory or constitutional power to adjudicate a case and turns on the issue being litigated.

Jurisdiction-stripping – A federal law passed by the United States Congress, or a state law passed by a state’s legislature, removing a court’s jurisdiction or severely limiting a court’s ability to hear a certain type of case. Jurisdiction-stripping is used as a political tool to punish judges who have rendered unpopular decisions and to prevent courts from issuing decisions that are unpopular with the legislators or voters.

Merit selection – The system of hiring judges based on their competence, or “merit.” Under this method of judicial selection, candidates for judicial positions are usually nominated by a committee that examines the judge’s experience and credentials. The governor or other appointing authority chooses the nominee from a short list of candidates screened and approved by the committee. Senate confirmation of the nominee may be required, and after a short term, the voters may vote whether to retain the appointee for a full term of office. *See* definition of “Appointing authority” and “Retention election,” this glossary.

Military tribunal – Convened subject to the code of military justice embodied in 10 U.S.C. § 801 et seq. Military tribunals are convened in times of foreign war that exceed the boundaries of the United States. Military tribunals supersede local law and are exercised by the military commander under the direction of the President, with the express or implied sanction of Congress.

Miranda warnings – If a person is taken into custody or otherwise deprived of his freedom in any significant way, prior to initiating any questioning, law enforcement officers must apprise the person that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The term derives from the United States Supreme Court decision that established the requirement of the warnings, *Miranda v. Arizona*, 384 U.S. 436 (1966). The purpose of the Miranda warnings is to prevent the government from using confinement by law enforcement to gain information that would not be given if the suspect were in an unrestrained environment. The United States Supreme Court in the *Miranda* decision held that this warning is required under the Fifth Amendment to the United States Constitution, which protects individuals from compelled self-incrimination.

“Narrowly tailored” – One of the requirements of the strict scrutiny standard of review that requires that a state action not be overbroad, and therefore “narrowly tailored” to achieve its objective with the least possible intrusion into either Equal Protection or First Amendment rights.

Nominating convention – An assembly or meeting of members of a committee that gathers to nominate candidates for judicial election.

Nomination – The appointment or designation of a person to fill the office of judge, or the act of suggesting or proposing a person by name as a candidate for a judicial position.

Nonpartisan election – A system of electing judges in which the political affiliation of each judicial candidate is not indicated to the voter at the time he makes his selection.

Partisan election – A system in which judges are elected and the political party affiliation of each of the candidates is indicated to the voter at the time she makes her selection. Under this system, candidates for election are nominated based upon their affiliation with a particular political party.

“Pay to play” – A slang term for the process by which a donor makes, or a judicial candidate accepts, a contribution with the implied understanding that the contributor will obtain subsequent fiduciary appointments or other benefits from the court.

Permanent injunction – A prohibitive, equitable remedy issued or granted by a court at the suit of a party complaint, directed to a defendant in the action, forbidding the latter to do some unjust and inequitable act which he is threatening or attempting to commit that is injurious to the plaintiff. A permanent injunction is ordered when the injury cannot be adequately redressed by an action at law, and is intended to remain in force until the final termination of a particular suit.

Petition – A formal written request addressed to the court. A petition includes an application or a prayer to the court to exercise its authority to redress some wrong or grant some favor, privilege, or license. It is a formal written application to the court requesting judicial action on a certain matter.

Precedent – An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases, and prior cases which are close in facts or legal principles to the case under consideration are called precedents.

“Preponderance of the evidence” – A standard of proof which requires that evidence be of greater weight or more convincing than the evidence which is offered in opposition to it. It is below the standard of “proof beyond a reasonable doubt” in criminal cases.

Prior restraint – Describes an administrative, legislative, or judicial order that prospectively forbids a communication. For example, a prior restraint would exist if a court ordered a newspaper not to publish certain information, as occurred in the trial court in the famous “Pentagon Papers” case, *New York Times Co. v. U.S.*, 403 U.S. 713 (1971). The United States Supreme Court overturned the trial judge’s order prohibiting publication on the grounds that it was unconstitutional. Prior restraints bear a heavy presumption against their constitutionality, and the government carries a very heavy burden in showing justification to support a prior restraint. There are exceptions to the prior restraint doctrine. For example, courts have held that publications disclosing troop movements during wartime, and publication of obscene materials, may be restrained prior to publication.

Prisoners of war – Combatants who surrender to, or are taken by, the enemy during an armed conflict. The Geneva Conventions of 1949 provide a framework of protective rights of prisoners of war (POWs). The laws apply from the moment a person is captured until he is released or repatriated. To be entitled to prisoner of war status, the combatant must conduct operations according to the laws and customs of war. Therefore, terrorists, spies, or unarmed non-combatants are not included in this designation; they are instead protected by the Fourth (as opposed to the Third) Geneva Convention.

Procedural rules – Govern the method of enforcing substantive rights or obtaining relief for injuries. Procedural rules are those administrative rules that prescribe, for example, the timing of pleadings and the manner in which evidence may be admitted.

Promulgate – To publish or to announce officially. Promulgation is the formal act of announcing a statute or rule of court. The act causes the regulation or law to become known and mandatory.

Prospective – Looking forward; contemplating the future. In this context, it is a sentence that is applied only to those who commit such offenses *after* the passage of a new law.

Receiver – A neutral officer appointed by the court. A receiver typically is appointed to take control, custody, or management of property that is involved or likely to become involved in litigation pending before the court. A receiver typically is appointed where there is a danger that in the absence of an appointment, the property will be lost, destroyed, or otherwise injured. A receiver is a fiduciary of the court and has no stake in the outcome of the litigation.

Receivership – The proceeding in which a receiver is appointed for purposes of protecting property or assets at issue in the litigation. The receiver does not hold title to any of the property but only the right of possession as a neutral officer of the court. *See* definition of “Receiver,” this glossary.

Recess appointment – A way for the president to temporarily bypass the typical confirmation process by naming a blocked or defeated nominee to a post while Congress is “in recess.” Thus, the president is delaying a confirmation until after an election, when the nominee possesses the advantage of incumbency and a more favorable Congress. President Eisenhower appointed three judges during recesses: Earl Warren, William Brennan, and Potter Stewart.

Recuse – The situation in which a judge disqualifies herself from hearing a case because of bias, prejudice, or self-interest, or the perception of any of these. Recusal may occur either upon objection of one of the parties to the litigation before the court or upon the court’s own initiative.

Referendum – The submission of a proposed public measure or actual statute to a direct popular vote. Some referendums are required under state law, when the substance of the measure being proposed requires amending the state’s constitution.

Repeal – To abrogate or annul a previously-existing law by the enactment of a subsequent statute that either expressly or implicitly abrogates the former statute. An express repeal requires that the legislative body overtly state within the new statute that the prior statute has been repealed. Implied repeal occurs when the two statutes cannot coexist; therefore, the latter statute necessarily supersedes the former. Implied repeal is disfavored by the courts as a means of statutory construction. Courts will imply a repeal only where strictly necessary as an interpretive tool to resolve mutually exclusive, conflicting statutes.

Republican (lower-case “r”) – A form of government in which the head of state is a president and not a monarch, and the state’s power is embodied in elected representatives of the citizens. Article IV, § 4 of the United States Constitution guarantees the citizens of the United States a republican form of government. This guarantee includes the right to have a system of state courts.

Retention election – An election in which judges who have been appointed through the merit-selection process are either retained or thrown out of office by the registered voters in that judicial district or state. In a retention election, the voters decide whether the judge should remain on the bench. In many states that use merit selection and subject judges to retention elections, judges run unopposed in the retention election, and the voters simply decide whether the judge should be retained in office. If the judge is not retained, a new judge will be seated through the merit-selection process.

Separation of powers – The division of the United States government into three departments: the legislative, executive and judicial branches. Specifically, the legislative branch is empowered to make laws, the executive branch is empowered to carry out or execute laws, and the judicial branch is charged with interpreting the law and adjudicating disputes under the law. Under the separation of powers doctrine, each branch of government is prohibited from intruding upon the constitutionally granted powers of the other branches of government. The separation of powers doctrine requires courts to adhere to its mandates even in the absence of an explicit statutory command to do so.

“Signaling” – A statement, indicator, or gesture that serves as a means of communicating improper campaign promises. Judicial officers, by virtue of their status as interpreters of the law, are not permitted to signal in advance how they will rule in specific types of cases that are likely to come before them in court. Thus, such signaling is improper in a judicial campaign.

Standard of proof – The burden of proof required in a particular type of case, as in a criminal case where the prosecution has the standard of proof beyond a reasonable doubt, and in most civil cases where proof by a fair preponderance of the evidence is required.

Standard of review – Defines the degree of deference that a reviewing court gives to the decisions made in the lower court. For example, if an appellate court decides to review a case “de novo,” the broadest scope of review, the court will examine questions of law rather than questions of fact and review the matter independently, therefore giving no deference to the trial court’s ruling on that case.

Statute – A formal written enactment of a legislative body. Statutes may be promulgated at the federal, state, and local levels. A statute declares, commands, or otherwise prescribes some sort of conduct. A statute may be public, private, declaratory, mandatory, directory, or enabling in nature.

Statute of limitations – Statutes of the federal governments and the various states, which establish the time period within which lawsuits may be commenced after a cause of action has accrued. Typically, a cause of action "accrues" at the time of injury or at the time of discovery of an injury. After the time period set out in the applicable statute has run, no legal action may be taken on the injury regardless of whether any cause of action ever existed. Statutes of limitations are powerful procedural limits on when a lawsuit may be brought.

Strict scrutiny – A legal standard of review used to examine state action, requiring that there be a compelling state interest that is narrowly tailored to achieve its goal with the least possible intrusion in either the Equal Protection or First Amendment rights afforded by the U.S. Constitution.

Subpoena – A court order to appear at a certain time and place to give testimony up on a certain matter. Usually it can be issued by a judge or the lawyer representing the plaintiff or defendant in a civil trial, or by the prosecutor or defense attorney in a criminal proceeding. Congress also has the power to issue subpoenas and can punish those who fail to comply.

Substantive law – Establishes the basic rights and duties of parties in litigation. For example, the Fifth Amendment to the United States Constitution provides a right to the defendant in a criminal trial not to testify against himself. Substantive law can also be found in state constitutions, statutes, or case law. Substantive law contrasts with procedural law, which governs the laws of pleading, evidence, jurisdiction, and other administrative matters before the court.

Symbolic speech – Symbolic speech is non-verbal activity that contains sufficient elements of communication to be regarded as a form of speech. Symbolic speech is an action that has as its primary purpose the expression of an idea, and generally is protected as "pure speech" under the United States Constitution. Typically, symbolic speech is intended to convey a particular message that will be understood by the audience in the context in which the speech is used. Some examples of symbolic speech include the white hood worn by members of the Klu Klux Klan and the wearing of black armbands to protest the Vietnam War – protected First Amendment expressions even though some of those who view the symbols would be offended by the messages.

"Tort reform" – A movement across the United States to change "tort" law — an area of civil litigation involving personal injury cases, product liability cases, and other lawsuits where damages are at issue. Advocates of tort reform often describe themselves as "pro-business," and favor such measures as limits on compensatory damages, limiting or eliminating punitive damages, limits on malpractice suits, and other similar measures.

Vacate – To annul or set aside an order of a court. When an order of a court is vacated, the slate is wiped clean. It is as though the court’s vacated opinion never existed.

Appendix C - Permissible Questions for Judicial Candidates

The following sample questions were developed by the King County Bar Association of Seattle, Washington, and have been reviewed by American Bar Association staff.

Knowledge

1. Do you believe the composition of juries adequately and fairly reflects society at large? Why or why not? What are the pros and cons of using driver's license registration as a source of jurors?
2. How could the costs of judicial administration be reduced? Can you give us a specific example of how you have reduced costs in your law practice/court?
3. In the area of hate crimes, what are some of the issues in balancing free speech rights against the need to control offensive activity?
4. What have been the most effective methods for improving court procedures and efficiency? What other methods would you suggest?
5. What do you perceive as the greatest obstacles to justice, if any?
6. Under what circumstances can the courts seal files or close court proceedings?
7. What criteria would you use for deciding whether to impose or affirm sentences outside of standard ranges?
8. What factors are considered in granting and setting bail amounts for defendants? What do you believe is the primary consideration?
9. If you became aware of unethical conduct on the part of a trial advocate in a case in which you were presiding, how would you handle it? Do you believe judges should be required to report attorney misconduct?
10. If you were the person responsible for deciding what cases would be tried in what order, how would you split the court's time between the criminal calendar and the civil calendar?
11. To what extent have you practiced in the area of criminal law? Family law? Complex civil litigation?
12. What do you believe are the causes of the high rates of minority incarceration?

13. Violent crime, particularly youth violence, is perceived by many experts to be at a crisis level today. What, if any, do you believe is the appropriate role for the judiciary in addressing this perceived crisis?
14. Do you believe there is such a thing as a “victimless crime?” If so, what offenses would you place in this category?
15. What do you think about the growing prison population? What response should society have to prison overcrowding?
16. Do you feel the war on drugs has been effective or ineffective?
17. Do you believe there is under-representation of women or people of color in the court system? If so, how would you work to correct the problem?
18. Do you believe that all citizens have adequate access to legal help and the legal system? If not, what can be done to provide wider and better access?

Character

1. Do you ever wake up in the middle of the night, thinking about a case, wishing you had handled something differently? If so, please describe one situation.
2. Please describe one instance in which you faced an ethical dilemma and how you resolved it.
3. What kind of jobs, interests, or volunteer activities did you pursue during school and law school?
4. Do you believe that voluntary professional and community service is a necessary commitment for persons holding public office? What forms of voluntary professional and community service have you been involved with in the past? Currently?
5. As a prospective judge, what do you consider your greatest strengths? Weaknesses?
6. What has been your greatest accomplishment in your legal career? In your personal life?
7. If elected or re-elected to the position you seek, what is the minimum number of years you intend to serve before seeking a judicial post at a higher level? What is your commitment to serving out the full term?
8. What are the major influences in your life? Why?

9. What injustices have you witnessed in or outside the courtroom and what was your response to those events?
10. Do you believe the current system for disciplining lawyers and judges is effective/ Why or why not?
11. Have you ever been disciplined by the bar association or the state commission on judicial conduct?
12. Who are your judicial role models? Why?

Effectiveness

1. How do you deal with difficult people, including peers, lawyers, clients, or litigants?
2. Please describe a situation in which you took a controversial position that angered or offended people and explain how you handled it.
3. How would/do you deal with a pro se party appearing in your court?
4. How would you prepare yourself to handle cases involving unfamiliar areas of the law?
5. Please describe your administrative experience. What are your primary strengths as a supervisor? As an administrator?
6. If you observed a party in your courtroom being poorly represented by an unprepared or ineffective lawyer, how would you handle the situation?
7. Do you believe you would encounter any problems moving from your role as an advocate to a new role as a judge? (for non-incumbents)
8. While serving on the bench, do you believe you have a role in bringing important legal or judicial issues before the public or the legislature? Why or why not? What should your role be?
9. Is it appropriate to impose more restrictions on what cases go to trial? Is there a need for more mandatory mediation and settlement efforts? What specifically do you propose to do about this, if elected?
10. What are the issues regarding alternative sentences for no-violent offenders?
11. What is your general judicial philosophy?

12. What is your vision for the future of our judicial system? What changes would you advocate and why?
13. Do judges have an obligation to improve public understanding of the courts? If so, how should they carry out that obligation?
14. What are your views on whether the court, as a whole, deals effectively with racial and gender bias?
15. Would you favor or oppose a system in which all sentencing decisions were routinely reported in local newspapers, indexed by the name of the judge?
16. Would you be willing to act as a settlement judge? What are the pros and cons of alternative dispute resolution?
17. Do you think the court system is working or do you believe the civil or criminal justice system is breaking down?
18. What types of clients have you represented while you have been an attorney?
19. What are your views on the need for more diversity on the bench and the manner in which the court treats members of different races?
20. Why should voters support you rather than your opponent?
21. What were the most important cases you had as a lawyer and why did you take the position you did in those cases?
22. Why do you believe you received the ratings you received from the organizations which rated you for the position of judge? Why do you believe you received the evaluations you received from the organizations which rated you for your position on the bench? (incumbents only)
23. Do you possess any expertise in a field other than law?
24. To what extent do you believe that a judge should or should not defer to the actions of a legislature?

Appendix D - Key Organizations

National Organizations Dedicated to Judicial Independence

1. American Bar Association
Judicial Division
541 North Fairbanks Court
Chicago, IL 60611
Tel: 312/988-5705
Fax: 312/988-5709
E-mail: abajd@abanet.org
Web: <http://www.abanet.org/jd/home.html>

The Judicial Division supports judges, lawyers, court administrators and academics committed to improving the judicial system through research, education and action.

2. American Bar Association
Standing Committee on Judicial Independence
541 North Fairbanks Court
Chicago, IL 60611
Tel: 312/988-5102
Fax: 312/988-5709
E-mail: biermanl@staff.abanet.org
Web: <http://www.abanet.org/judind/home.html>

The Standing Committee on Judicial Independence assists courts, administrative judiciaries and state, local and territorial bar associations in considering and effectuating responses to infringement of judicial independence. It encourages public awareness and appreciation of the importance of judicial independence and merit selection to the American judicial system and the rule of law; makes recommendations on ways to improve the institutional independence and efficiency of state, territorial and local judiciaries; and encourages appropriate accountability to enhance judicial independence and the efficient administration of justice. The Committee also acts as a clearinghouse for the American Bar Association's activities dealing with the judicial independence of state, local and administrative judiciaries.

3. American Judicature Society
The Center for Judicial Independence
180 North Michigan Avenue, Suite 600
Chicago, IL 60601
Tel: 312/558-6900, Fax: 312/558-9175 ext. 107
E-mail: ccolista@ajs.org
Web: <http://www.ajs.org/>

The American Judicature Society created the Center for Judicial Independence in 1997 in response to an increase in efforts to remove from the bench judges who had issued unpopular rulings.

4. Brennan Center for Justice at NYU School of Law
Brennan Center Democracy Program on Judicial Independence
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Tel: 212/998-6730, Fax: 212/995-4550
E-mail: brennan.center@nyu.edu
Web: http://www.brennancenter.org/programs/programs_dem_judind.html

The Brennan Center focuses on preventing judges from receiving politically motivated attacks on their rulings, safeguarding the judicial selection process and fighting improper efforts to restrict judicial jurisdiction and power.

5. Colorado Courts Judicial Independence Site
Tel: 800/888-0001
Web: <http://www.courts.state.co.us/scao/judind.htm>

This Web site provides excellent links and information on judicial independence.

6. The Committee for Justice
Tel: 202/481-6850
E-mail: info@committeeforjustice.org
Web: <http://www.committeeforjustice.org/>

The Committee for Justice was formed in July 2002 to counter partisan obstruction of President Bush's federal judicial nominations, remedy vacancies in the federal appellate courts and "vindicate the President's responsibilities under the Constitution."

7. The Federalist Society for Law and Public Policy Studies
1015 18th Street, NW, Suite 425
Washington, DC 20036
Tel: 202/822-8138
E-mail: fedsoc@radix.net
Web: <http://www.fed-soc.org/>

Representing conservative and libertarian views of the American legal system, the Federalist Society for Law and Public Policy Studies engages in public policy research and public education.

8. Justice at Stake Campaign
717 D Street, NW, Suite 203
Washington, DC 20036

Tel: 202/588-9700, Fax: 202/588-9485
E-mail: info@justiceatstake.org
Web: <http://www.justiceatstake.org/>

Justice at Stake's mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom—so judges can do their job protecting the Constitution, individual rights and the rule of law.

9. League of Women Voters
1730 M Street, NW, Suite 100
Washington, DC 20036-4508
Tel: 202/429-1969, Fax: 202/429-0854
Web: <http://www.lwv.org/join/judicial/>

The League of Women Voters is a national, nonpartisan voter education organization. The “Creating a Just Society” link on its Web site describes its Judicial Independence Project.

10. People for the American Way
2000 M Street, NW, Suite 400
Washington, DC 20036
Tel: 202/467-4999 or 800/326-7329
E-mail: pfaw@pfaw.org
Web: <http://www.pfaw.org/issues/judiciary/>

People for the American Way is a nonpartisan but politically liberal group that works on judicial independence, among other issues.

11. Lawyers’ Committee for Civil Rights Under Law
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
Tel: 202/662-8600, Fax: 202/783-0857
E-mail: kcoates@lawyerscomm.org
Web: <http://www.lawyerscomm.org/publicpolicy/judicialindependence.html>

This nonpartisan, nonprofit organization was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination.

12. Manhattan Institute
Center for Legal Policy
52 Vanderbilt Avenue, 2nd Floor
New York, NY 10017
Tel: 212/599-7000, Fax: 212/599-3494
E-mail: mb@manhattan-institute.org
Web: <http://www.manhattaninstitute.org/html/clp.htm>

A voice of legal reform, the politically conservative Manhattan Institute's Center for Legal Policy publishes books, academic volumes, white papers, reports and Op-Eds; hosts conferences and seminars for policy-makers, judges and journalists; and publishes a memo series on civil justice issues.

13. U.S. Chamber of Commerce
Institute for Legal Reform
Litigation Fairness Campaign
1101 17th Street, NW, Suite 800
Washington, DC 20036
Tel: 800/397-3371, Fax: 800/999-1812
E-mail: speakup@litigationfairness.org
Web: <http://www.litigationfairness.org>

The U.S. Chamber of Commerce Institute for Legal Reform established the Litigation Fairness Campaign to curb frivolous lawsuits by “restoring fairness, balance, efficiency and consistency to the U.S. civil justice system.”

Bar Associations

1. American Bar Association
740 15th Street, NW
Washington, DC 20005-1019
Web: <http://www.abanet.org/>
2. National Bar Association
1225 11th Street, NW
Washington, DC 20001
Tel: 202/842-3900, Fax: 202/289-6170
E-mail: headquarters@nationalbar.org
Web: <http://www.nationalbar.org/>
3. Alabama State Bar
415 Dexter Avenue
Montgomery, AL 36104
Tel: 334/369-1515, Fax: 334/261-6310
Web: <http://www.alabar.org/>
4. Alaska Bar Association
510 L Street, Suite 602
Anchorage, AK 99501
Tel: 907/272-7469, Fax: 907/272-2932
E-mail: info@alaskabar.org
Web: <http://www.alaskabar.org/>

5. American Samoa Bar Association
Tel: 684/699-8342
E-mail: csherwoodesq@yahoo.com
Web: <http://www.asbar.org/>
6. Arizona Bar Association
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742
Tel: 602/252-4804,
Fax: 602/271-4930
E-mail: azbar@azbar.org
Web: <http://www.azbar.org/>
7. Arkansas Bar Association
400 West Markham
Little Rock, AR 72201
Tel: 501/375-4606
E-mail: arkbar1@swbell.net
Web: <http://www.arkbar.com/>
8. California Bar Association
180 Howard Street
San Francisco, CA 94105
Tel: 415/538-2000
Web: http://www.calbar.ca.gov/state/calbar/calbar_home.jsp
9. Colorado Bar Association
1900 Grant Street, Suite 900
Denver, CO 80203
Tel: 303/860-1115, Fax: 303/894-0821
E-mail: comments@cobar.org
Web: <http://www.cobar.org/>
10. Connecticut Bar Association
30 Bank Street
New Britain, CT 06050
Tel: 860/223-4400, Fax: 860/223-4488
Web: <http://www.ctbar.org/>
11. Delaware State Bar Association
301 North Market Street
Wilmington, DE 19801
Tel: 302/658-5279, Fax: 302/658-5212
Web: <http://www.dsba.org/>
12. District of Columbia Bar

- 1250 H Street, NW, 6th Floor
Washington, DC 20005-5937
Tel: 202/737-4700, Fax: 202/626-3471
E-mail: executive.office@dcbbar.org
Web: <http://www.dcbbar.org/>
13. Florida Bar Association
650 Apalachee Parkway
Tallahassee, FL 32399-2300
Tel: 850/561-5600
Web: <http://www.flabar.org/>
14. State Bar of Georgia
104 Marietta Street, NW, Suite 100
Atlanta, GA 30303
Tel: 404/527-8700, Fax: 404/527-8717
Web: <http://www.gabar.org/>
15. Guam Bar Association
259 Martyr Street, Suite 201
Hagatna, GU 96910
Tel: 671/477-7010, Fax: 671/477-9734
E-mail: info@guambar.org
Web: <http://www.guambar.org/>
16. Hawaii State Bar Association
1132 Bishop Street, Suite 906
Honolulu, HI 96813
Tel: 808/537-1868, Fax: 808/521-7936
Web: <http://www.hsba.org/>
17. Idaho State Bar
PO Box 895
Boise, ID 83701
Tel: 208/334-4500, Fax: 208/334-4515
Web: <http://www2.state.id.us/isb/>
18. Illinois State Bar Association
Illinois Bar Center
Springfield, IL 62701-1779
Tel: 217/525-1760, Fax: 217/525-0712
Web: <http://www.illinoisbar.org/>
19. Indiana State Bar
Tel: 317/639-5465
Web: <http://www.inbar.org/>

20. Iowa State Bar Association
521 East Locust, 3rd Floor
Des Moines, IA 50309-1939
Tel: 515/243-3179, Fax: 515/243-2511
E-mail: isba@iowabar.org
Web: <http://www.iowabar.org/main.nsf>
21. Kansas Bar Association
1200 SW Harrison
Topeka, KS 66612-1806
Tel: 785/234-5696, Fax: 785/234-3813
Web: <http://www.ksbar.org/>
22. Kentucky State Bar
514 West Main Street
Frankfort, KY 40601-1883
Tel: 502/564-3795, Fax: 502/564-3225
Web: <http://www.kybar.org/>
23. Louisiana State Bar
601 St. Charles Avenue
New Orleans, LA 70130-3404
Tel: 504/566-1600
Web: <http://www.lsba.org/index.html>
24. Maine State Bar
PO Box 788
Augusta, ME 04332-0788
Tel: 207/622-7523, Fax: 207/623-0083
Web: <http://www.mainebar.org/>
25. Maryland State Bar
520 West Fayette Street
Baltimore, MD 21201
Tel: 410/685-7878, Fax: 410/685-1016
Web: <http://www.msba.org/index.htm>
26. Massachusetts Bar Association
20 West Street
Boston, MA 02111
Web: <http://www.massbar.org/>
27. State Bar of Michigan
306 Townsend Street
Lansing, MI 48933-2083

Tel: 800/968-1442, Fax: 517/482-6248
Web: <http://www.michbar.org/>

28. Minnesota State Bar Association
600 Nicollet Mall #380
Minneapolis, MN 55402
Tel: 612/333-1183
Web: <http://www.mnbar.org/>
29. The Mississippi Bar
Web: <http://www.msbar.org/>
30. The Missouri Bar
PO Box 119
Jefferson City, MO 65102-0119
Tel: 573/635-4128, Fax: 573/635-2811
E-mail: mobar@mobar.org
Web: <http://www.mobar.org/>
31. State Bar of Montana
PO Box 577
Helena, MT 59624
Tel: 406/442-7660, Fax: 406/442-7763
E-mail: mailbox@montanabar.org
Web: <http://www.montanabar.org/>
32. Nebraska State Bar Association
635 South 14th Street
PO Box 81809
Lincoln, NE 68501
Tel: 402/475-7091
Web: <http://www.nebar.com/>
33. The Nevada State Bar
600 East Charleston Boulevard
Las Vegas, NV 89104
Tel: 702/382-2200, Fax: 702/385-2878
Web: <http://www.nvbar.org/index.php3>
34. New Hampshire Bar Association
112 Pleasant Street
Concord, NH 03301
Tel: 603/224-6942, Fax: 603/224-2910
Web: <http://www.nhbar.org/>
35. New Jersey State Bar Association

- 1 Constitution Square
New Brunswick, NJ 80901-1520
Tel: 732/249-5000, Fax: 732/249-2815
Web: <http://www.njsba.com/>
36. State Bar of New Mexico
PO Box 25883
Albuquerque, NM 87125
Tel: 505/797-6000, Fax: 505/828-3765
Web: <http://www.nmbar.org/>
37. New York State Bar Association
1 Elk St
Albany, NY 12207
Tel: 518/463-3200, Fax: 518/487-5517
Web: <http://www.nysba.org/>
38. North Carolina Bar Association
PO Box 3688
Cary, NC 27519
Tel: 919/677-0561, Fax: 919/677-0761
Web: <http://www.barlinc.org/>
39. State Bar Association of North Dakota
515 ½ East Broadway, Suite 101
Bismarck, ND 58501
Tel: 701/255-1404
E-mail: info@sband.org
Web: <http://www.sband.org/>
40. Northern Mariana Islands Bar Association
PO Box 504539
Saipan, MP 96950
Tel: 670/235-4529, Fax: 670/235-4528
E-mail: cnmibar@vzpacifica.net
41. Ohio State Bar Association
1700 Lake Shore Drive
Columbus, OH 43204
Tel: 800/282-6556, Fax: 614/487-1008
E-Mail: osba@ohiobar.org
Web: <http://www.ohiobar.com/>
42. Oklahoma Bar Association
PO Box 53036
1901 North Lincoln Boulevard

- Oklahoma City, OK 73152-3036
Tel: 405/416-7000, Fax: 405/416-7001
Web: <http://www.okbar.org/>
43. Oregon State Bar
5200 SW Meadows Road
Lake Oswego, OR 97035
Tel: 903/620-0222
Web: <http://www.osbar.org/>
44. Pennsylvania Bar Association
100 South Street
PO Box 186
Harrisburg, PA 17108-0186
Tel: 717/238-6715, Fax: 717/238-1204
E-mail: info@pabar.org
Web: <http://www.pabar.org/>
45. Colegio de Abogados de Puerto Rico
PO Box 9021900
San Juan, PR 00902
Tel: 809/721-3358, Fax: 809/725-0330
E-mail: abogados@prtc.net
Web: <http://www.capr.org/>
46. Rhode Island State Bar
115 Cedar Street
Providence, RI 02903
Tel: 401/421-5740
E-mail: info@ribar.com
Web: <http://www.ribar.com/>
47. State Bar of South Carolina
950 Taylor Street
Columbia, SC 29202
Tel: 803/799-6653, Fax: 803/799-4118
E-mail: scbar-info@scbar.org
Web: <http://www.scbar.org/>
48. State Bar of South Dakota
222 East Capitol Avenue
Pierre, SD 57501
Tel: 605/224-7554
Web: <http://www.sdbar.org/>
49. Tennessee Bar Association
Web: <http://www.tba.org/>

50. Texas State Bar Association
1414 Colorado
Austin, TX 78701
Tel: 512/463-1463, Fax: 512/463-1475
Web: <http://www.texasbar.com/>
51. Utah State Bar
645 South 200
East Salt Lake City, UT 84111
Tel: 801/531-9077, Fax: 801/531-0660
Web: <http://www.utahbar.org/>
52. Vermont Bar Association
35-37 Court Street
PO Box 100
Montpelier, VT 05601-0100
Tel: 802/223-2020, Fax: 802/223-1573
Web: <http://www.vtbar.org/>
53. Virgin Islands Bar Association
PO Box 4108
Christiansted, VI 00822
Tel: 809/778-7497, Fax: 809/773-5060
E-mail: viabar@viaccess.net
Web: <http://www.vibar.org/>
54. Virginia State Bar
701 East Franklin Street, Suite 1120
Richmond, VA 23219
Tel: 804/644-0041, Fax: 804/644-0052
E-mail: thevba@vba.org
Web: <http://www.vba.org/>
55. Washington State Bar Association
2101 4th Avenue, Suite 400
Seattle, WA 98121-2330
Tel: 206/443-9722, Fax: 206/727-8320
E-mail: questions@wsba.org
Web: <http://www.wsba.org/>
56. West Virginia State Bar
2006 Kanawha Boulevard
East Charleston, WV 25311-2204
Tel: 304/558-2456, Fax: 304/558-2467
Web: <http://www.wvbar.org/>

57. State Bar of Wisconsin
PO Box 7158
Madison, WI 53707-7158
Tel: 608/257-3838, Fax: 608/257-5502
E-mail: drossmiller@wisbar.org
Web: <http://www.wisbar.org/>
58. Wyoming State Bar
500 Randall Avenue
PO Box 109
Cheyenne, WY 82003-0109
Tel: 307/632-9061, Fax: 307/632-3737
Web: <http://www.wyomingbar.org/>

Associations of Judges

1. American Judges Association
Web: <http://aja.ncsc.dni.us/>
2. National Association of Women Judges
1112 16th Street, NW, Suite 520
Washington, DC 20036
Tel: 202/393-0222, Fax: 202/393-0125
E-mail: nawj@nawj.org
Web: <http://www.nawj.org/>
3. Federal Magistrate Judges Association
E-mail: info@fedjudge.org
Web: <http://www.fedjudge.org/>
4. National American Indian Court Judges Association
3618 Reder Street
Rapid City, SD 57702
Tel: 605/342-4804, Fax: 605/719-9357
Web: <http://www.naicja.org/>
5. Conference of Chief Justices
Web: <http://ccj.ncsc.dni.us/>

Associations of Court Administrators

1. National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185
Tel: 757/259-1841, Fax: 757/259-1520

Web: <http://www.ncsconline.org/>

2. The Conference of State Court Administrators (COSCA)
c/o Shelley Rockwell
National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185
Tel: 800/877-1233
Web: <http://cosca.ncsc.dni.us/>
3. National Association for Court Management (NACM)
Web: <http://www.nacmnet.org/>
4. American Judges Association (AJA)
Web: <http://aja.ncsc.dni.us/>
5. National Conference of Appellate Court Clerks (NCACC)
Web: <http://www.ncsc.dni.us/ncacc/index.html>
6. National College of Probate Judges (NCPJ)
Web: <http://www.ncpj.org/>
7. National Association of State Judicial Educators (NASJE)
Web: <http://nasje.unm.edu/>

Judicial Education Groups

1. National Judicial College
Judicial College Building 358
University of Nevada, Reno
Reno, NV 89557
Tel: 775/784-6747, Fax: 775/784-4232
Web: <http://www.judges.org/>
2. National Center for the Courts and Media
Judicial College Building, 358
Reno, NV 89557
Tel: 775/327-8270, Fax: 775/327-2164
E-mail: hengstler@judges.org
Web: <http://www.judges.org/nccm/>
3. National Center for State Judicial Educators
Web: <http://nasje.unm.edu/>
4. Arizona Judicial Education

- 1501 West Washington
Phoenix, AZ 85007
Tel: 602/354-1060
Web: <http://www.supreme.state.az.us/ed/default.htm>
5. California Center for Judicial Educational Research
Web: <http://www.courtinfo.ca.gov/>
 6. New Mexico Judicial Education Center
University of New Mexico School of Law
1117 Stanford, NE
Albuquerque, NM 87131
Tel: 505/277-5006
Web: <http://jec.unm.edu/>
 7. North Dakota Judicial Education Commission
Supreme Court
Judicial Wing
State Capitol, 1st Floor
Bismarck, ND 58505-0530
Tel: 701/328-2221, Fax: 701/328-4480
Web: http://www.court.state.nd.us/Court/Committees/jud_educ/Committee.htm
 8. Ohio Judicial College
Supreme Court of Ohio
Rhodes State Office Tower
30 East Broad Street
Columbus, OH 43215-3431
Tel: 614/752-8677, Fax: 614/752-4580
E-mail: jcollege@sconet.state.oh.us
Web: <http://www.sconet.state.oh.us/judcoll/>
 9. Texas Justice Court Training
1501 South MoPac
Suite 350
Austin, TX 78746
Tel: 512/447-9927, Fax: 512/347-9921
Web: <http://www.tjctc.org/>

Federal, State and Territorial Courts

Federal Courts

Supreme Court:

Supreme Court of the United States
Public Information Officer
Washington, DC 20543
Tel: 888/293-6498
E-mail: gpoaccess@gpo.gov
Web: <http://www.supremecourtus.gov/>

Courts of Appeals:

1. United States Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210
Tel: 617/748-9057
Web: <http://www.ca1.uscourts.gov/>
2. United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007
Tel: 212/857-8500
Web: <http://www.ca2.uscourts.gov/>
3. United States Court of Appeals for the Third Circuit
19613 U.S. Courthouse
601 Market St
Philadelphia, PA 19106
Tel: 267/299-4909
Web: <http://www.ca3.uscourts.gov/>
4. United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr., U.S. Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517
Tel: 804/916-2700
Web: <http://www.ca4.uscourts.gov/>
5. United States Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130
Tel: 504/310-7700

- Web: <http://www.ca5.uscourts.gov/>
6. United States Court of Appeals for the Sixth Circuit
Web: <http://www.ca6.uscourts.gov/>
 7. United States Court of Appeals for the Seventh Circuit
219 South Dearborn Street
Chicago, IL 60604
Tel: 312/435-5850
Web: <http://www.ca7.uscourts.gov/>
 8. United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
Room 24-329
111 South 10th Street
St. Louis, MO 63102
Tel: 314/244-2400
Web: <http://www.ca8.uscourts.gov/>
 9. United States Court of Appeals for the Ninth Circuit
Office of the Clerk
95 7th Street
San Francisco, CA 94103-1526
Tel: 415/556-9800
Web: <http://www.ca9.uscourts.gov/>
 10. United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257
Tel: 303/844-3157
Web: <http://www.ca10.uscourts.gov/>
 11. United States Court of Appeals for the Eleventh Circuit
Elbert P. Tuttle Building
56 Forsyth Street, NW
Atlanta, GA 30303
Tel: 404/335-6100
Web: <http://www.ca11.uscourts.gov/>
 12. United States Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001
Tel: 202/216-7000
Web: <http://www.cadc.uscourts.gov/>

13. United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439
Tel: 202/633-6550
Web: <http://www.fedcir.gov/>

State and Territorial Courts

1. Alabama
Alabama Supreme Court
300 Dexter Avenue
Montgomery, AL 36104
Tel: 334/242-4609
Web: http://www.alalinc.net/appellate_supreme.cfm
2. Alaska
Alaska Supreme Court
303 K Street
Anchorage, AK 99501
Tel: 907/264-0608, Fax: 907/264-0878
E-mail: corrections@appellate.courts.state.ak.us
Web: <http://www.state.ak.us/courts/>
3. American Samoa
High Court of American Samoa
American Samoa Government
Pago Pago, AS 96799
Tel: 684/633-1261, Fax: 684/633-5127
E-mail: hcourt@samoatelco.com
4. Arizona
Arizona Supreme Court
1501 West Washington
Suite 402
Phoenix, AZ 85007-3231
Tel: 602/542-9396
Web: <http://www.supreme.state.az.us/>
5. Arkansas
Arkansas Supreme Court
625 Marshall Street
1320 Justice Building
Little Rock, AR 72201
Tel: 501/682-6849
Web: <http://courts.state.ar.us/courts/sc.html>

6. California
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783
Tel: 415/865-7000
Web: <http://www.courtinfo.ca.gov/courts/supreme/>
7. Colorado
Colorado Supreme Court
Colorado State Judicial Building
2 East 14th Avenue, 4th Floor
Denver, CO 80203
Tel: 303/861-1111
Web: <http://www.courts.state.co.us/supct/supct.htm>
8. Connecticut
Connecticut Supreme Court
231 Capitol Avenue
Hartford, CT 06106
Web: <http://www.jud.state.ct.us/external/supapp/default.htm>
9. Delaware
Supreme Court of Delaware
Carvel State Office Building
820 North French Street, 11th Floor
Wilmington, DE 19801
Tel: 302/577-8425, Fax: 302/577-3702
Web: <http://courts.state.de.us/supreme/>
10. District of Columbia
District of Columbia Court of Appeals
H. Carl Moultrie I Courthouse
500 Indiana Avenue, NW
Washington, DC 20001
Tel: 202/879-2725
Web: <http://www.dcbbar.org/dcca/index.html>
11. Florida
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399
Tel: 850/488-0125
Web: <http://www.fts.org/>
12. Georgia
Supreme Court of Georgia

244 Washington Street
Atlanta, GA 30334
Tel: 404/656-3470
Web: <http://www2.state.ga.us/Courts/Supreme/>

13. Guam
Supreme Court of Guam
Suite 300 Guam Judicial Center
120 West O'Brien Drive
Hagatna, GU 96910
Tel: 671/475-3162, Fax: 671/475-3140
E-mail: justice@guamsupremecourt.com
Web: <http://www.justice.gov.gu/supreme/>
14. Hawaii
Hawaii Supreme Court
Aliolani Hale
417 South King Street
Honolulu, HI 96813-2902
Tel: 808/539-4919, Fax: 808/539-4928
Web: http://www.courts.state.hi.us/page_server/Courts/Supreme/72D2460755E8199BEBD3ACE8C3.html
15. Idaho
Supreme Court of Idaho
PO Box 83720
Boise, ID 83720-0101
Tel: 208/334-2246
Web: <http://www2.state.id.us/judicial/supreme.htm>
16. Illinois
Supreme Court of Illinois
Springfield, IL 62701
Tel: 217/782-2035
Web: <http://www.state.il.us/court/default.htm>
17. Indiana
Supreme Court of Indiana
200 West Washington Street, Room 312
Indianapolis, IN 46204
Tel: 317/232-2540
Web: <http://www.in.gov/judiciary/supreme/index.html>
18. Iowa
Iowa Supreme Court
State Capitol

- Des Moines, IA 50319
Tel: 515/281-5174
Web: <http://www.judicial.state.ia.us/>
19. Kansas
Kansas Supreme Court
Kansas Judicial Center
301 West 10th
Topeka, KS 66612-1507
Web: <http://www.kscourts.org/supct/>
 20. Kentucky
Supreme Court of Kentucky
State Capitol
700 Capital Avenue, Room 235
Frankfort, KY 40601
Tel: 502/564-5444
Web: http://www.kycourts.net/Supreme/SC_Main.shtm
 21. Louisiana
Louisiana Supreme Court
Court Public Information Officer
1555 Pydras Street
New Orleans, LA 70112
Tel: 504/599-0319
E-mail: vsw@lajao.org
Web: <http://www.lasc.org/>
 22. Maine
Maine Supreme Judicial Court
Web: <http://www.courts.state.me.us/Directory/supremecourt.html>
 23. Maryland
Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
361 Rowe Boulevard
Annapolis, MD 21401
Tel: 410/260-1500
Web: <http://www.courts.state.md.us/coappeals/index.html>
 24. Massachusetts
Supreme Judicial Court of Massachusetts
New Courthouse, 13th Floor
Pemberton Square, MA 02108
Tel: 617/557-1000
Web: <http://www.state.ma.us/courts/courtsandjudges/courts/>

supremejudicialcourt/index.html

25. Michigan
Michigan Supreme Court
PO Box 30052
Lansing, MI 48909
Tel: 517/373-0120
Web: <http://courts.michigan.gov/supremecourt/>
26. Minnesota
Minnesota Supreme Court
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155
Tel: 651/297-6750
Web: <http://www.courts.state.mn.us/scgroup.htm>
27. Mississippi
Mississippi Supreme Court
Gartin Justice Building
450 High Street
Jackson, MS 39201
Tel: 601/359-3694, Fax: 601/359-2407
Web: <http://www.mscc.state.ms.us/>
28. Missouri
Supreme Court of Missouri
PO Box 150
Jefferson City, MO 65102
Tel: 573/751-4144, Fax: 573-751-7514
Web: <http://www.osca.state.mo.us/sup/index.nsf?OpenDatabase>
29. Montana
Montana Supreme Court
Web: <http://www.lawlibrary.state.mt.us/>
30. Nebraska
Nebraska Supreme Court
PO Box 98910
2413 State Capitol Building
Lincoln, NE 68509
Tel: 402/471-3731, Fax: 402/471-3480
Web: <http://court.nol.org/judges/scjudges.htm>
31. Nevada
Nevada Supreme Court

- 201 South Carson Street, Suite 100
Carson City, NV 89701-4702
Web: <http://nvcourtaoc.state.nv.us/>
32. New Hampshire
New Hampshire Supreme Court
1 Noble Drive
Concord, NH 03301
Tel: 603/271-2646
Web: <http://www.state.nh.us/courts/supreme.htm>
33. New Jersey
New Jersey Supreme Court
The Richard J. Hughes Justice Complex
PO Box 037
Trenton, NJ 08625
Tel: 609/984-0275
Web: <http://www.judiciary.state.nj.us/supreme/index.htm>
34. New Mexico
New Mexico Supreme Court
Box 848
Santa Fe, NM 87504-0848
Tel: 505/828-4860
Web: <http://web.state.nm.us/ROSTER/S-Court.HTM>
35. New York
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207-1095
Tel: 455-7700
Web: <http://www.courts.state.ny.us/ctapps/>
36. North Carolina
Supreme Court of North Carolina
Administrative Office of the Courts
PO Box 2448
Raleigh, NC 27602-2448
Tel: 919/733-7107
Web: <http://www.nccourts.org/Courts/Appellate/Supreme/Default.asp>
37. North Dakota
North Dakota Supreme Court
State Capitol Judicial Wing, 1st Floor
Bismarck, ND 58505-0530
Tel: 701/328-2221, Fax: 701/328-4480

Web: <http://www.court.state.nd.us/>

38. Northern Mariana Islands
Northern Mariana Islands Supreme Court
PO Box 502165
Saipan, MP 96950-2165
Tel: 670/236-9715, Fax: 670/236-9701
E-mail: supreme.court@saipan.com
Web: <http://www.cnmilaw.org/htmlpage/hpg34.htm/>
39. Ohio
Supreme Court of Ohio
30 East Broad Street
Columbus, OH 43215-3431
Tel: 614/826-9010
Web: <http://www.sconet.state.oh.us/>
40. Oklahoma
Civil matters:
Supreme Court of Oklahoma
Administrative Office
1915 North Stiles, Suite 305
Oklahoma City, Oklahoma 73105
Web: <http://www.oscn.net/oscn/schome/start.htm>

Criminal matters:
Oklahoma Court of Criminal Appeals
230 State Capitol Building
Oklahoma City, OK 73105
E-mail: jhubbard@okcca.net
Web: <http://www.occa.state.ok.us/>
41. Oregon
Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97301-2563
Tel: 503/986-5555
Web: [http://www.ojd.state.or.us/ojdinternet.nsf/supreme_court.htm?
OpenPage&charset=windows-1252](http://www.ojd.state.or.us/ojdinternet.nsf/supreme_court.htm?OpenPage&charset=windows-1252)
42. Pennsylvania
Supreme Court of Pennsylvania
The Fulton Building
200 North 3rd Street, 9th Floor
Harrisburg, PA 17101
Tel: 215/560-6370

Web: <http://www.courts.state.pa.us/Index/Supreme/indexSupreme.asp>

43. Puerto Rico
Tribunal Supremo de Puerto Rico
Oficina de Administración de los Tribunales
PO Box 190917
San Juan, PR 00919-0917
Tel: 787/724-3551
Fax: 787/725-4910
Web: <http://www.tribunalpr.org/tribunal.html>
44. Rhode Island
Rhode Island Supreme Court
Web: <http://www.courts.state.ri.us/supreme/Default.htm>
45. South Carolina
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201
Tel: 803/734-1080, Fax: 803/734-1499
<http://www.judicial.state.sc.us/supreme/index.cfm>
46. South Dakota
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501
Tel: 605/773-3511
Web: <http://www.sdjudicial.com/>
47. Tennessee
Tennessee Supreme Court
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219
Tel: 615/741-2687
Web: <http://www.tsc.state.tn.us/>
48. Texas
Civil matters:
Supreme Court of Texas
201 West 14th, Room 104
Austin, TX 78701
Tel: 512/463-1312, Fax: 512/463-1365
Web: <http://www.supreme.courts.state.tx.us/>

- Criminal matters:
Texas Court of Criminal Appeals
PO Box 12308
Capitol Station
Austin, TX 78711
Tel: 512/463-1551
Web: <http://www.cca.courts.state.tx.us/>
49. Utah
Utah Supreme Court
450 South State
PO Box 140230
Salt Lake City, UT 84114-0230
Web: <http://courtlink.utcourts.gov/knowcts/appeals/supreme.htm>
50. Vermont
Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0701
Tel: 802/828-3278, Fax: 802/828-3457
Web: <http://www.vermontjudiciary.org/courts/supreme/index.htm>
51. Virgin Islands
Territorial Court of the United States Virgin Islands
PO Box 929
Christiansted, VI 00820
52. Virginia
Supreme Court of Virginia
Office of the Executive Secretary
100 North 9th Street, 3rd Floor
Richmond, VA 23219
Tel: 804/786-6455, Fax: 804/786-4542
Web: <http://www.courts.state.va.us/scv/home.html>
53. Washington
Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929
Tel: 360/357-2077, Fax: 360/357-2012
E-mail: supreme@courts.wa.gov
Web: <http://www.courts.wa.gov/courts/>
54. West Virginia
Supreme Court of Appeals of West Virginia
Administrative Office

State Capitol, Room B316
Charleston, WV 25305
Tel: 304/558-0145, Fax: 304/558-1212
Web: <http://www.state.wv.us/wvsca/>

55. Wisconsin
Wisconsin Supreme Court
16 East State Capitol
PO Box 1688
Madison, WI 53701-1688
Tel: 608/266-6828, Fax: 608/261-8299
Web: <http://www.courts.state.wi.us/supreme/>

56. Wyoming
Wyoming State Supreme Court
2301 Capitol Avenue
Cheyenne, WY 82001
Tel: 307/777-7316, Fax: 307/777-6129
Web: http://courts.state.wy.us/supreme_court.htm

Appendix E – Quotes

“That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be an unwillingness to hazard the displeasure of either; if to the people or to persons chosen by them for the social purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.” *Alexander Hamilton, The Federalist No. 78 at 232*

“The greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent Judiciary.” *U.S. Supreme Court Chief Justice John Marshall, 1830.*

“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *U.S. Supreme Court Associate Justice Robert Jackson, 1952.*

“We must never forget that the only real source of power that we as judges can tap is the respect of the people.” *U.S. Supreme Court Associate Justice Thurgood Marshall, 1981.*

“An orderly society, in which people follow the rulings of courts as a matter of course, and in which resistance to a valid court order is considered unacceptable, is the core assurance that if cases are heard by impartial judges, who are free from the influences of politics, and who decide independently according to law, then the people subject to court orders will also behave according to law.” *U.S. Supreme Court Associate Justice Stephen G. Breyer, 1996.*

“Once again this year . . . I am struck by the paradox of judicial independence in the United States: we have as independent a judiciary as I know of in any democracy, and yet the judges are very much dependent on the Legislative and Executive branches for the enactment of laws to enable the judges to do a better job of administering justice. . . . To preserve liberty, the Judicial branch of the federal government is separate, equal and independent from the Legislative branch. Yet both must work together if feasible solutions are to be found to the practical problems that confront today’s federal judiciary.” *U.S. Supreme Court Chief Justice William H. Rehnquist, 1996.*

Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing.” *Former Tennessee Supreme Court Justice Adolpho Birch, Jr., 1998.*

“Deference to the judgment and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn depends upon their acting without fear or favor.” *Commentary, ABA Model Code of Judicial Ethics, 1990.*